(2009) 03 KL CK 0091

In the High Court Of Kerala

Case No : S.T.A. No. 11 of 2008 and W.P.C. No. 26807 of 2008

P. Aboobacker — APPELLANT

Vs

Commissioner — RESPONDENT

Date of Decision : 25-03-2009

Acts Referred:
Kerala General Sales Tax Act, 1963 — Section 30C, 37, 45A(3)

Citation : (2009) 2 KLT 595 : (2010) 28 VST 351

Hon'ble Judges : K. Surendra Mohan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Shaji P. Chaly, for the Appellant; V.K. Shamsudeen, Government Pleader, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—The connected sales tax appeal and writ petition arise from the common orders of the Commissioner of Commercial Taxes dismissing the second revision filed by the appellant/petitioner against penalty order and revising a remand order issued by the Deputy Commissioner in first revision against the very same penalty order. We have heard Sri S.P. Chaly appearing for the appellant/petitioner and Government Pleader for the respondent.

2. The main grievance of the assessee is that the Commissioner had no jurisdiction to interfere with a remand order issued by the Deputy Commissioner in exercise of revisional power u/s 45A(3) of the Kerala General Sales Tax Act. According to him the Commissioner is entitled to interfere with only "orders prejudicial to the interests of the Revenue" as referred to in Section 37 of the Act and an order of remand in first revision by the Deputy Commissioner is not an order prejudicial to the interests of the Revenue. Counsel also relied on the decision of this Court in Bismillah Trading Co. Vs. Intelligence Officer, Squad No. II, Agricultural Income Tax and Sales Tax and Others, , and the decision of the Supreme Court in MALABAR INDUSTRIAL CO. LTD. Vs. COMMISSIONER OF INCOME TAX, . The Government Pleader on the other hand relied on the Full

Bench decision of this Court in S.T. Rev. 133 of 2006 (Alukkas Jewellery v. State of Kerala [2009] 26 VST 584) whereunder this Court has explained the scope of "orders prejudicial to the interests of the Revenue". The facts that led to the penalty on the assessee in this case are the following.

3. A truck transporting a load of rubber from Kerala to Tamil Nadu without sales tax records was seized alleging attempt at smuggling of goods u/s 30C of the Act. The driver of the truck gave a statement that the rubber so transported belonged to the assessee herein and that he had occasion to transport five loads of tread rubber for the very same assessee in the very same truck outside Kerala, and that one such truck load was seized by the Karnataka sales tax authorities and they imposed fine of above Rs. 19,000. Based on the information furnished by the driver, the Deputy Commissioner authorised a search in the premises of the assessee which led to recovery of business slips, note books, bill books, etc. On analysing the entries in these records, the Intelligence Officer of Sales Tax noticed that the driver''s statement pertaining to purchase and transport of rubber by the assessee outside Kerala was corroborated and established. Based on the records obtained on search, penalty was proposed on the assessee. The assessee''s case is that even though the assessee was heard both in the smuggling case booked at the time of seizure of the truck and in the penalty proceedings, he was not given an opportunity to cross-examine the driver. Counsel highlighted before us the violation of natural justice inasmuch as the assessee was not given an opportunity to cross-examine the driver. He has also relied on the decision of this Court in Jose Pallissery v. Additional Sales Tax Officer [1993] 89 STC 165 : [1993] 1 KLT 401, and contended that denial of opportunity to cross-examine affects the validity of the proceedings. The Government Pleader on the other hand contended that the assessee has not been prejudiced in this case because the penalty is levied not based on the driver''s statement, but based on the records pertaining to unaccounted business transactions seized from the assessee''s business premises.

4. We are in complete agreement with the argument of the Government Pleader because the driver''s statement constituted an information which triggered a search in the assessee''s business premises leading to recovery of business slips, two bill books and note book containing details of quantity of rubber purchased and sold and the release thereof. Search was conducted in the presence of the assessee and he has signed the shop inspection report. Since the search and recovery of records from the business premises of the assessee are not questioned it was for the assessee to explain the nature of business transactions entered in the search records which admittedly the assessee did not explain as anything unrelated to the business carried by him. In the first place we do not find any violation of natural justice affecting the assessee because so long as the Department has not relied on the driver''s statement for the purpose of levy of penalty, denial of opportunity to cross-examine the driver does not affect the validity of the proceedings. The only remaining question to be considered is whether the Commissioner was justified in interfering with the orders of the first

revisional authority.

5. Section 37(1) authorises the Commissioner to interfere with orders passed by the lower authorities which, in his opinion, are prejudicial to the Revenue. This is a case where the order interfered with is the first revisional order issued by the Deputy Commissioner u/s 45A(3) of the Act on revisions filed against penalty orders. We have already found that penalty orders are based on evidence collected from the business premises of the assessee and the lack of opportunity to cross-examine the driver of the vehicle who gave the statement about the involvement of the assessee did not affect the validity of the proceedings. In fact, the Deputy Commissioner accepted the argument of the assessee about violation of natural justice and consequently set aside the penalty orders with direction to redo the same. We are unable to accept the contention of counsel for the assessee that the order issued by the Deputy Commissioner remanding the case is not an order prejudicial to the Revenue. In fact an open remand by itself is prejudicial to the Revenue because the assessing officer is free to restore the original order. We are of the view that it is open to the Commissioner to examine whether the first part of the order setting aside the penalty order is prejudicial to the interests of the Revenue and if it is so, he is free to interfere with such order, if the grounds on which the order is set aside by the first revisional authority are not tenable. In fact a penalty order serves the interests of the Revenue because so long as it is not interfered with penalty levied will be recoverable as revenue due to the State. Once this order is set aside the demand raised by the State goes and therefore such an order is prejudicial to the interests of the Revenue. It is immaterial whether the subsequent order is a remand to reconsider the matter or not. So much so an order remanding the matter after setting aside the penalty order is an order prejudicial to the interests of the Revenue and if such an order is not based on tenable reasons, the higher authority namely the Commissioner is entitled to interfere with such order. In this case we have already found that the alleged violation of natural justice has not caused prejudice to the assessee which is the view taken by the Commissioner as well, in his order issued u/s 37 of the Act. We therefore uphold the order issued by the Commissioner rejecting the revision filed by the assessee and restoring the penalty order u/s 37 after setting aside the order of the first revisional authority.

6. Counsel for the assessee contended that the Commissioner has not considered the assessee''s request for reduction of penalty. We find some force in this contention because for both the years, maximum penalty is imposed and there is nothing to indicate that the assessee was involved in any offences previously. Besides this it is seen that at least in respect of one truck load of rubber transported outside Kerala, the assessee had to pay penalty in the State of Karnataka. Taking all these into account, we reduce the penalty to equal amount of tax for both the years. In other words, the penalty will stand reduced by half. However, the reduction is granted by us on the further condition that the assessee will make payment within one month from today.

7. Both STA and WP are disposed of as above.

