

(2004) 08 KL CK 0031
In the High Court Of Kerala
Case No : W.A. No. 62 of 2004

Vasulal International

APPELLANT

Vs

Addl. Sales Tax Officer-II

RESPONDENT

Date of Decision : 03-08-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 19
Kerala General Sales Tax Act, 1963 — Section 17(4), 17(5A)

Citation : (2004) 3 KLT 162 : (2007) 7 VST 283

Hon'ble Judges : N.K. Sodhi, C.J;K.K. Denesan, J

Bench : Division Bench

Advocate : N. Muraleedharan Nair, for the Appellant; S. Soman, Sr. Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Denesan, J.—Appellant represented by its Managing Partner is the petitioner in O.P.No.2793 of 2003. It is an assessee under the Kerala General Sales Tax Act (for short "the Act" only). The assessment of the appellant under the Act for the year 2000-2001 was completed by the Additional Sales Tax Officer-II, 1st Circle, Kannur u/s 17(4) of the Act. The assessment thus completed was reopened u/s 19 of the Act alleging omission to include in the return filed by the appellant the amount received under Duty Entitlement Pass Book Scheme exigible to tax. Besides initiating revised assessment proceedings, the assessment authority issued notice dated 27.11.2002 (Ext.P2) u/s 17(5 A) of the Act proposing to levy thrice the amount of the difference between the amount of the tax already paid by the appellant and that arrived at on fresh assessment, as penalty. To the Original Petition, appellant sought for a writ of certiorari quashing Ext.P2 and a declaration that Section 17(5A) of the Act is unconstitutional as it is violative of the fundamental rights guaranteed under Articles 14 and 19 of the Constitution. The learned Single Judge who heard the above Original Petition along with other connected cases, disposed of the same on 7.4.2003 by a common judgment upholding the constitutional validity of Section 17(5A) of the Act and specifying

certain guidelines to be followed in imposing penalty under the impugned provision. Feeling aggrieved by the above judgment of the learned Single Judge, the appellant has preferred this Writ Appeal u/s 5 of the Kerala High Court Act.

2. Section 17(5A) of the Act was newly inserted in the statute book by Act 14/1998 with effect from 1.4.1998. The said provision reads:

"(5 A). Where on reopening of an assessment completed under Sub-section (4), in respect of any dealer, it is found that the amount of tax, if any, paid by such dealer is less than the amount of tax which he is liable to pay on such fresh assessment, the assessing authority shall direct such dealer to pay the difference between the amount of tax already paid by him and that arrived at on such fresh assessment, together with thrice the amount of such difference as penalty",

3. Learned counsel for the appellant submitted before us that Section 17(5A) of the Act is arbitrary, discriminatory and expropriatory and hence unconstitutional. According to the appellant once deficiency in payment of tax by utilising the method prescribed u/s 17(4) is found, the penalty imposable under the impugned provision is automatic and rigid, leaving no discretion to the authorities to impose a lesser amount as penalty than the one stipulated in Section 17(5A) of the Act. The contention is that absence of discretion is tantamount to arbitrariness. In this context, Section 45A of the Act was referred to for a comparison of the effect of that provision vis-a-vis the impugned provision, both conferring on the authorities to impose penalty on dealers who evade or attempt to evade tax. Reference was made to Section 19 of the Act also. According to the appellant, as the penalty imposable u/s 17(5A) does not depend on proof of mens rea, the impugned provision is bad in law. Another contention taken was that the penalty is expropriatory in nature.

4. Before advertng to the contentions of the appellant in detail it would be useful to have an idea about the scheme of Section 17 of the Act, more particularly, Sub-section (4) of the said Section with which Sub-section (5A) is interlinked. Section 17 casts a duty on every dealer to submit return or returns relating to his turnover in such manner and within such period as may be prescribed by the rules made under the Act. If the assessing authority is satisfied that the return submitted by the assessee is correct and complete, it shall assess him on that basis. If no return is submitted by the dealer within the prescribed period, or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority is empowered u/s 17(3) of the Act to assess the dealer to the best of its judgment, after making such enquiry as it may consider necessary and after taking into account all relevant materials gathered by it. Of course, the best judgment assessment shall be done after affording the assessee a reasonable opportunity of being heard including the opportunity to prove the correctness or completeness of the return where such return was filed by the assessee. Section 17(4) of the Act, however, prescribes a method of assessment different from the one prescribed u/s 17(1), (2) and (3) of the Act. Section 17(4) permits certain specified classes of dealers to submit return

alongwith the statements prescribed, which facility is comparable with the freedom given to assesseees under taxation statutes to file self-assessment returns. Sub-section (4) of Section 17 mandates that notwithstanding anything to the contrary contained in Sub-sections (3) and (4A), the assessing authority shall accept the return for any year, the assessment relating to which has not been completed alongwith the statements prescribed, which are in accordance with the provisions of the Act and the rules made thereunder, submitted by any dealer, whose total turnover specified in the return submitted by him for the year for which the assessment relates does not exceed rupees fifteen lakhs or by a dealer having dealings only in goods which are completely exempted from tax or by a dealer having dealings only in non-taxable points of goods coming in the First, Second or Fifth Schedules or by a dealer the tax payable by him does not exceed rupees five thousand for the year irrespective of any limit in turnover and assess the dealer on the basis of such turnover. On a conspectus of the procedure laid down for filing the returns invoking Section 17(4) as also the procedure prescribed under Rule 18A of the Rules and Form No. 21CC prescribed thereunder, the learned Judge has made a categoric finding in the judgment under appeal that the facility made available to the specified classes of dealers u/s 17(4) is optional; and the dealers who do not invoke Section 17(4) of the Act as well as those do not file returns as prescribed in Rule 18A and in Form 21CC with the documents referred to therein, would be liable to be assessed under the regular procedure prescribed in Section 17(3) of the Act. The correctness of the above finding of the learned Single Judge is not disputed by the appellant in this appeal.

5. Section 19 of the Act deals with assessment of escaped turnover. Under Sub-section (1) of Section 19, the assessing authority is vested with the power to determine to the best of its judgment the turnover which has escaped assessment to tax or has been under-assessed or had been assessed at a rate lower than the rate at which it is assessable or the deduction that has been wrongly made and assess the tax payable on such turnover after issuing a notice on the dealer and after making such enquiry as it may consider necessary. However, before making the re-assessment the dealer shall be afforded a reasonable opportunity of being heard. Sub-section (2) of Section 19 of the Act says that in making an assessment under Sub-section (1), the assessing authority may, if it is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under Sub-section (1) a penalty as provided in Section 45A, provided that no such penalty shall be imposed unless the dealer affected has a reasonable opportunity of showing cause against such imposition.

6. Section 45A empowers the authority of officer concerned to direct that person(s) who commit(s) the offences prescribed in Clauses (a) to (h) of the said provision, 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 ten thousand

rupees in any other case.

7. According to the appellant, the penalty u/s 17(5A) which is three times of the difference in tax is arbitrary and unconscionable. Again, while Section 45A gives discretion to the authorities under the Act to impose or not, to impose the penalty, the element of discretion is absent in proceedings u/s 17(5A). In proceedings initiated u/s 45A, even if the authorities are to impose penalty; they are vested with the discretion to impose a lesser amount than the maximum prescribed under that provision. But the penalty provision u/s 17(5A) is automatic and mandatory in nature. The authorities have no discretion and they are left with no option but to impose penalty on the assessee at the rate prescribed therein. According to the appellant, the authorities should have the discretion, before deciding to impose penalty on the assessee, to examine whether the omission or failure to file return for the correct amount was wilful and deliberate or inadvertent and unintentional. The contention further goes to say that even in cases falling within the first category, the authorities should have the discretion to determine the quantum of penalty, subject to the maximum prescribed under the relevant provision, taking into account the gravity of the fault or offence committed by the assessee. Discrimination is alleged on the ground that assessee who resort to Section 17(4) are treated differently in the matter of imposition of penalty.

8. Having heard the submissions made by the learned counsel for the appellant and having gone through the relevant provisions of the Act, we find no merit in the contention that Section 17(5A) of the Act is unconstitutional.

9. Penalty contemplated under the impugned provision, i.e., Section 17(5A) of the Act is inextricably interlinked with the method of assessment provided u/s 17(4) which has given certain special facilities and privileges to the dealers concerned. It is open to such dealers to resort to the method of assessment prescribed thereunder and enjoy the facilities, provided thereunder and avoid the comparatively time consuming and cumbersome method of assessment prescribed in Sub-sections (1), (2) and (3) of Section 17. Section 17(4) visualises completion of assessment in terms of the claim made by the assessee, presuming that the returns and the declarations were made by the assessee honestly and with due care and caution. The assessing officers repose faith and confidence in the assessee and accept without detailed scrutiny and other formalities, the returns and supporting statements filed by the assessee. It may be stated at the risk of repetition that the assessing officers take it for granted that the returns and documents furnished by the assessee are correct. The accounts are not called for, for verification. Thus acting upon the returns and the statements of the assessee, the assessment is completed. Thus Section 17(4) of the Act is the simplified method of assessment intended for the benefit of the righteous and law abiding class of assessee. Law expects only those who belong to the aforesaid class of dealers to opt and feel comfortable with the above method which is virtually "a self assessment". But in the case of those assessee

who do not come within the specified categories of dealers as also those who do not opt for the assessment u/s 17(4) of the Act, it is the responsibility of the assessing officer to scrutinise the returns filed by the assessees, compare the figures declared with reference to the book-results by scrutiny of the books of accounts, and to complete the assessment in accordance with the statutory provisions by issuing notice u/s 17(3) containing proposals for assessment even by rejecting the turnover declared and Claims made by the assessees; and to make a proper assessment in contradistinction to the assessment u/s 17(4), which is done without adjudication of the claims made by the assessees. As rightly observed by the learned Single Judge, the department would be completing assessment u/s 17(4) based on the return of the assessee and supporting declarations, at the risk and mercy of the assessee's honesty. When the dealer is assessed on the basis of the return filed by him, the statute which relieves the assessee from the burden of satisfying the assessing authority that the return and the statements filed by the assessee are true and correct, expects more than ordinary care and caution as well as higher responsibility and absolute honesty on the part of the assessee. However, the statute as a measure of caution provides detailed scrutiny of the accounts of a small percentage of those who avail the facility provided under Sub-section(4) of Section 17, by random sampling and if such scrutiny discloses that the assessee concerned failed to account any purchases or sales or otherwise attempted to evade payment of tax, then the assessing authority is competent to reopen the previous five years assessments of the dealer and assess the escaped turnover and levy tax after following the procedure prescribed in Sub-section (3) of Section 17. In addition, the law provides in terms of Sub-section (5A) of Section 17 that such assessee shall pay the difference between the amount of tax already paid by him and that arrived at on fresh assessment, together with thrice the amount of such difference as penalty. It is pertinent to note that escaped turnover is assessed in the case of those who file returns u/s 17(4) also by following the procedure laid down in Section 17(3) which is the procedure applicable to those falling u/s 17(1) of the Act. Hence in the matter of determination, of the escaped turnover, the appellant cannot contend that the procedure prescribed is arbitrary or discriminatory. Now, coming to the question of quantum of penalty u/s 17(5A) it is to be noted that the penalty will vary from case to case depending upon the gravity of tax evasion because the quantum is thrice the amount of the difference between the tax already paid by the assessee and that arrived at on fresh assessment. Hence, there is no substance in the contention that thrice the amount of penalty means a fixed sum without regard to the gravity of the infraction of law. Certainly assessees who opt for the method of assessment u/s 17(4) and those dealt with under the regular method of assessment are treated differently in some respects because they are a class apart. We are clearly of the view that Section 17(5A) is neither discriminatory nor arbitrary. Assessee falling within Section 17(4) form a separate class and offenders who attempt to evade tax liability by abusing the dealer friendly facility and the simplified procedure laid down therein can be dealt with separately in the matter of imposition of

penalty also so as to protect the vulnerable part of the statutory provision and to prevent recurrence of tax evasion. That object is sought to be achieved by Sub-section (5A) of Section 17. Assesseees who choose to file returns u/s 17(4) cannot be equated with those class of assesseees who are subjected to the regular method of assessment. It is well settled that there is no constitutional inhibition in treating unequals differently and dealing with them under different provisions of the same statute.

10. Appellant has contended that the assessing authorities are not conferred with discretionary powers in the matter of imposition of penalty u/s 17(5A) and hence the impugned provisions is arbitrary. We find no merit in this submission. A dealer friendly provision like Section 17(4) can operate smoothly and without loss to the revenue if only the assessee concerned commits no breach of trust. Taking advantage of the fact that the authorities are expected to scrutinise only a small percentage of the returns filed u/s 17(4) the assessee are likely to file false returns to defraud the revenue. The object of introducing Section 17(5A) is to bring down instances of abuse of the facility provided u/s 17(4). Tendency to evade tax by abusing the simplified procedure can be curbed only if those who are caught in the random sampling are not dealt with lightly. Evidently, Section 17(5A) envisages strict liability and hence the exclusion of discretion is not arbitrary.

11. Next contention is based on the absence of mens rea. According to the appellant since Section 17(5A) is a punitive measure, penalty cannot be imposed without proof of mens rea in the evasion or attempt to evade tax. The contention of the appellant in this respect has been repelled by the learned Single Judge, in our view rightly, by placing reliance on the decision of the Supreme Court in Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam, . In the above decision, the Hon"ble Supreme Court was considering the scope of Section 271(1)(a) of the Income Tax Act, 1961. What the Apex Court said about Section 271(1)(a) of the Income Tax Act squarely applies to Section 17(5A) of the Act. We therefore extract the following from Gujarat Travancore Agency"s case (supra):

"In the case of a proceeding u/s 271(1)(a), however, it seems that the intention of the Legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection, the terms in which the penalty falls to the measured are significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum, Volume 85, page 580, paragraph 1023:

"A penalty imposed for a tax delinquency is a civil obligation, remedial and

coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

Accordingly, we hold that the element of mens rea was not required to be proved in the proceedings taken by the Income Tax Officer u/s 271(1)(a) of the Income Tax Act against the assessee for the assessment years 1965-66 and 1966-67".

In the light of the above decision of the Apex Court, the attack made on the basis of absence of proof of mens rea should fail.

12. The next contention of the appellant is that thrice the amount of difference between the tax returned and the tax re-assessed as penalty u/s 17(5A) is expropriatory. But no material whatsoever has been placed on record in support of the above contention. In the absence of factual basis for the above contention it is not necessary for us to examine the same on merits. That apart we do not find any legal basis for raising such a contention in terms of Article 19 of the Constitution. Thus, the Writ Appeal fails on all the counts.

13. No other points were raised by the appellant for our consideration.

14. In the light of the discussions made above, we affirm the judgment of the learned Single Judge and dismiss the Writ Appeal.