

(2008) 09 KL CK 0058

In the High Court Of Kerala

Case No : S.T. Rev. No's. 153, 191, 193, 208, 256 and 273 of 2006

Universal Steel Corporation

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 23-09-2008

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 29, 29(2), 29A, 29A(2), 29A(3)

Citation : (2009) 19 VST 332

Hon'ble Judges : H.L. Dattu, C.J.;A.K. Basheer, J

Bench : Division Bench

**Advocate : N. Muraleedharan Nair and V.K. Shamsudheen, for the Appellant;
Muhammed Rafiq, Government Pleader (SR), for the Respondent**

Judgement

H.L. Dattu, C.J.—In all these revision petitions, the orders passed by the Sales Tax Officer (Enquiry) in exercise of his powers u/s 29A(4) of the Kerala General Sales Tax Act, 1963 (hereinafter for the sake of brevity referred to as, "the Act, 1963"), and confirmed by the Sales Tax Appellate Tribunal is called in question by the petitioner which is a partnership firm doing business in iron and steel at Coimbatore, State of Tamil Nadu.

2. The questions of law raised for our consideration and decision is as under:

1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in confirming the penalty imposed considering the fact that the transaction in question is not a sale transaction and that there is no element of mens rea to attract penalty ?

2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal has erred in law in sustaining the penalty imposed u/s 29A of the KGST Act upon the petitioner considering the fact that the tax liability is only on the seller and not on the purchaser even if it is presumed that the transaction in question is sale ?

3. Whether, on the facts and in the circumstances of the case, the Appellate

Tribunal has erred in law in upholding the penalty imposed u/s 29A of the KGST Act considering the fact that the transaction in question is inter-State transaction and hence Section 29A of the KGST Act will not be attracted?

4. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal has erred in law in confirming the imposition of maximum penalty in the light of the principles of law laid down by the honourable Supreme Court and this High Court through the decisions reported in Hindustan Steel Ltd. Vs. State of Orissa, reported in [1992] 85 STC 337 SC (P.D. Sudhi v. Intelligence Officer, Agricultural Income Tax and Sales Tax, Mattancherry) [2003] 3 KLT 56, etc.?

3. The revision petitioner is common in all these six revision petitions. The facts and legal issues are identical and therefore, these petitions are disposed of by this common judgment.

4. The Check-post Officer had issued six notices u/s 29A(2) of the KGST Act, mainly on three grounds, namely, that the goods under transport was not accompanied by the permit prescribed u/s 30E of the Act; the documents prescribed u/s 29(2) of the Act; and the goods vehicle was not carrying the transit pass as prescribed u/s 29A of the Act. While five notices were issued on May 21, 2003, one notice was issued on August 21, 2003. The total value in respect of all the transactions is Rs. 26,37,895.

5. In all these cases, the vehicles had carried the following documents:

(i) In all the six transportation, the form 27B declaration was tendered showing the consignor as Cochin Shipyard Ltd., Cochin ("CSL", for short) and consignee as Universal Steel Corporation ("USC", for short).

(ii) Dispatch note issued by CSL, Cochin.

(iii) Fax copy of the letter of Hyundai Corporation, Liaison Office, New Delhi, informing CSL that USC will discharge the customs duty and interest, if any, and thereafter to deliver the goods to USC, Coimbatore.

(iv) Certificate of CSL informing that they have delivered the material to USC on the advice of Hyundai Corporation after de-bonding and hence this is not a sale transaction at their end.

6. In response to the notice issued by the Check-post Officer, USC had replied that the permit u/s 30E in form 27B has been tendered and the transit pass as required in form 29C is not required, since CSL, Cochin is the consignor. Hence, it sought for release of the consignment without levy of penalty. USC has also tendered a declaration that for the goods in question, customs duty, bond interest, tax both under CST and KGST Act was also paid.

7. The Check-post Officer, after rejecting the explanation offered had estimated the value of goods and had demanded security deposit as provided u/s 29A(3) of the Act. The total security deposit that was demanded was Rs. 2,17,973 and the same was paid by the assessee.

8. As required u/s 29A(4) of the Act, the Sales Tax Officer (Enquiry) issued notice giving an opportunity to both the consignee and the consignor to produce relevant documents to establish that the goods transported is in accordance with law, failing which it would be presumed that the goods are transported without valid documents with a view to evade tax and hence would pass orders and confirm penalty and that the amount paid towards security deposit would be adjusted towards penalty imposed and collected by the Check-post Officer.

9. In response to the notices, the CSL informed that they had imported 4781.245 MT of steel from Hyundai Corporation, Korea and out of this quantity 42.027 MT of steel plates were rejected due to defects and as such, a portion of the consignment had to be returned to Hyundai Corporation, Korea. However, subsequently on the advice from Hyundai Corporation, Korea, the rejected materials were de-bonded and handed over to Universal Steel Corporation, Coimbatore. CSL, Cochin enclosed copies of the documents in proof of their explanation. For the reply made to the Check-post Notice No. 183/03-04, dated September 25, 2003, CSL has also enclosed a copy of the letter of Hyundai Corporation, Korea dated May 16, 2003, authorising them to handover the rejected goods to Universal Steel Corporation.

10. In response to the notice issued, Universal Steel Corporation appeared before the Sales Tax Officer (Enquiry) through their authorised representative on November 12, 2003 and had submitted:

(i) The transportation in all the cases where notices issued was supported by, certificate issued by CSL, copy of the bill of entry for Ex-Bond for Home Consumption evidencing clearance of 171.183 MT of steel plates, copy of the material out pass issued by the Cochin Shipyard Ltd., copy of the letter dated May 16, 2003 of Hyundai Corporation addressed to CSL instructing the latter to handover the rejected goods to USC.

(ii) That CSL imported certain quantities of steel and certain quantities were found defective. These rejected steel had to be returned to Hyundai Corporation, Korea and that finally to reduce the liability, USC, Coimbatore came forward to lift the goods after discharging the liability towards customs duty and interest.

(iii) That, it was under such peculiar circumstances that, CSL handed over the goods to USC at the instance of Hyundai Corporation.

(iv) That CSL had no ownership over the goods, but acted only as a bailee or agent of Hyundai Corporation, who had the ownership over the goods.

(v) That there is no scope to levy penalty for the transactions, since there is no attempt to evade tax for the following reasons:

(a) That USC is a partnership firm doing business in iron and steel in Coimbatore. It has entered into an agreement with Hyundai Corporation for removal of defective steel plates and under the arrangement they did not have to pay any price for the goods except to discharge the liability towards customs duty and

interest.

(b) That the goods were transported against documents which showed that USC had been duly authorised by Hyundai Corporation to remove the goods and that goods had been delivered by CSL.

(c) That the transport was duly declared at the check-post.

(d) That even assuming that the transaction is liable to be taxed, it should be levied on Hyundai Corporation.

11. In view of the above submissions the authorised representative requested the Sales Tax Officer (Enquiry) to drop the proceedings and further to direct the Check-post Officer to refund the penalty collected in all the six cases.

12. The Sales Tax Officer (Enquiry), after examining the submissions, has 12 passed six separate orders corresponding to six different notices and, thereby, has confirmed the proposals made in the notice and has ordered to adjust the security deposit towards penalty imposed by him on the ground that the documents produced at the check-post were only a photostat copy of the material pass; that there was no record to show that the seller was a registered dealer under KGST/CST Acts within the State so as to prove the liability for payment of tax. Hence, the documents produced were not bona fide and hence there is an attempt to evade tax; that Form 27B was not duly filled up and that none of the documents required under the KGST Act or Rules accompanied the goods; that CSL has not filled up their registration number in Form 27B declaration, the name of the person who has signed the declaration has not been declared in the relevant portion and the total value of the goods is also not filled up; that there was no bill of sale, deliver note, certificate of ownership, way bill, transit pass or permit issued u/s 30E of the KGST Act; that the contention at the time of hearing that USC had entered into an agreement with Hyundai Corporation is not supported by documentary proof; that it is highly unlikely that USC did only a rescue operation to bail out Hyundai Corporation and that there was no financial consideration between them; that CSL cannot be considered as bailee of the goods as it is well-known that CSL is only engaged in manufacturing and repairing of ships; that tax cannot be recovered from Hyundai Corporation since as per the document, CSL is the consignor and as per Section 29 of the Act, it is mandatory to carry permit issued by the concerned officer or the assessing authority and in the instant cases, the goods were not accompanied by the relevant permits.

13. The petitioner, Universal Steel Corporation, being aggrieved by the orders passed by the Sales Tax Officer (Enquiry) had filed first appeal, before the Appellate Commissioner, Palakkad in S.T. A. Nos. 462-467/2004. The first appellate authority by his order dated September 12, 2004 has dismissed all the appeals.

14. The petitioner had carried the matter before the Appellate Tribunal in T. A.

Nos. 722 to 726 of 2004 and T. A No. 728 of 2004. Before the Tribunal, it was contended among others that the valuable consideration, which is an essential ingredient of "sale" was absent in the transactions and hence the transactions did not attract any tax. Secondly, that the delivery of goods was by way of "goods return" and that while making delivery to USC, CSL was making a constructive delivery to Hyundai Corporation as well and lastly, that non-production of transit pass is not an offence as the goods had been sold within the State and whereas the transit pass is required for transaction between outside destinations.

15. The Tribunal by its common order dated October 21, 2005 has dismissed the appeals on the ground, that, out of Rs. 30,39,738 paid by the petitioner-USC, Rs. 8,07,097 is paid as interest by CSL and the rest is taken as sale price for 171.183 MT of iron and steel plates. Hence the purchase is made from CSL and transported to Coimbatore without any valid documents prescribed under the KGST Act such as bill of sale, delivery note, certificate of ownership, way-bill, etc.

16. The petitioner, being aggrieved by the common order passed in six appeals, is before us in these tax revision cases. We have already noticed the questions of law framed by the assessee for our consideration and consequent decision.

17. We have heard Sri. V.K. Shamsudheen, the learned Counsel for the petitioner and Sri Mohammed Rafiq, learned Government Advocate. We have also perused the original records produced by the learned Government Advocate.

18. Sri Shamsudheen, learned Counsel, primarily contends that since the materials were being transported with the required documents as envisaged u/s 29(2) of the KGST Act, there was no occasion or reason for the authorities under the Act to levy any penalty u/s 29A(4) of the Act. Secondly, since there is no finding by any of the authorities under the Act, that, there is an attempt to evade payment of tax due to the State, the authorities under the Act could not have detained the lorries in which goods were being transported, much less could have imposed any penalty u/s 29A(4) of the Act. In aid of his submission, the learned Counsel has relied on the observations made by this Court in the case of K.G. Thommen v. State of Kerala [1994] KLJ 477 and E.K. Hajee Mohammed Meera Sahib & Sons v. Sales Tax Officer, II Circle, Trivandrum [1992] 86 STC 99 (Ker) and the observations made by the apex court in the case of Shahnas Trading Co. v. State of Kerala [2002] 127 STC 1 ker.

19. Sri Mohammed Rafiq, learned Government Advocate, ably justifies the impugned order passed by the Tribunal.

20. To resolve the lis, in our view, firstly, we require to ascertain the exact nature of the transaction between the parties and secondly in relation to the transaction, whether the relevant documents were carried in the goods vehicle and tendered at the check-post.

21. Our analysis : It is necessary to appreciate the nature of the transaction in the first place before considering whether there has been any contravention of

Section 29(2) read with Section 29A(4) of the Act. It is not disputed that certain quantities of steel plates imported by CSL from Hyundai Corporation, Korea were found defective and they were rejected. Apparently, from the records, CSL had put Hyundai Corporation on notice that they had rejected certain quantities of steel plates so imported. The details of the notice issued by CSL is not forthcoming from the records nor has the sales tax department made any efforts to find out the nature of the transaction, and correspondence that followed between CSL and Hyundai Corporation in this regard. Be that as it may. However, from the statements made by the authorised representative before the Sales Tax Officer (Enquiry), it is clear that the USC had entered into an agreement with Hyundai Corporation, Liaison Office, New Delhi for clearing the customs duty and interest and then taking delivery of the goods from CSL. Copy of the agreement, if any, between USC and Hyundai Corporation should have been insisted by the Sales Tax Officer (Enquiry) to find out whether USC had paid any consideration to Hyundai Corporation or was it only a bailout transaction for Hyundai Corporation. Even if it is a bailout transaction, it still does not make a difference for imposing penalty if the documents produced are defective.

22. From the letter of Hyundai Corporation dated May 16, 2003, addressed to CSL and other correspondence and explanations offered by the authorised representative of USC the following conclusion can be deduced:

1. That, it was at the behest of Hyundai Corporation that CSL handed over the rejected goods to USC once custom duty and interest was paid by USC. Therefore, if the rejected goods were to be the property of CSL then the question of Hyundai Corporation issuing the letter to CSL to hand over the goods to USC would not arise.
2. Since CSL had rejected the goods it would follow that either Hyundai Corporation could ship it back to Korea or dispose it of in any manner within the country subject to duty and other levies being paid.
3. From the records it is not known how the consideration of the quantities of rejected material was settled between CSL and Hyundai Corporation. But from the circumstances of the case, this aspect may not be relevant to this case.
4. Once CSL rejected the material and Hyundai Corporation accepted the rejected material, it would make little difference to CSL how Hyundai Corporation disposed of the material.
5. Since the rejected material was apparently bonded, it would be necessary for CSL to de-bond the goods before any action Hyundai Corporation could take. De-bonding would require payment of duty and interest.
6. Admittedly, Hyundai Corporation under some agreement with USC arranged USC to lift the rejected goods after payment of duty and interest. CSL merely obliged Hyundai Corporation in handing over the goods to the nominee of Hyundai Corporation.

7. If CSL had taken delivery of the goods, then CSL had to pay duty and the ownership would have vested with it even after it had rejected the goods. This is not the case. CSL has not paid the duty. It merely de-bonded to facilitate Hyundai Corporation to take further action. Hyundai Corporation's action was to instruct USC to pay the duty and take delivery from CSL. The rejected goods were with CSL perhaps at the risk of Hyundai Corporation.

8. Once duty was paid by USC on behalf of Hyundai Corporation, the goods were handed over to USC as advised in Hyundai Corporation's letter.

23. From the sequence of events it emerges that, the transaction in effect is a sale transaction between Hyundai Corporation Liaison Office, New Delhi, and USC. Once CSL rejected the material was (apparently) accepted by Hyundai Corporation, then the rejected goods is under the control of Hyundai Corporation though lying with CSL. This is apparent since Hyundai Corporation has taken the responsibility to instruct CSL that they could hand over the goods to USC after the duty is cleared. Such instruction would in effect make Hyundai Corporation a non-resident dealer liable for registration and payment of tax and for the sale of the rejected goods in question as first seller in the State. If Hyundai Corporation had obtained registration as a non-resident dealer they could have given the necessary sale invoice, delivery note and other declarations as required for the transportation of the goods outside the State. Therefore, it is apparent that the transaction was defective right from the beginning. The Sales Tax Officer (Enquiry) and the Tribunal have not erred in their observation of the actual nature of the transaction before concluding that the documents tendered at the check-post were defective and upholding the levy of penalty.

24. The Sales Tax Officer (Enquiry) in his orders had rejected the submission of the authorised representative of USC, that if at all the transaction has to be taxed it has to be at the hands of Hyundai Corporation and not at the hands of USC, on the grounds that CSL is the consignor. This is an incorrect appreciation of facts. If CSL were the consignor, then the CSL would be obliged to issue a bill of sale and collected the appropriate local taxes. CSL has in fact categorically stated that they are not involved in this transaction other than to deliver the goods to the nominee of Hyundai Corporation. This was not an afterthought by CSL as one of the document tendered by the goods vehicle at the check-post is a letter issued by CSL informing that they, as per the instruction of Hyundai Corporation, have delivered the rejected goods to USC.

25. Therefore, Hyundai Corporation in giving instruction to CSL to deliver the goods has acted in the capacity of a non-resident dealer and hence had full control of the rejected goods and therefore requested CSL to deliver the goods to whomsoever they directed. The sales tax department appears to have lost sight of the fact that the Hyundai Corporation could be considered as a non-resident dealer liable for tax. The Sales Tax Officer (Enquiry) has erroneously come to the conclusion that CSL is the consignor, while in fact it was Hyundai Corporation who was the actual non-resident consignor of the goods. Thus form 27B tendered

incorrectly states CSL as the consignor and it is not clear from the records as to who signed as consignor.

26. One of the documents submitted by the driver of the goods vehicle is a letter of the consignee USC which states that custom duty, Central sales tax, sales tax, bond interest have been paid. This declaration is incorrect to the extent of the Central sales tax and sales tax being paid. No proof has been shown at the check-post or subsequently to any of the appellate authorities that either CST or local sales tax has been paid. The Check-post Officer while detaining the goods has correctly observed in the notices issued that the detention is justified in the absence of documents to show that the seller is a registered dealer under the KGST/CST Act and that relevant tax liability is levied and collected. Section 30E(1) specifies that "...in addition to the documents prescribed u/s 29 of the Act a permit issued by the officer empowered in this behalf or the assessing authority as the case may be, in the prescribed form". In this case the goods being steel it must accompany the permit issued either by the empowered officer or assessing authority. This is a statutory requirement. In this case the sale has been effected at the behest of Hyundai Corporation and hence if Hyundai Corporation was a registered dealer they would have got the permit as required u/s 30E and issued it to USC. If the Check-post Officer had not stopped the vehicle, issued a notice and recovered the security deposit, in all probabilities the State would not have realised the tax from this transaction. USC has given a false declaration that the CST/ST has been paid. If the Check-post Officer had taken cognisance of this declaration, the consignee would have managed to hoodwink the officer and escape paying the due tax to the State. Since, this is a transaction where no proof was produced at the check-post that the tax at the first point had been paid, the Check-post Officer was correct in holding that there is an attempt to evade sales tax due to the Government notwithstanding the documents produced at the check-post. The documents produced were subsequently examined by the Sales Tax Officer (Enquiry) who came to the conclusion that they were defective and that the taxes due to the State were not paid and hence confirmed the penalty. The appeal before the first appellate authority is also dismissed and the Appellate Tribunal too on the nature of documents tendered found it defective and confirmed the penalty.

27. Since, Hyundai Corporation is not a dealer in the State, the transaction would have escaped being subjected to tax had the Check-post Officer not detained the goods. The representative of USC has stated that there is an agreement between Hyundai Corporation and USC. Though the agreement is not part of the submission and part of the record, it is clear that there is some privity of contract between Hyundai Corporation and USC which resulted in USC getting delivery of the goods after they cleared the custom duty and interest. The only person who could have issued a sale bill and a valid permit under 30E is Hyundai Corporation. This aspect of Hyundai Corporation being a non-resident dealer, as mentioned earlier has been examined. The fact now remains that the goods under transport had not suffered tax in the State. From the statement of the

authorised representative of USC, it is clear that there was an agreement between Hyundai Corporation and USC, which is not available on record nor produced in this revision petition filed. The only conclusion that can be inferred from the fact that there was an agreement is that it could be an agreement for the purchase of the rejected steel. It is this agreement that pre-supposes a concluded sale and consequently, the goods were being transported with documents other than what is statutorily required under the Act. That the goods vehicle did not tender the appropriate documents has been clearly observed and detailed by the Check-post Officer and subsequently the Sales Tax Officer (Enquiry) and the Tribunal all of whom came to the same conclusion that the goods were not accompanied by the prescribed document as required u/s 29A and Section 30E of the Act.

28. The Tribunal has come to a conclusion that the entire consideration Rs. 30,39,738 plus the interest of Rs. 8,09,097 has been received by CSL and hence it is a sale at the hands of CSL. This is an incorrect observation by the Tribunal. Nowhere in the record is there any evidence to show that CSL has received a consideration of Rs. 30,39,738. What is available from the record is that after the custom duty and interest on bonding has been paid by USC, the goods were handed over from CSL's stores and a material outpass issued. CSL has all the while contended that they have nothing to do with the rejected goods and that the action taken in delivering the rejected materials to USC was at the behest of Hyundai Corporation. The Tribunal failed to appreciate the fact of the case especially the contention of CSL. Notwithstanding this, Tribunal concluded that the goods were not accompanied with relevant documents as required u/s 29A and hence the appeals were dismissed.

29. In view of the aforesaid discussion, we are of the view that the owner or person-in-charge of the goods vehicle had not produced the prescribed documents before the Check-post Officer and if not for the Check-post Officer detaining the goods vehicles, there was every possibility of the Revenue losing the tax due to the State.

30. Now we come to the decision on which reliance was placed by the learned Counsel for the petitioner in aid of his submission. The learned Counsel firstly relies on the decision of the Supreme Court in the case of Shahnas Trading Co. [2002] 127 STC 1 SC. In the said decision, the court has observed that the power of the Check-post Officer u/s 29A of the Kerala General Sales Tax Act, 1963, is not merely limited to verifying the documents required by Sub-section (2) of Section 29 to be in the possession of the person transporting the goods, but is to satisfy himself that there is no evasion of tax.

31. The learned Counsel for the petitioner has also placed reliance on the observations made by this Court in the case of K.G. Thommen v. State of Kerala [1994] KLJ 477, wherein, this Court has observed, that mere fact that the transport of the goods was not accompanied by proper documents by itself will not be sufficient to attract levy of penalty u/s 29A(4) of the Act. It is essential

that the officer should find that there has been an attempt to evade tax due under the Act and that should be based on proper material.

32. The observations made by the learned judges in the above decision are binding on us. Secondly, we cannot have any quarrel on the proposition of law enunciated either by the apex court or by this Court. In fact, while analysing the facts of this case, we have stated that the Sales Tax Officer, (Enquiry), has not just levied the penalty u/s 29A(4) of the Act, merely on the ground that the goods was not accompanied by proper documents but also there was an attempt to evade tax due under the Act by the owner of the goods.

33. In view of the above discussion, the revision petitions requires to be rejected and accordingly they are rejected. In the facts and circumstances of the case, parties are directed to bear their own costs.

34. Ordered accordingly.