

(1998) 04 KL CK 0015

In the High Court Of Kerala

Case No : O.P. No. 15560 of 1997-B

North Malabar District Co-operative Supply and Marketing
Society Ltd.

APPELLANT

Vs

Assistant Commissioner (Asst.) IV and Others

RESPONDENT

Date of Decision : 28-04-1998

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 2, 22, 45A, 45A(1)

Citation : (1998) 111 STC 271

Hon'ble Judges : G. Sivarajan, J

Bench : Single Bench

Advocate : G.G. Poothicote and George George K, for the Appellant; V.M. Kurian, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

G. Sivarajan, J.—The matter arises under the Kerala General Sales Tax Act, 1963. The petitioner is an oil miller. It is an assessee on the files of the first respondent. For the assessment year 1990-91 the first respondent completed the assessment by order dated April 5, 1995 (exhibit P1). During the course of the assessment proceedings the first respondent issued notice u/s 45A of the Act alleging that the petitioner has submitted untrue returns which is an offence under Sub-section (1)(d) of the said section and imposed a penalty of Rs. 2,11,960 evidenced by exhibit P2. The petitioner took up the matter in revision before the Deputy Commissioner of Agricultural Income Tax and Sales Tax, Kozhikode, who by his order dated November 1, 1995 (exhibit P3) cancelled the penalty. Subsequently the Board of Revenue initiated suo motu proceedings u/s 45A(5) of the Act for cancellation of exhibit P3 order. Thereafter, the Board of Revenue passed exhibit P5 order cancelling exhibit P3 revisional order and restoring exhibit P2 penalty order passed by the first respondent.

2. The brief facts necessary for adjudication of the question involved in this case are as follows : As already stated, the petitioner is an Oil miller. The petitioner

purchases coconut/copra locally for the manufacture of coconut oil and coconut oil cake. For the assessment year 1990-91 the petitioner purchased 2,220.80 quintals of copra locally for Rs. 43,96,403.86 for the oil mill section and 2,134 quintals of copra valued at Rs. 42,24,525 was used for manufacture of coconut oil. Out of the 1368.11.950 quintals of coconut oil produced, 1,296.32 quintals of coconut oil was sold locally and the balance on inter-State trade. For the assessment year 1990-91 the petitioner filed return where it had declared only an amount of Rs. 2,40,302.50 and claimed exemption on the taxable turnover in copra amounting to Rs. 39,84,222.50. The petitioner had paid the tax due on the taxable turnover of copra returned and also collected and remitted tax on the taxable turnover of coconut oil and cake at 5 per cent. According to the respondents, the exemption on copra was claimed erroneously which will amount to filing of untrue or incorrect return with intent to evade tax payable on the purchase turnover of copra.

3. The purchase value of copra used for production of coconut oil was taxable at the rate of 2 per cent. Coconut and copra other than those coming under declared goods was liable to tax at the point of last purchase in the State by a dealer who is liable to pay tax u/s 5 at the relevant period at 2 per cent. Coconut oil and coconut oil cake were liable to tax at the point of first sale in the State by a dealer who is liable to tax u/s 5 at 5 per cent. Explanation to items Nos. 50 and 51 of the First Schedule provides that where a tax has been levied in respect of copra or coconut the tax leviable on coconut oil and coconut oil cake, produced out of such coconut or copra shall be reduced by the amount of tax levied on such copra or coconut. The petitioner has taken the view that if tax at the rate of 5 per cent is paid on the taxable turnover of coconut oil and coconut oil cake as provided under items 50 and 51 by virtue of the explanation to the said items, it need not pay the tax due on the purchase turnover of coconut or copra, for the explanation provides for deduction of the amount of tax payable on the turnover of coconut or copra from the tax payable on the taxable turnover of coconut oil and coconut oil cake. According to the petitioner, since the petitioner had remitted tax at the rate of 5 per cent on the taxable turnover of coconut oil and coconut oil cake, there is no requirement of payment of tax on the purchase turnover of copra or coconut and therefore, there is no question of any evasion of tax. The first respondent took the view that the explanation to items 50 and 51 of the First Schedule will not operate as exemption from payment of tax on the purchase turnover of copra and that the explanation only provides for deduction of the tax levied on the purchase turnover of copra from the tax levied on coconut oil and coconut oil cake. According to the first respondent, the collection of tax at the rate of 5 per cent on coconut oil and cake from the purchasers is in violation of the provisions of Section 22 of the Act and therefore, the excess collection is liable to be forfeited u/s 46A of the Act. It is stated in exhibit P2 order that the petitioner in reply to the notice u/s 45A of the Act, had admitted that it had wrongly claimed exemption from tax on the turnover of copra crushed, but in spite of request, it did not remit the tax due on the

purchase turnover of copra used for production of coconut oil and coconut oil cake. It is in these circumstances the first respondent took the view that the assessee sought to evade tax on the purchase turnover of copra by submitting untrue returns. The first respondent also imposed the maximum penalty stating that considering the conduct of continuing and wilful default it is necessary to impose the maximum penalty. The second respondent in revision cancelled the penalty stating that as per the explanation if the petitioner remits tax at the rate of 5 per cent on the sales tax on coconut oil and cake, he is not liable to pay tax on the purchase turnover of copra or if the petitioner remits tax on the purchase turnover of copra, he is liable to pay tax on the sale of coconut oil and cake only at 3 per cent and that in the instant case, the petitioner had opted the former method and the entire tax due as per law has been remitted. The Board of Revenue, on the other hand, had taken the view that the explanation to entries 50 and 51 did not contemplate any exemption from the tax payable on the purchase value of copra used for milling and that the reduction of tax levied on copra from the tax leviable on the local sales of coconut oil and cake cannot be construed as an exemption from the tax payable on copra. Similarly, according to the Board, the petitioner was liable to tax on the purchase value of copra at the rate of 2 per cent and the assessee-petitioner should not have collected sales tax at the rate of 5 per cent on the sale of coconut oil effected locally. According to the Board, the purchase value of copra used for milling worked out to Rs. 42,24,525 is taxable at the point of last purchase within the State and since the petitioners being the last purchaser in the State liable to pay tax at the rate of 2 per cent on the purchase value of copra, ought to have declared the same in the return since the petitioner had claimed exemption on the taxable turnover of Rs. 39,84,222.50 of copra used. According to the Board, the same was with the intention to evade payment of tax. It is in these circumstances the Board of Revenue cancelled the order of the Deputy Commissioner and restored the order of the first respondent-assessing authority.

4. A statement is filed on behalf of the third respondent. It is stated therein that the assessee has unauthorisedly claimed exemption from tax on the taxable turnover of copra amounting to Rs. 39,84,222.50 by which the petitioner sought to evade Rs. 1,05,980.32 towards tax by filing untrue and incorrect returns and therefore penalty was imposed. It is further stated that the returns filed by the petitioner are untrue and incorrect and was done with an intention to evade tax payable on the turnover of copra. It is also stated that the petitioner had clearly admitted the submission of untrue and incorrect returns and non-payment of tax would amount to a direct penalty u/s 45A of the Act and therefore, the contention of the petitioner that they bona fide believed that by virtue of explanation to entry 50/51 of the First Schedule, they are liable for exemption from payment of tax if the tax collected at 5 per cent from the sales of coconut oil and coconut oil cake has been remitted to the Government, is not sustainable. It is admitted that the petitioner had paid tax at 5 per cent on the sales of coconut oil which they have collected on their sales and stated that it will not

give an exemption from payment of tax due on the purchase turnover of copra crushed. It is also stated that the explanation to entry 50/51 of the First Schedule to the Act cannot be construed as an exemption from tax on the copra used for producing oil. It is also stated that the question that arises in the instant case is whether the petitioner has violated the statutory obligations or not and that it can be seen from the facts already stated that the petitioner has filed untrue and incorrect return for the year 1990-91 and the tax due thereon has not been paid in time which is a violation of the provisions of the Act which attracts penal liability. It is stated that the contention of the petitioner that the Government has not lost any revenue as the prescribed rate of 5 per cent has been collected and paid over to Government is not sustainable. It is also stated that the petitioner failed to remit 2 per cent tax on the purchase turnover of copra crushed and that the petitioner ought to have collected only 3 per cent on the sales of coconut oil and coconut oil cake.

5. I have heard the learned counsel appearing for the petitioner and the learned Government Pleader appearing for the respondents. The learned counsel appearing for the petitioner submitted that in the instant case the petitioner bona fide believed that if the petitioner remits tax at the rate of 5 per cent on the sales turnover of coconut oil and coconut oil cake produced out of the copra purchased, it need not pay tax on the purchase turnover of copra by virtue of the explanation to items 50 and 51 of the First Schedule to the KGST Act as it stood at the relevant time. Learned counsel submitted that it is on the basis of the said understanding of the entries that the petitioner filed its return for the year 1990-91, The learned counsel submitted that the petitioner did not show the purchase turnover of coconut/copra used for the manufacture of coconut oil and coconut oil cake and further submitted that it is admitted by the respondent in the statement that the petitioner had claimed exemption from tax on the taxable turnover of copra amounting to Rs. 39,84,222, The learned counsel submitted that in order to attract the levy of penalty u/s 45A of the KGST Act the authorities have to establish mens rea. The learned counsel submitted that in the instant case, there is no question of mens rea or contumacious conduct on the part of the petitioner since the petitioner had claimed exemption on the purchase turnover of copra used for the manufacture of coconut oil and coconut oil cake sold locally and since the petitioner had remitted tax at the rate of 5 per cent on the sale of coconut oil and coconut oil cake. In such circumstances, the learned counsel submitted that there is no question of evasion of tax or any attempted evasion of tax warranting imposition of penalty u/s 45A. The learned counsel in support of the said contention relied on the decisions of the Supreme Court in Hindustan Steel Ltd. v. State of Orissa [1970] 25 STC 211(Ori) Hindustan Sugar Mills v. State of Rajasthan [1980] 45 STC 194(Raj) and the decisions of this Court in P.D. Sudhi v. Intelligence Officer, Agricultural Income Tax and Sales Tax, Mattancherry [1992] 85 STC 337 and in Muttom Oil & Flour Mills v. State of Kerala (1991) KLJ114. The learned counsel further submitted that, at any rate, the respondents were not justified in imposing the maximum penalty for the

simple reason that the petitioner did not remit the tax due on the purchase turnover of copra inspite of demand. The learned Government Pleader appearing for the respondents, on the other hand, submitted that the failure to show the taxable turnover of copra in the return filed for the assessment year 1990-91 is wilful and that the attempt of the petitioner was to evade the payment of tax due on the said turnover. The learned Government Pleader further submitted that the petitioner had illegally collected tax at the rate of 5 per cent on the sales turnover of coconut oil and coconut oil cake. The learned Government Pleader submitted that the fact that the petitioner had remitted the tax collected at the rate of 5 per cent, will not exonerate the petitioner from remitting the tax due on the purchase turnover of copra. The learned Government Pleader further submitted that the Board of Revenue was perfectly justified in cancelling the appellate order, exhibit P3 and in restoring the penalty order by exhibit P5.

6. I have considered the rival submissions. The question that arises for consideration in this case is as to whether the Board of Revenue was justified in cancelling the appellate order, exhibit P3 and in restoring the order imposing penalty. It is seen from exhibit P1 assessment order passed for the year 1990-91 that the turnover of copra crushed is estimated at Rs. 42,24,525 and the local sales of coconut oil and coconut oil cake come to Rs. 42,23,075.53 and Rs. 2,82,992.70 respectively. It is stated in the assessment order that the assessee admitted its liability to pay tax on the taxable turnover of copra shown in the notice. The purchase value of copra used for the production of coconut oil was estimated at Rs. 40,02,845.97 and the tax due on the said copra comes to Rs. 80,056.92. It is stated in exhibit P2 order imposing penalty that the petitioner sought to evade the tax payable on copra amounting to Rs. 1,05,980.32 by submitting untrue and incorrect returns in form No. 9 and that in order to avoid imposition of penalty the petitioner was requested to remit the balance tax payable on the accounted turnover and produce the proof of the payment within 3 days of receipt of the notice. The reason for imposition of penalty is stated to be the failure to remit the balance tax and the petitioner was directed to remit a sum of Rs. 2,11,960 being the maximum penalty provided u/s 45A(1)(d) of the Act. The petitioner filed objection to the penalty notice wherein the petitioner sought to explain that in view of the explanation to item 50 to the First Schedule to the Act, it would not be liable to pay tax on copra and stated that the exemption was wrongly claimed. The first respondent-assessing authority considered the matter in the following manner :

"There is no exemption from tax on the turnover in copra. Reduction allowable on the tax payable on the resultant coconut oil vide Explanation to entry No. 51 to the First Schedule to the KGST Act, cannot be construed as blanket exemption from tax on the copra used for producing oil. When the assessee realised that claim for tax exemption made on copra made in the return was wrong as admitted in the letter dated March 31, 1995, the assessee should have been honest enough to remit the tax legally due on copra. But the assessee failed to remit tax due on copra. Instead, it sought to escape from its liability by resorting

to evasive explanation to the said explanation coming in Serial No. 51 of the First Schedule. In the circumstances, this authority is satisfied that the assessee sought to evade tax due on copra by submitting untrue returns. The tax sought to be evaded is quantified at Rs. 1,05,980.32. Considering the conduct of continuing and wilful default, this authority considers it necessary in this case, the imposition of maximum penalty."

The first appellate authority in exhibit P3 order considered the matter with reference to the explanation to entry Nos. 50 and 51 of the First Schedule and observed as follows :

"As per the above explanation, if the petitioner remits tax at the rate of 5 per cent on the sales of coconut oil and cake, he is not liable to pay tax on the purchase turnover of copra. Similarly, if the petitioner remits tax on the purchase turnover of copra, he is liable to pay tax on the sale of coconut oil and cake only at 3 per cent. Here, the petitioner has opted the former method and the entire tax due as per law has been remitted. Under the circumstances, the imposition of penalty is not warranted. Hence the following orders are passed."

The Board of Revenue in exhibit P5 order held that the order passed by the Deputy Commissioner is erroneous, against law and prejudicial to revenue. It is stated that the purchase value of copra used for production of coconut oil and coconut oil cake was taxable at the rate of 2 per cent, that the statute did not contemplate any exemption from payment of the tax payable on the purchase value of copra used for milling and that the reduction of tax levied on copra from the tax leviable on the sales of coconut oil and cake cannot be construed as exemption from tax payable on copra. It is also stated that the petitioner should not have collected sales tax at the rate of 5 per cent on the sales of coconut oil effected locally and that the Deputy Commissioner ought to have found that the assessee had submitted untrue or incorrect returns and sought to evade tax payable on the purchase turnover of copra. It is stated that the assessee had declared in the return an amount of Rs. 2,40,302.50 only and claimed exemption from tax on the taxable turnover of copra amounting to Rs. 39,84,222.50 with intention to evade payment of tax. It is relevant to note that whereas the total tax due for the assessment year 1990-91 was Rs. 4,96,999 the petitioner had remitted a sum of Rs. 5,13,658.81. It is seen that the assessing authority passed exhibit P6 order on the date of exhibit P1 itself whereby a sum of Rs. 1,00,071 which was collected in excess of the tax due on the sales turnover of coconut oil and coconut oil cake was forfeited as provided u/s 46A of the Act. It is only on account of this forfeiture, a sum of Rs. 83,411 has become payable by way of sales tax and a sum of Rs. 2,797 by way of surcharge. It is thus clear from the assessment order exhibit P1, the order passed u/s 46A, exhibit P6, and from exhibit P5 order passed by the Board of Revenue that the petitioner in the return filed for the assessment year 1990-91 claimed exemption on the purchase turnover of copra used for production of coconut oil and cake locally sold which exemption has not been allowed since the explanation to item Nos. 50 and 51 did

not permit. It is also relevant to note that the tax due on the taxable turnover had been paid then and there itself and but for the forfeiture order, exhibit P6 there would not have been any further liability. The question then is whether the aforesaid circumstances are sufficient to attract the provisions of Section 45A of the Act. The Supreme Court in Hindustan Steel Ltd.'s case [1970] 25 STC 211 provided the guidelines for imposition of penalty in the following manner :

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily, be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

The Supreme Court in the subsequent decision in Shiv Dutt Rai Fateh Chand v. Union of India [1983] 53 STC 289 held that the considerations which should weigh with the authorities while imposing penalty are well-known and have been settled by many decisions and referred with approval the decision in Hindustan Steel Ltd. Vs. State of Orissa, . The decision of the Supreme Court in Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, is relevant in this context. In that case, the assessee effected certain transactions of sale of cement in accordance with the provisions of the Cement Control Order and deducted from the price shown in the invoices sent to the purchasers, the amount of freight, which was included in the "free on rail destination railway station price" and which was paid by the purchasers. The assessee, proceeding on the basis that the amount of freight did not form part of the sale price and was not includible in the taxable turnover, did not show it in the returns, but the assessing authority took the view that having regard, to the provisions of the Cement Control Order, the amount of freight formed part of the sale price and was includible in the taxable turnover of the assessee and included the amount of freight in the taxable turnover in the assessment under the Central Sales Tax Act and under the Madhya Pradesh General Sales Tax Act. The assessing authority also imposed heavy penalty on the assessee on the ground that the assessee had failed to disclose in its returns the amount of freight as forming part of the taxable turnover. The assessee challenged the said orders in appeals. The Supreme Court following its decision in Hindustan Sugar Mills v. State of Rajasthan [1980] 45 STC 194 (Raj) held that the amount of freight formed part of the sale price and was includible in the taxable turnover of the assessee so as to be exigible to sales tax and was rightly included in the taxable turnover of the assessee. On the question whether the assessing authority was

right in imposing penalty on the assessee for not showing the amount of freight as forming part of the taxable turnover in its returns, the Supreme Court observed as follows :

"Now it is difficult to see how the assessee could be said to have filed "false" returns, when what the assessee did, namely, not including the amount of freight in the taxable turnover was under a bona fide belief that the amount of freight did not form part of the sale price and was not includible in the taxable turnover. The contention of the assessee throughout was that on a proper construction of the definition of "sale price" in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958, and Section 2(h) of the Central Sales Tax Act, 1956, the amount of freight did not fall within the definition and was not liable to be included in the taxable turnover. This was the reason why the assessee did not include the amount of freight in the taxable turnover in the returns filed by it. Now, it cannot be said that this was a frivolous contention taken up merely for the purpose of avoiding liability to pay tax. It was a highly arguable contention which required serious consideration by the court and the belief entertained by the assessee that it was not liable to include the amount of freight in the taxable turnover could not be said to be mala fide or unreasonable. What Section 43 of the Madhya Pradesh General Sales Tax Act, 1958, requires is that the assessee should have filed a "false" return and a return cannot be said to be "false" unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty. This view which is being taken by us is supported by the decision of this Court in Hindustan Steel Ltd. Vs. State of Orissa, where it has been held that "even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute....." It is elementary that Section 43 of the Madhya Pradesh General Sales Tax Act, 1958, providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. If the view canvassed on behalf of the revenue were accepted, the result would be that even if the assessee raises a bona fide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on pain of being held liable for penalty in case his contention is ultimately found by the court to be not acceptable. That surely could never have been intended by the Legislature."

The Supreme Court held that the assessee could not be said to have filed false returns when it did not include the amount of freight in the taxable turnover shown in the returns and the assessing authority was not justified in imposing penalty on the assessee.

7. A Division Bench of this Court also had occasion to consider the guidelines for imposition of penalty u/s 45A of the Act in the context of a challenge to the said section in *P.D. Sudhi v. Intelligence Officer, Agricultural Income Tax and Sales Tax, Mattancherry* [1992] 85 STC 337(SC). There the Division Bench considered the various decisions of the Supreme Court on this point including the two decisions referred to earlier and held that the use of the words "evasion" and the expression "sought to be evaded" in Section 45A(1) of the Kerala General Sales Tax Act, 1963, makes it clear that it is not the mere default that is made the foundation for the liability to penalty, but it is the contumacious or fraudulent or other blame worthy or objectionable conduct of an assessee in fulfilling his obligations mentioned in Section 45A of the Act, that will attract the levy of penalty. It was held that the concept of mens rea is embedded in the expressions "evaded" or "sought to be evaded" occurring in Section 45A(1) of the Act.

8. In the instant case, as already stated, the petitioner claimed exemption on the purchase turnover of copra on the bona fide belief that it is not liable to pay tax on the same in view of the explanation to items 50 and 51 of the First Schedule to the KGST Act since the petitioner had remitted tax at the rate of 5 per cent on the sales of coconut oil and cake. It is also relevant to note that the petitioner had remitted the tax due on the taxable turnover. The liability to pay balance tax arose under exhibit P1 only because of exhibit P6 order forfeiting the excess collection. When the petitioner had remitted the tax due in respect of the taxable turnover for the year 1990-91, the fact that the petitioner had omitted to show the purchase turnover of copra in the taxable turnover is only a technical or a venial defect as pointed out by the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, By applying the decision of the Supreme Court in *Hindustan Steel Ltd. Vs. State of Orissa*, it has to be held that no penalty is exigible. The decision of the Supreme Court in *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others*, squarely applies to the facts of this case. On the facts of the case on hand, it cannot be held that the assessing authority as well as the Board of Revenue is justified in imposing penalty on the petitioner u/s 45A(1) of the Act. I accordingly quash exhibits P2 and P5 orders passed by the first and third respondents respectively.

The original petition is allowed as above. In the circumstances of the case, there will be no order as to costs.

Order on C.M.P. No. 27933 of 1997 in O.P. No. 15560 of 1997 dismissed.