
(2009) 07 KL CK 0049

In the High Court Of Kerala

Case No : S.T. Rev. No's. 75, 79, 80, 85, 88, 89 and 91 of 2009

State of Kerala

APPELLANT

Vs

Kaycee Distilleries

RESPONDENT

Date of Decision : 24-07-2009

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 23(3), 23(3A), 23(3B), 5(2C), 55C
Kerala General Sales Tax Rules, 1963 — Rule 21(7)

Citation : (2010) 30 VST 93

Hon'ble Judges : C.N. Ramachandran Nair, J;C.K. Abdul Rehim, J

Bench : Division Bench

Advocate : K. Vinod Chandran, Special Government Pleader, for the Appellant;
T.A. Shaji, for the Respondent

Final Decision : Allowed

Judgement

C.N. Ramachandran Nair, J.—The main issue raised in the sales tax revision cases filed by the Revenue against the orders of the Tribunal is against cancellation of interest levied u/s 23(3A) of the Kerala General Sales Tax Act, 1963 (hereinafter referred to for short as, "the Act") for belated payment of turnover tax on the excise duty component of the price. Interest demanded was for the period beginning with the end of each assessment year. The assessments involved are for the years 1998-99 to 2004-05. Even though the Revenue has raised another question on purchase tax liability on purchase of water by the respondent, we do not think this is a question of law because the finding is based on the conclusions of fact arrived at by the Tribunal. We therefore proceed to consider only the question raised on interest. We have heard Special Government Pleader appearing for the State and Counsel appearing for the respondent.

2. The respondent is a distillery engaged in manufacture and sale of Indian made foreign liquor. The entire products are sold to the Kerala State Beverages Corporation Limited, a Government of Kerala undertaking engaged in monopoly distribution of liquor in the State. Under the provisions of the Act, sales tax is

payable on Indian made foreign liquor at the point of sale by the Beverages Corporation Limited. However, dealers in liquor including manufacturers are liable to pay turnover tax at the rate of five per cent on their turnover at all points of sale in the State. By virtue of this provision, the respondent as a manufacturer was liable to pay turnover tax on the sale price of liquor. Excise duty under the Foreign Liquor Rules was payable on Indian Made foreign liquor by the Beverages Corporation Limited at the point of release of liquor by them on sale from their warehouse. However, the Foreign Liquor Rules were amended by the Government with effect from January 5, 1999 whereunder the Beverages Corporation was liable to pay excise duty before lifting the liquor from the warehouse of the manufacturer. A dispute arose as to whether excise duty paid by the Kerala State Beverages Corporation on the liquor purchased from the respondent and other distilleries formed part of the turnover for payment of turnover tax by manufacturers for period prior to the amendment and after the amendment. This Court in the decision in *Kerala Distilleries and Allied Products Limited v. Assistant Commissioner (Assessment) (I), Commercial Tax, Special Circle, Palakkad* reported in [2000] 117 STC 553, though took note of the amendment to the Foreign Liquor Rules, held that excise duty paid by the Beverages Corporation will not form part of turnover of the manufacturer/distillery. Even though this decision of the Division Bench pertains to sales tax assessments for periods prior to amendment of the Foreign Liquor Rules with effect from January 5, 1999 and another Division Bench in the decision in *MC Dowell and Co. Ltd. v. State of Kerala* [2002] 10 KTR 652 though differed from the view expressed by the earlier Division Bench, for sake of consistency, they followed the earlier judgment and held that excise duty paid by the Beverages Corporation is not part of the turnover for the purpose of payment of turnover tax by the distillery. After the first Division Bench judgment, an Explanation was introduced to Section 5(2C) of the Act declaring excise duty paid by the Beverages Corporation as turnover with retrospective effect. The retrospective amendment was also challenged before this Court. Ultimately, all cases decided by this Court were taken up in appeal by the State before the honourable Supreme Court and the Supreme Court finally settled the matter by decision in *State of Kerala v. Maharashtra Distilleries Ltd.* [2005] 141 STC 358. The Supreme Court, after noting the amendment to the Foreign Liquor Rules with effect from January 5, 1999, held that since the Beverages Corporation remits the duty before lifting the same from the warehouse of the distillery, the purchased liquor is duty paid liquor and so much so, the sales turnover for the distillery includes excise duty though paid by the Beverages Corporation Ltd. The conclusion drawn by the Supreme Court contained in paragraph 82 of the judgment is as follows:

...We, therefore, hold that from January 5, 1999, the date with effect from which the KSBC started paying duty to the manufacturers/distillers before lifting the stock of IMFL to its own licensed premises, the amount of duty paid formed part of the consideration paid by the Corporation to the manufacturers and consequently it formed part of the turnover of the manufacturers.

3. There was a mistake in this part of the judgment because the Beverages Corporation remits the duty directly to the State before purchase of the liquor from the distillery and the statement of the Supreme Court that duty is paid by the KSBC to the distillery was incorrect. However, the distilleries, taking advantage of the mistake in the judgment, again contended that they are not liable to pay turnover tax as excise duty and they filed petition before the Supreme Court to clarify that since excise duty was paid by the KSBC to the State, the same cannot be included in their turnover. However, clarification petition was dismissed by the Supreme Court, but with the observation as follows:

The petitioners shall pay the balance turnover tax within a period of three months from today and till then no coercive steps shall be taken against them for recovery of turnover tax. This is without prejudice to the right of the respondents to demand penalty, interest or any other charge leviable under law, subject to rights of the petitioners to oppose.

(Here italicised)

4. It is obvious from the judgment of the Supreme Court and the orders-dismissing the clarification petition that the respondent was liable to pay turnover tax on the excise duty remitted by the Beverages Corporation on the sale of liquor made by the respondent from January 5, 1999 onwards. This position is not contested by the respondent. However, since turnover tax on excise duty was not paid by the respondent along with the returns filed, the assessing officer, while making assessments, levied interest u/s 23(3A) of the Act for the belated payment of turnover tax from the end of each year. In fact, amounts paid have been adjusted first towards interest in terms of Section 55C of the Act and the balance only was adjusted towards turnover tax and it is against these orders statutory appeals were filed. Even though first appeals were dismissed, on second appeals, the Tribunal relying on the decisions of the Supreme Court in J.K. Synthetics Ltd. v. Commercial Taxes Officer reported in [1994] 94 STC 422 and in Maruti Wire Industries Pvt. Ltd. v. Sales Tax Officer reported in [2001] 122 STC 410 and the two decisions of this Court, one in Universal Traders v. Agricultural Income Tax and Sales Tax Officer, Adimaly [1999] 113 STC 11 (Ker) : 9 KTR 177 and P.K. Damodaran Vs. State of Kerala, held that interest for default is payable for periods after expiry of 30 days from the date of service of assessment order along with notice of demand. In other words, the Tribunal's finding is that interest is payable only after the respondents committed default in payment after service of assessment order and demand notices in 2006. The Special Government Pleader appearing for the State has relied on a later Division Bench decision of this Court in Chandramani Traders v. State of Kerala [2008] 16 VST 294 wherein this Court after taking note of the amendment held that Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, has no application for the later period. He also relied on the decision of the Supreme Court in Commissioner of Trade Tax v. Kanhai

Ram Thekedar [2005] 141 STC 1 wherein the Supreme Court has held that the liability of a dealer to pay interest on late payment of tax arises automatically by operation of law. The Counsel for the respondent, however, contended that interest payable u/s 23(3A) is for default in payment of tax and the respondent-assessee cannot be held to be a defaulter because as and when assessments are made after judgment of the Supreme Court, they have remitted the tax. It is the specific case of the respondent that pursuant to the judgment of the Supreme Court, demand was raised on them on regular assessment and as and when regular assessments were completed, they remitted tax. However it is seen that even after judgment of the Supreme Court pronounced on May 6, 2005, the respondent has not cared to file revised returns or remit tax on excise duty. Further, though the assessing officer issued notice on October 13, 2005, the respondent filed revised return only for three months, i.e., for January, February and March 2002 and for the remaining period, they waited for assessments to be taken up for filing revised returns, that too without payment of tax.

5. In our view, the Tribunal's decision is liable to be vacated for the simple reason that they decided the cases wrongly assuming that interest was levied u/s 23(3) whereas the levy actually was u/s 23(3A). The decisions of the High Court and the Supreme Court relied on by the Tribunal are on Section 23(3) of the Act whereas the interest levied and that was contested before the Tribunal was u/s 23(3A) which is the provision introduced to the Kerala General Sales Tax Act by Act 14 of 1998 with effect from April 1, 1998. The said Section is extracted hereinbelow for easy reference:

23. Payment and recovery of tax.- (1) to (3)....

(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.

6. In fact, the original provision under which interest for default in payment of tax was being levied and recovered was Section 23(3) which provides for levy of interest for default in payment of assessed and demanded tax or other amounts assessed or due under the Act. In several decisions, the Supreme Court and this Court held that interest u/s 23(3) could be demanded only if there is default in payment of tax assessed and demanded by the officer. Section 23(3A) was introduced obviously to get over these court decisions and to provide for a new scheme for levy of interest on the belated payment of tax, which, in our view, is compensatory in nature and not a penal levy at all. On going through the above section, it is clear that the interest payable is on the non-payment or short payment of tax by the dealer and the period for which interest is payable is from the due date on which such tax would have been payable had the dealer filed correct return disclosing full amount of tax due under the Act. Non-payment or short-payment of tax may arise on account of failure of the dealer to disclose full

turnover or on account of the dealer declaring taxable turnover as exempted turnover or on account of mis-classification of goods on rate of tax in the declared turnover. Section 23(3A) provides for interest for short payment of tax which may be on account of any of the reasons stated above. In other words, as and when assessment is completed, the returns and payment of tax made by the dealer will be verified and the assessing officer is bound to compute interest for the short-payment of tax for the period of default as provided under the said section. Interest u/s 23(3A) is compensatory in nature and it will be payable in all cases where tax assessed and demanded is higher than the tax paid by the dealer based on the returns filed. Non-payment or short-payment of tax even on account of mistakes in returns will also lead to levy of interest on the dealer for the short-payment of tax. In this case, the assessments involved were for the assessment years 1998-99 onwards. As held by the Supreme Court, the respondent was liable to pay turnover tax on the turnover including excise duty for the sales made with effect from January 5, 1999. Therefore, along with the monthly returns filed from February 1999 onwards, the dealer should have included excise duty along with the turnover and should have remitted turnover tax on the entire turnover including excise duty. After the decision of the Supreme Court, the respondent has not contested about their liability to pay turnover tax on the excise duty component for sales made from January 5, 1999 onwards. Our finding above is that the mandator)" interest u/s 23(3A) is payable for the belated payment of turnover tax on excise duty component. The Tribunal indifferently allowed the respondent's appeals without even referring to the relevant statutory provisions and therefore, it has to be necessarily vacated. We have found above that interest for default is automatic for non-payment/belated payment of tax. In fact, it is clear from the order extracted above that while granting time for the respondent to remit the arrears at the time of dismissal of clarification petitions, the Supreme Court specifically stated that time is granted subject to provisions for penalty and interest. In fact, Section 23(3A) provides for interest for the period commencing from the due date for payment of the same which in fact for every month is 10th of the following month on which tax is payable along with monthly return as provided under Rule 21(7) of the Kerala General Sales Tax Rules, 1963 (for short, "the Rules"). The assessing officer has demanded interest calculating the period of default from the end of the year in which turnover tax was due. However, we do not want to disturb the orders which will lead to enhancement. Even though Counsel for the respondent contended that non-payment of turnover tax was on account of pendency of case before the Supreme Court, we do not find any such defence is available against levy of compensatory interest u/s 23(3A) of the Act. Further, even though the Supreme Court declared liability vide judgment dated May 6, 2005 See [2005] 141 STC 358, the respondent has not chosen to file revised return or remit the turnover tax on excise duty so that at least interest from such date could be avoided. Further, it is worthwhile to mention here about the scope of Section 23(3B) which provides for recovery of interest even for the period during which disputed tax remained stayed by any order of court or authority. In other words,

interest u/s 23(3A) is mandatory in nature irrespective of pendency of any case or orders passed by any court or authority. Therefore, we allow the revisions on this issue by reversing the order of the Tribunal and by restoring the assessments levying interest u/s 23(3A) of the Act.

7. The next grievance of the respondent is against the appropriation of the amount paid first towards the interest payable under the Act in terms of Section 55C of the Act. We do not find any substance in this contention because the payments are made much after the introduction of Section 55C which authorises the Department to adjust payment first towards interest and balance, if any, towards tax. This contention is also rejected.

8. The sales tax revisions are allowed as above, but with a direction to the officer to correct mistakes, if any, in regard to the credit given for payments or working out of interest for which the respondent can make application.