
(1994) 02 KL CK 0043
In the High Court Of Kerala
Case No : W.A. No. 1561 of 1993-A

Sujir Ganesh

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 21-02-1994

Acts Referred:

Central Sales Tax Act, 1956 — Section 5(3)
Kerala General Sales Tax Act, 1963 — Section 45A(1)

Citation : (1994) 95 STC 368

Hon'ble Judges : Varghese Kalliath, J; P.A. Mohammed, J

Bench : Division Bench

Advocate : N.D. Premachandran and V.P. Seemanthini, for the Appellant;

Final Decision : Dismissed

Judgement

P.A. Mohammed, J.—This writ appeal arises from the judgment of the learned single Judge dismissing O.P. No. 5298 of 1989 on the file of this Court. In the said writ petition the appellant-writ petitioner has challenged the levy of penalty u/s 45A of the Kerala General Sales Tax Act, 1963 (for short "the Act") for the assessment year 1984-85. By exhibit P5 order the Board of Revenue upheld the levy of penalty fixed by the second respondent, Deputy Commissioner in the revision petition and that order was under challenge in the writ petition disposed of by the learned Single Judge on March 15, 1993.

2. The main question to be decided in this appeal is whether the ingredients of the provisions contained in Section 45A are attracted in this case so as to levy of penalty on the petitioner as prescribed therein. The portion of the said section which is relevant for the present purpose is extracted hereunder :

"45 A. Imposition of penalty by officers and authorities.--(1) If the assessing authority or the Appellate Assistant Commissioner is satisfied that any person,--

.....

(d) has submitted any untrue or incorrect return ; or

.....

such authority or officer may direct that such person shall pay, by way of penalty, an amount not exceeding twice the amount of sales tax or other amount evaded or sought to be evaded where it is practicable to quantify the evasion or an amount not exceeding five thousand rupees in any other case."

3. The appellant had filed the annual return in form 8 on November 20, 1985 for the purpose of assessment for the year 1984-85 claiming exemption in respect of purchase of cashew made during the year. According to the appellant, he is not liable to tax by virtue of the provisions contained in Section 5(3) of the Central Sales Tax Act, 1956, which reads thus :

"(3) Notwithstanding anything contained in Sub-section (1), the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export."

The above provision formulates a principle of general applicability in regard to all penultimate sales provided they satisfy the specified conditions mentioned therein. By virtue of this provision "sales for export" or "penultimate sales" before export will also be deemed to be sales in the course of export provided (!) sales or purchases took place after the agreement or order for the export of the goods was made, (2) the sale or purchase was for purposes of complying with the agreement or order for export of the goods. From the account books and other documents available in this case, it has sufficiently come out that the assessee had no prior foreign contract or orders to which the purchase during the year 1984-85 was related. It is revealed that the assessee had one contract No. 22/80 dated January 10, 1985 during the year. There is no dispute with regard to this point. Since all the purchases were made prior to the above contract, the assessee is not entitled to claim exemption u/s 5(3). However, in the return the appellant has claimed exemption in respect of the entire purchases made during the year. Therefore it is evident that the annual return submitted in form 8 is an untrue and incorrect return as contemplated in Clause (d) of Sub-section (1) of Section 45A. By filing this incorrect and untrue return the assessee got an undue advantage, that is to say, he could avoid payment of tax legitimately due along with the return, in respect of the turnover involved in the claim of exemption. In other words, by this unauthorised claim, the assessee deliberately withheld the payment of tax to the tune of Rs. 1,65,431.63 though this amount is payable along with monthly returns. Thus it is practically proved that there was dishonest intention and contumacious conduct on the part of the assessee to defraud the revenue legitimately due to the State.

4. When exhibit P1 notice was issued proposing to levy penalty u/s 45A the

assessee did not file any objection. He had no explanation to offer in so far as the violation of the provisions contained in Clause (d) of Sub-section (1) of Section 45A. By exhibit P2 the Assistant Commissioner imposed a penalty of Rs. 3,30,863 being twice the amount of tax sought to be evaded. As against that order the assessee filed a revision before the Deputy Commissioner which was partly allowed. The Deputy Commissioner reduced the penalty to Rs. 1,65,432 being the amount equal to the tax sought to be evaded. Thereafter the assessee filed a further revision before the Board of Revenue as per exhibit P4. Exhibit P4 was finally disposed of by the Board of Revenue as per exhibit P5 order confirming the order passed by the Deputy Commissioner. The writ petition filed against the said order was dismissed by the learned single Judge.

5. In this writ appeal, with great respect we agree with the findings entered by the learned single Judge. In this case we do not see any reason for the assessee to contend that the penalty levied is in any way disproportionate to the offence alleged. Such contention was not advanced before the learned single Judge. We feel, this is not a fit case where doctrine of "proportionality" or "Wednesbury" principle can be applied for fixing the quantum of penalty because there was deliberate and systematic defrauding of revenue from the beginning of the assessment year itself. In this case it is not possible to argue that there was no fraudulent intention to evade the payment of tax. A cursory glance at the provision contained in Section 5(3) would reveal that this is a case where no exemption is available. No argument or discussion is found necessary to understand non-applicability of this provision in the facts of the present case. If there is an "arguable point" we would have definitely applied the rule laid down by the Supreme Court in Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, What we see here is only "a frivolous" contention taken up merely for the purpose of avoiding the liability to pay the tax".

6. Finally, it came to our notice that a new point was taken for the first time in the memorandum of appeal. The point is that though in exhibit P1 notice it was proposed to impose a penalty of Rs. 1,65,431.63, double the amount of tax sought to be evaded was levied by the 2nd respondent. We have perused exhibit P1 notice and what is contained in exhibit P1 is that "by preferring irregular claim of exemption in the monthly return the assessee sought to avoid the timely payment of the dues amounting to Rs. 1,65,431.63". It is further stated : "It is proposed to impose penalty equal to the tax amount which remained unpaid". This appears to be a mistake. This mistake now appears to have developed into a "new point". Whatever that be, the assessee did not take up this point either before the Assistant Commissioner or before the Board of Revenue. It is not even argued before the learned single Judge. No such point was taken in the writ petition also. Thus, by his own conduct the assessee is seen to have waived the said point if at all it is considered to be a relevant point. He is, therefore, precluded from taking advantage of this error at the final stage of the litigation. It is for the first time we see the point in the memorandum of writ appeal. We do

not see any substance in this point and we consider it a bona fide mistake from which nothing emerges. No serious argument is advanced before us in so far as this "new point". We are completely in agreement with the conclusions of the learned single Judge. The writ appeal is dismissed. No order as to costs.