

(2002) 09 KL CK 0103
In the High Court Of Kerala
Case No : T.R.C. No. 97 of 1996

Well Worth Plastics

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-09-2002

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 22(2), 22(3), 46A, 46A(1)
Kerala General Sales Tax Rules, 1963 — Rule 31D

Citation : (2004) 138 STC 550

Hon'ble Judges : G. Sivarajan, J; C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Arikkat Vijayan Menon and R. Krishna Raj, for the Appellant;
Georgekutty Mathew, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The only issue raised in this revision petition by the assessee is that the Tribunal ought not have justified the demand of collected tax in the assessment year 1983-84 by invoking section 46A of the Kerala General Sales Tax Act, 1963. According to the learned counsel appearing for the revision petitioner, the revision petitioner by mistake collected excess tax and remitted the same to the Government. In the assessment the assessing officer assessed tax at the actual rate but demanded collected tax which is in excess of the tax assessed and due from the revision petitioner. The revision petitioner filed an appeal against the same stating that the revision petitioner ought to have been granted refund of the excess tax paid though collected and remitted by it to the Government. This was rejected by the appellate authority and the Tribunal also confirmed the action by the assessing officer by relying on section 46A of the Act, which provides for forfeiture of excess collection.

2. According to the learned counsel appearing for the revision petitioner, this is a case of excess collection of tax and remittance of the same by the assessee to the Government. Though the assessing officer rightly assessed tax at the correct

rate, he demanded the tax paid as "tax due". The revision-petitioner questioned this action of the officer in demanding collected tax which is in excess of the tax assessed on the ground that there was no provision in the Act or Rules during the year to demand collected tax. According to the counsel appearing for the revision-petitioner the assessing officer should have granted refund of the excess tax while completing the assessment u/s 44(1) of the Act. On facts, we find that the assessment was completed on the basis of the return filed and the revision-petitioner never claimed refund of the excess tax by filing revised return showing excess payment of tax or claiming refund of the same. Therefore, there was no occasion for the assessing officer to consider the question as to whether excess tax collected and paid should be refunded or forfeited.

3. In the first appeal also there was no issue of forfeiture of excess tax collection and the revision petitioner's claim was only to refund excess tax paid on the ground that the revision petitioner is bound to refund the amount to the buyers. It does not appear to us that before disposal of the appeal, the revision-petitioner had already refunded the amount to the buyers. The revision-petitioner probably much after assessment issued credit notes by way of refund to the buyers. The only question to be considered by us is whether the Tribunal is justified in sustaining the demand of excess tax collected and paid by invoking section 46A of the Act. Section 46A which provides for forfeiture of excess collection of tax, reads as follows :

"(1)- If any person collects any sum by way of tax or purporting to be by way of tax in contravention of sub-section (2) or sub-section (3) of section 22, he shall be liable to pay penalty not exceeding five thousand rupees and any sum collected by the person by way of tax or purporting to be by way of tax in contravention of sub-section (2) or sub-section (3) of section 22 shall be liable to be forfeited to the Government by an order issued by the assessing authority after giving such person an opportunity to show cause why penalty or forfeiture shall not be ordered :

Provided that no penalty or forfeiture shall be ordered under this sub-section if the assessing authority is satisfied that the sum so collected has been returned to the person from whom it was collected.

2. Where any sum is forfeited to the Government under subsection (1), any person from whom the amount was collected in contravention of the provisions of sub-section (2) or sub-section (3) of section 22 may apply to the assessing authority for reimbursement of such sum and the amount shall be reimbursed to such person in the prescribed manner.

3. No prosecution for an offence under this Act shall be instituted in respect of the same facts on which a penalty has been imposed or forfeiture has been ordered under this section."

We feel sub-section (1) of section 46A is very clear in that any tax collected in excess of the tax by a registered dealer that is in contravention of sub-sections

(2) and (3) of section 22 is liable to be forfeited to Government. The proviso to sub-section (1) is an exception which is applicable when there is refund of the excess collection by the dealer himself. We feel the stage of refund by the dealer under the proviso to section 46A(1) is a stage prior to the remittance of the collected amount to the Government. This is very clear from the wording used in the proviso that "the sum so collected has been returned to the person from whom it was collected". This only shows that the sum so collected, i.e., excess tax collected should be "returned" to the very same person from whom it was collected. Return of same amount is possible only when it is available with the petitioner. Therefore, proviso to section 46A(1) will no longer be available after the dealer remit the excess collection to the department along with monthly returns. In other words, it is not every refund made later that saves forfeiture but only return of money in any mode such as cheque, cash or otherwise before remittance of the same to Government. We feel the purpose of proviso will not be served by issuing credit notes later. Once the excess collection is remitted by the petitioner to the Government, there is no scope for application of proviso to sub-section (1) of section 46A. As per subsection (2) of section 46A, if any amount is collected from any person in contravention of the provisions of sub-sections (2) and (3) of section 22, such person is entitled to apply to the assessing authority for reimbursement of such sum. The said provision entitles the person from whom the excess tax is collected to claim refund of the same in terms of rule 31D by furnishing a statement in form 40. It is clear from the details called for in rule 3 1D and in form 40 that the applicant should produce the purchase bill wherein excess collection is shown and refund has to be considered with reference to such excess collection from the applicant from whom it was collected. This necessarily involves an adjudication on application by the person from whom excess tax is collected. The revision petitioner does not have any involvement in the processing of refund claim except verification of the genuineness of the bill under which tax was collected from the purchaser whether he be a dealer or a consumer. We feel this is the scheme of the section. Therefore, the contention of the revision petitioner that claim for refund of the excess tax is made only after the same was noticed and after issuing credit notes does not deserve consideration. In the first place, no refund is provided by the dealer after the excess collection is remitted to the Government and thereafter necessarily the Department only can refund on an application to the person from whom it is collected.

4. The question now remains for consideration is whether an order could be sustained by the Tribunal u/s 46A when no order was issued by the officer after observing the procedure contemplated u/s 46A. On the facts, we find that the revision petitioner has filed return admitting the turnover and the tax collection at higher rate and remitted the same along with monthly returns. The Officer though assessed the turnover at lower rate, demanded the tax paid by the petitioner as "tax due" because there was no claim for refund at the time of assessment. In such a case, there was no necessity for the assessing officer for

issuing a notice u/s 46A to forfeit the excess collection because petitioner had voluntarily paid the amount and did not claim refund of it. In such circumstances, we find there is nothing wrong in the action of the Tribunal in treating the order of the officer as one issued in exercise of the powers conferred u/s 46A of the Act especially when the officer has such power and the order is consistent with it. We find there is nothing illegal or irregular in the assessment demanding excess tax collected and paid which is in exercise of the statutory powers conferred on the officer u/s 46A of the Kerala General Sales Tax Act and we, therefore, sustain the order of the Tribunal upholding it. The buyers from whom the petitioner has collected excess tax are free to approach the officer concerned in terms of rule 3 1D of the Kerala General Sales Tax Rules for refund.

This tax revision case is accordingly dismissed.