(2001) 06 KL CK 0024

In the High Court Of Kerala

Case No : O.P.No. 2211 of 1995

Sahadevan APPELLANT

Vs

Sales Tax Officer RESPONDENT

Date of Decision : 27-06-2001

Acts Referred:
Kerala General Sales Tax Act, 1963 — Section 23(3), 23(3B), 23(4), 23(5)

Citation : (2002) 128 STC 391

Hon'ble Judges : J.B. Koshy, J

Bench : Single Bench

Advocate : T.M. Sreedharan and N. Unnikrishnan, for the Appellant; Subal Paul, Government Pleader, for the Respondent

Judgement

J.B. Koshy, J.—Petitioner was a dealer under the Kerala General Sales Tax Act, 1963 (hereinafter referred to as the ''the Act''). He was assessed by Ext. P1 and as per the above petitioner had to pay Rs.34, 783/- as balance tax and Rs. 3,360-80 as surcharge. petitioner filed an appeal. The appellant authority reduced the same by Ext. P2 order dated 12.2.1985. That was implemented by Ext. P3 and demand was issued reducing balance tax amount due as Rs. 3,972/- and surcharge as Rs.1,120/-. It is stated that that amount was paid. The Board took up the matter in appeal. The Tribunal, by Ext. P4 order, set aside the appellate order and restored Ext. P1 assessment order of original authority. Consequentially, Ext. P5 demand was issued. While issuing the demand, penal interest under S.23(3) of the Act was also demanded. S.23(3) of the Act is as follows:

"(3) If the tax or any other amount assessed or due under this Act is not paid by any dealer or other person within the time prescribed therefore in this Act or in any rule made thereunder and in other cases within the time specified therefore in the notice of demand the dealer or other person shall pay, by way of interest, in the manner prescribed, in addition to the amount due, a sum equal to-

(a) one per cent of such amount for each moth or part thereof for the first three months after the date specified for its payment;

(b) two per cent of such amount for each month or part thereof subsequent to the first three months aforesaid.

Explanation: Where the period of default is less than one month, interest shall be calculated for the actual number of days of default."

2. In this connection, S.23(5) is also important which is as follows:

"(5). Where, as a result of any order in appeal or revision or any rectification under S. 43, any tax assessed or any other amount due from any dealer or other amount shall be proportionately reduced and if any amount of interest in excess of such reduced interest has been collected, such excess shall be refunded to the dealer or other person, as the case may be."

Interest demanded under S.23(3) is penal in nature. It is not ordinary interest payable as held by the Supreme Court in Food Corporation of India Vs. State of Haryana and Another, . I also refer tot he decision of the Supreme Court in State of Kerala v. Joy Varghese (1997 (5) KTR 372 SC) and interpretation of S. 23(3). The principle enunciated by the Constitutional Bench of the Supreme Court in J.K.Synthetics Ltd. v. Commercial Tax Officer 1991 (94) STC 422 SC is also relevant here. The Supreme Court in Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, held that penal interest can be demanded under S. 23(3) only when there was unpaid tax due or payable on the basis of a return as per self-assessment or by assessment order or appellant/revisional order. The Supreme Court in B. Rajagopala Naidu Vs. State Transport Appellate Tribunal and Others, held that if an order of assessment is restored or replaced by the appellate order, then notice of demand and all other steps based upon the original order must be deemed to have become ineffective. While considering an identical matter, this Court held in Nachimuthu v. Sales Tax Officer (1994 (2) KLT 171) as follows:

"8. The consequence of an appellate order setting aside or modifying an order of assessment is to nullify the demand for the amount of tax in respect of which relief is granted. The amount ceases to be payable. No doubt the demand revives when the appellate order itself is set aside in further proceedings; by way of appeal or revision; but in the interregnum, the amount is not payable by virtue of an order passed by a statutory authority. In my opinion, no penal interest could therefore accrue during this period.

9. This view which accords with sub-ss. (3), (4) and (5) of S. 23 also subserves the ends of justice. Sub-s. (3) inter alia provides that penal interest runs after the expiry of the period of time allowed for payment of the tax by any appellate or revisional authority; and sub-ss. (4) and (5) provide for cancellation of the levy of penal interest, or for proportions reduction therein accordingly as the liability for tax is cancelled or reduced in appeal or revision....."

Of course, the matter would have been different if appellate order was stayed and the appeal was dismissed thereafter in view of S. 23 (3B) of the Act.

3. I respectfully agree with the view expressed by T.L. Viswanatha Iyer, J. in paragraph 8 of the above decision. Here, in this case, the original demand as per Ext. P1 was set aside by Ext. P2. Therefore, interest as contemplated under S. 23(3) of the Act is payable for the entire amount as demanded in Ext. P1 from the date of Ext.P1 original assessment till Ext.P2 appellate order, that is, 12.2.1985. The above appellate order was in force till Ext. P4 order was passed on 3.4.1993. Till Ext. P4 was passed only demand payable was Ext. P3 demand consequent of Ext. P2 appellant order. There was no other valid demand over and above Ext.P3 after Ext. P2. Therefore, for that period, no penal interest is payable if amount demanded in Ext. P3 is paid as demanded. From the date of Ext. P3 till Ext. P4 and if that amount is not paid, penal interest is payable on that amount till Ext. P4. But, for the period after Ext. P4 is passed, petitioner is liable to pay penal interest on the basis of the entire balance tax payable till it is paid.

4. In the above circumstances, Ext. P5 is set aside and the Sales Tax Officer is directed to make fresh demand on the basis of the principles mentioned above.