

(2003) 02 KL CK 0006
In the High Court Of Kerala
Case No : T.R.C. No. 249 of 2002

P.K. Damodaran

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 26-02-2003

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 23(3), 23(3A)

Citation : (2004) 138 STC 442

Hon'ble Judges : J.M. James, J;G. Sivarajan, J

Bench : Division Bench

Advocate : N. Muraleedharan Nair and V.K. Shamusudheen, for the Appellant;
Georgekutty Mathew, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

G. Sivarajan, J.—The assessee is the revision-petitioner. The State is the respondent. The assessment year concerned is 1998-99. The only question that arises for consideration in this case is as to whether penal interest u/s 23(3)/23(3A) of the Kerala General Sales Tax Act, 1963 for short "the Act", can be levied in a case where the assessee did not disclose the correct rate of tax in the return and had paid tax showing a lesser rate in the return.

2. The assessee is a dealer in cattle feeds. For the assessment year 1998-99, the assessee filed returns disclosing the rate of tax on cattle feeds only at the rate of 3 percent, whereas, the rate of tax for cattle feeds was fixed at 4 per cent, with effect from April 1, 1998, as per the Finance Act, 1998. The assessing authority did not object to the same until the final assessment for the year 1998-99 is completed as per order dated April 3, 2001. In the assessment order, the assessing authority has levied interest of Rs. 9,926. Being aggrieved by the said levy, the assessee filed an appeal before the Appellate Assistant Commissioner, Commercial Taxes, Kannur, who by his order dated November 13, 2001 (annexure-B), allowed the appeal in that respect. However, in appeal filed by the State, the order of the first appellate authority was set aside and the order of

assessing authority levying penal interest was restored.

3. We have heard the learned counsel appearing for the assessee and the learned Government Pleader appearing for the respondent. There is no dispute that the rate of tax applicable to cattle feeds during the relevant year is 4 percent, and that pursuant to the assessment order, the assessee had remitted the tax also. The dispute as already noted is with regard to the levy of penal interest of Rs. 9,926. The Sales Tax Officer has not noted the provisions under which the said interest was levied. However, the Tribunal has sustained the levy u/s 23(3A) of the Act. So far as the levy of penal interest u/s 23(3) of the Act is concerned, the matter is concluded by the decision of the Supreme Court in *Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others*, The Supreme Court has considered the question with reference to the provisions of Section 23(3) of the Act, as amended in 1988, which is the provision available during the relevant period. Relying on the decision of the Constitutional Bench of the Supreme Court in *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, the Supreme Court held that the liability of the assessee to pay sales tax would have arisen either on return of turnover being filed by way of self-assessment or else on an order of assessment being made. The Supreme Court also referred to the provisions of Rule 21(7A) of the KGST Rules, and observed that, no doubt the said rule casts an obligation on an assessee to file monthly return disclosing the total turnover and taxable turnover accompanied by proof of payment of the amount of tax within a specified time. It was also noted that, in that case, the assessee did not file the return, and observed that the failure to file return of taxable turnover may render the assessee liable for any other consequences or penal action as provided by law, but cannot attract the liability for payment of penal interest under sub-Section (3) of Section 23 of the Act, on the parity of reasoning that if a return of turnover would have been filed on the due date then the tax as per return would have become due and payable on that date.

4. In this context, it must also be noted that the Supreme Court in *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, mentioned above, has approved the minority opinion of P.N. Bhagwati, J., (as His Lordship then was). The said minority view, reported in *Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others*, was as follows :

"We must look at the return actually filed by the assessee in order to see what is the full amount of tax due on the basis of such return. It is not the assessed tax nor is it the tax due on the basis of a return which ought to have been filed by the assessee but it is the tax due according to the return actually filed that is payable under sub-Section (2) of Section 7. This provision is really in the nature of self-assessment and what it requires is that whatever be the amount of tax due on the basis of self-assessment must be paid up along with the filing of the return which constitutes self-assessment. I fail to see how the plain words of sub-

Section (2) of Section 7 can be tortured to mean full amount of tax due on the basis of return which ought to have been filed but which has not been filed."

In the above extracted minority view, it was specifically observed that what is relevant is the tax due according to the return actually filed, that is payable under sub-Section (2) of Section 7 which was involved in that case, and observations extracted above clearly applies to the present case also.

5. In the instant case, as we have already noted, the assessee had filed the return, but showed the rate of tax only at 3 per cent. This is the self-assessment made by the assessee. If the same is not acceptable to the assessing authority, he could have invoked the provisions of rule 21(9) of the Rules, passed an order and could have raised the demand of the tax due. In such circumstances, it is only when the assessee fails to remit the tax so demanded within the time stipulated therein, the liability to penal interest arises. In the present case, the order of assessment has been issued only on April 3, 2001. Consequently the liability to pay penal interest arises only on default of payment of any tax due under the said order.

6. In the instant case, the Tribunal did not sustain the order of the assessing authority u/s 23(3). The Tribunal has considered the matter u/s 23(3A) and sustained the levy under that Section. Hence, it is necessary to see as to whether Section 23(3A) of the Act is attracted. Section 23(3A) of the Act introduced by Act 14 of 1998 with effect from April 1, 1998 reads as follows :

"23(3A) Where any dealer has failed to include any turnover of his business in any return filed or where any turnover has escaped assessment, interest under sub-Section (3) shall accrue on the tax due on such turnover with effect from such date on which the tax would have fallen due for payment had the dealer included the same in the return relating to the period to which such turnover relates."

In order to attract the said sub-Section, there must be a failure on the part of the dealer to include any turnover of his business in the return filed or there must be an escapement of turnover in the assessment. It is only on those two circumstances, sub-Section (3A) is attracted entitling charging of interest under sub-Section (3) with effect from such date on which the tax would have fallen due for payment, had the dealer included the same in the return relating the period to which such turnover relates. In the instant case, there is no such failure on the part of the dealer or an escapement of turnover liable to be assessed. The present is a case where the assessee had shown the rate of tax at 3 per cent as against 4 per cent due. Such a situation does not come within the ambit of sub-Section (3A). As such there is no question of application of sub-Section (3A) warranting levy of interest under sub-Section (3) of Section 23 from the date of return filed. For all these reasons, we are of the view that the Tribunal was not justified in sustaining the levy of interest in the assessment order. We accordingly set aside the orders of the appellate authorities on this point and

direct the assessing authority to modify the assessment deleting penal interest of Rs. 9,926 levied in the assessment order.

The T.R.C. is allowed as above.

Order on CM.P. No. 4309 of 2002 in T.R.C. No. 249 of 2002 dismissed.