

(2013) 10 KL CK 0008

In the High Court Of Kerala

Case No : S.T. Rev. No's. 47, 48, 49, 50, 51 of 2012, 32, 33, 34, 35 of 2013

Yogesh Trading Company

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 09-10-2013

Acts Referred:

Citation : (2014) 1 ILR (Ker) 1 : (2014) 1 KHC 7

Hon'ble Judges : Manjula Chellur, C.J.;A.M. Shaffique, J

Bench : Division Bench

Advocate : T.M. Sreedharan and Saigi Jacob Palatty, for the Appellant; Bobby John Pulikkaparambil, Government Pleader, for the Respondent

Judgement

Manjula Chellur, C.J.—The entire issue revolves around the assessment years from 1998-99 to 2002-03. The genesis for the present revision petitions was, information collected by the Intelligence wing of the Department that the assessee has evaded tax payable within the State of Kerala while dealing with the commodity of rubber allegedly smuggled out of Kerala in various light vehicles through bye routes to the nearby place, Karikke in the State of Karnataka, across the road through bigger vehicles successfully evading the purchase tax payable within the State of Kerala. In response to the notices issued at Exts. P4 to P8 proposing to impose penalty u/s 45A of the Kerala General Sales Tax Act (the Act for short), in respect of alleged evasion of tax payable within the State, for the above said period, several replies numbering to 14 came to be submitted by the assessee herein.

2. It is not in dispute that in the earlier round of litigation questioning the imposition of penalty u/s 45A of the Act, the matter came up before this Court in WP (C) No. 37470 of 2004 which came to be disposed of with a direction to the assessee to file a statutory revision u/s 45A(3) of KGST Act before the concerned authority. The same came to be questioned before the Division Bench in WA No. 2220 of 2006 which came to be disposed of by judgment dated 23/03/2007 quashing the penalty imposition with a direction to the Intelligence Officer for

fresh consideration. Subsequent to such remand, fresh assessment came to be made once again after issuing show-cause notice and giving an opportunity to the assessee herein to explain or to produce evidence substantiating his contentions that he made all the purchases pertaining to Karikke branch from local growers within the State of Karnataka and there was no smuggling of rubber sheets from Kerala to Karnataka as alleged by the Department. By order dated 08/09/2009, the Intelligence Officer proceeded to levy penalty against the petitioner u/s 45A of the Act.

3. Aggrieved by the same, the assessee preferred appeals before the Deputy Commissioner of Appeals in the first round. The Deputy Commissioner dismissed the appeals preferred by the assessee, confirming the opinion of the Intelligence Officer. Against the said dismissal of the appeals, a batch of writ appeals came to be filed before the Kerala Agricultural Income Tax and Sales Tax Appellate Tribunal and the Tribunal, after hearing both the parties, dismissed the appeals by a detailed order and the said order of the Tribunal is impugned in this batch of revisions.

4. The entire issue revolves around the fact whether there is justification and truth in the contention or the stand raised by the assessee that all purchases shown in Karikke branch of him were the purchases made from different persons as reflected in the purchase bills produced by him before the authorities. It is not in dispute that while assessing the materials on record, the Intelligence Officer, apart from taking into consideration documentary evidence produced by the assessee before us, has also collected relevant data available from Rubber Board so far as annual production of rubber in Karikke in the State of Karnataka and what was the possible maximum production between 1998-99 to 2002-03 so as to believe the case of the petitioner that all the purchases of rubber shown in the bills produced by him from Karikke branch belongs to the purchases within the State of Karnataka especially Karikke as reflected in the purchase bills.

5. On verification of the documents, the authority concerned took into consideration the total turnover so far as the business of the assessee at Kasaragod as well as branch office at Karikke in the State of Karnataka. According to the Department, the entire modus operandi alleged to have been adopted by the assessee was to see that he pays lesser rate of tax within the State of Karnataka payable on the sales of rubber at 4% than to pay 12% purchase tax within the State of Kerala.

6. Apart from the above material, they have also taken note of the details regarding the actual journey the vehicles belonging to the assessee have made during the alleged period from Karikke to Jalandar, Faridabad, Jaipur, New Delhi and back to Karikke, in order to show that it was not possible to return from Jalandar within 24 hours as the said journey would take minimum of 4 days when goods are transported either from Karikke to Jalandar or from Kerala to Jalandar.

7. In order to substantiate the defence or the stand, several purchase bills relating to Karikke branch of the business of assessee were produced. What could be noticed from these purchase bills was, none of the bills had complete address of the person from whom the rubber said to have been purchased by the assessee hereunder. Similarly, the quantity shown in the purchase bills was far above the quantity possibly could have been produced with all the available resources by growers of rubber at Karikke. In other words, the possible production of rubber at Karikke was much lower than the quantity purchased by the assessee under various purchase bills at Karikke.

8. Based on the above materials, the authorities concluded that the names shown as the persons who sold the rubber to the assessee in question were fictitious and non-existing and there was no possibility for purchasing such a huge quantity of rubber from those persons who were not really in existence. Even otherwise, the quantity shown is far beyond the quantity which could possibly be grown in Karikke. Based on this informations and also referring to one instant where at the check post the vehicle belonging to the assessee was seized carrying cashew nut without proper documents which ended in imposition of penalty, matter was considered. However, this was only taken into consideration in order to opine that on earlier occasions also such method was adopted by the assessee, indicating the intention of the assessee to evade payment of actual tax payable to the authorities. Anyway the said instance does not pertain to transportation of any rubber from Kerala to Karnataka.

9. In the present case though there is no direct material like seizure of goods on interception of a vehicle at the check post, the documents produced by the assessee in response to the notices sent by the Department indicate that the persons alleged to be the sellers of rubber in the State of Karnataka were fictitious, not in existence.

10. The explanation of the assessee-petitioner is that it pertains to five years period between 1998-99 to 2002-03, therefore, it would be very difficult for the assessee to trace those persons. If really such persons were in existence, there was no need to write the address of the persons incomplete in the purchase bills. In addition to this fact the details collected from Rubber Board has given away the correct picture so far as maximum production of rubber possible in each year between 1998-99 to 2002-03 in Karikke as against the quantities purchased by the assessee in these five years period. It was more than the production possible in Karikke. Therefore, based on the material, that is factual situation, the authorities have concluded that there is evasion of payment of tax on the part of the revision petitioner-assessee only in order to see that he pays lessor rate of tax as sales tax in the State of Karnataka at the rate of 4% as against the purchase tax payable by him at the rate of 12% within the State of Kerala.

11. Two authorities who had the opportunity of verifying the records in order to appreciate the factual situation have considered in detail all the materials produced by the revision petitioner and have arrived at a conclusion purely based

on factual situations as per the materials produced before them. There was no other possible opinion that could have been arrived at by the authorities based on the materials placed before the authorities.

12. We are considering these revision petitions only to see whether there is any question of law or irregularity in the proceedings conducted by the authorities concerned. In the absence of any absurdity in appreciating the materials before the authorities concerned and in the presence of opportunity of being heard given to the assessee, we find no other good ground being raised before us to interfere with such opinion based on the factual situation in the present case. Every possible material and information other than from the documents produced by the assessee was taken into consideration only to see whether the proceedings initiated against the assessee were proceeded in a justifiable and proper manner, in order to ascertain the truth or otherwise in the so called notices issued by the Intelligence Officer. It was very much within the power or control of the assessee to produce materials to show either to rebut the factual material collected by the Department as an information from Rubber Board, or to show that there was irregularity in assessing the materials before the authority.

13. In the absence of any perversity in the process of arriving at conclusion when the principles of natural justice were adhered to by the Department, we fail to understand how any of the grounds raised by the revision petitioner touching the factual situation could be gone into again by this Court when there is no illegality of any nature on the face of record.

14. Then coming to the quantum of penalty imposed by the authorities, i.e., twice the amount of tax payable which being the maximum penalty provided u/s 45A of the Act, according to learned counsel for the revision petitioner, there was no reasoning why twice the amount payable as tax deserves to be imposed as penalty and in the absence of any reasoning or discussion to arrive at such a conclusion, the imposition of penalty at maximum rate provided under the provisions cannot be imposed. To substantiate this contention, he relies upon P.D. Sudhi v. Intelligence Officer, Agricultural income tax and Sales Tax, Mattancherry and Others 1992(85) STC 337 (Ker). This decision was relied upon to contend that quantum of penalty always should depend upon the gravity of the offence, if it is not so, the maximum penalty if levied is nothing but a mechanical way of imposition of penalty and the same would not amount to proper exercise of jurisdiction by the officer who was expected to exercise judicial discretion while imposing penalty. In the very same judgment, their Lordships, while considering the words "evasion" and the expression "sought to be evaded", were of the opinion that the words in Section 45A(1) of the Act make it clear that it is not the mere default that is made the foundation for the liability to penalty, but it is the contumacious or fraudulent or other blame-worthy or objectionable conduct of an assessee in fulfilling his obligations mentioned in Section 45A of the Act, which will attract the levy of penalty. They further opined that the concept of mens rea is embedded in the expressions

"evaded" or "sought to be evaded" occurring in Section 45A(1) of the Act.

15. In order to ascertain whether an officer has exercised discretion vested in him to impose the penalty, it is not the satisfaction of the authority without any basis or mere imposition of penalty, but he has to be satisfied why such penalty is to be imposed depending upon the facts and circumstances of each case. As already stated above, it is the blameworthy intention, that is, conduct of the assessee which forms criterion to decide such issues, rather than personal opinion of the officer who imposes penalty. He must give reasons for imposition of such penalty.

16. Then coming to other decision in M/s. U.K. Monu Timbers, Kottacherry, Kanhangad, Kasaragod District Vs. State of Kerala learned counsel for the revision petitioner relies upon this decision to contend that on detection of any evasion or attempt to evade tax, the officer initiating penalty proceedings would be perfectly justified in imposing penalty at the maximum rate of twice the rate of tax evaded, but this power does not confer the power on him to make a reasonable estimate. The suppression or omission must be clearly disclosed from the material available and there should be evidence of the amounts sought to be suppressed from the turnover. Paragraph 10 of this judgment is relevant which reads as under:

10. In penalty proceedings the offences indicated u/s 67 should be evidenced by the materials recovered on inspection or otherwise and the enquiry is pointedly against any actual suppression or omission in the course of the business transactions, which would lead to the definite conclusion of evasion or attempt to evade. On detection of such offences; in the event of the tax evaded or sought to be evaded being determinable, the officer initiating penalty proceedings is perfectly justified in imposing penalty at the maximum rate of twice the rate of tax actually evaded or sought to be evaded. Such officer conducting penalty proceedings cannot exceed his jurisdiction by finding out as to whether the evasion detected would in fact lead to an interference of earlier or subsequent evasion. Nor can such inferences regarding the earlier or subsequent conduct be reflected in the penalty proceedings by way of estimation of turnover based on such inferences. This, going by the clear words employed in the Statute, is within the realm of the assessment proceedings.

17. Having gone through the above two judgments, it is clear from the very wordings used in Section 45A of the Act that there must be proper exercise of judicial mind to assess the penalty and mere default in evading payment of tax alone cannot be the ground to impose such penalty, rather it should be the objectionable conduct or intention of the assessee which would decide the quantum of penalty to be imposed. In order to understand whether there is proper exercise of judicious mind of the officer it can be reflected from the orders imposing penalty.

18. Paragraph 17 of the order clearly indicates, why the maximum penalty

deserves to be imposed so far as the assessee is concerned. It would be just and proper to understand the exercise done by the officer whether the officer in question has exercised judicial mind taking into consideration all the relevant facts in order to arrive at the conclusion of imposing maximum penalty available in the provision. Paragraph 17 of the judgment is relevant which reads as under.

17. All these investigation revealed that the dealer has clandestinely smuggled out rubber from Kerala and evaded purchase tax since Rubber is a commodity taxable at last purchase point in Kerala under KGST Act, 1963. The dealer has evaded an amount of Rs. 1,74,44,914/- during 2002-03 due to state exchequer. These clandestine transport of Rubber done by the dealer who is a big player in the field of trading for many years has to be rendered with severe punishment. As a dealer having a well versed knowledge in taxation matters and as a dealer who can employ highly qualified professionals to manage Accounting and taxation matters, it is not at all expected from this dealer that without his willful knowledge such a huge tax evasion can be committed. If such a grave offence is left with a lesser punishment it will sent wrong messages to trading community. Now we have succeeded in gathering positive evidence as to the tax evasion committed by the dealer as ordered by the Hon''ble High Court of Kerala. The persons from whom the dealer, as per the records produced by him, has stated to have purchased rubber, themselves have denied the claim of the dealer as to the purchase of rubber from them. Though the materials pertaining to the clandestine transport of rubber in lorry No. KL 14B-8532 as per the GVR No. 72/15-6-02 was highlighted in the order of the 2nd revisional authority as well as in the notice dt. 16/05/09 of the under signed, they could not rebut this evidence before the Hon''ble High Court or before the under signed on any occasion. As the dealer had not accounted any such transport it can be reasonably concluded that they had even resorted to fabricated documents in support of such transports under cover of GVRs, in respect of other vehicles, not produced. All these things proved beyond any shadow of doubt that the dealer has smuggled Rubber from Kerala which is taxable at last purchase point within the state of Kerala, and camouflaged such smuggling of rubber as purchase of rubber from Karikke with the help of bogus and fabricated documents. The purchase bills produced before me are bogus and fabricated and raised against unidentifiable and fictitious persons. The information provided by the Rubber Board also confirmed the findings as to the tax evasion committed by the dealer. So this is a case which involve tax evasion by means of smuggling. Compromise on such unlawful and unethical tactics will be fatal as far as state revenue is concerned. Such a malicious, illicit and illegal activity of a dealer should not be spared with lesser punishment. Hence in the circumstances and in the best interest of revenue, imposition of maximum penalty as contemplated u/s 45A of the act is warranted. Therefore the following orders are issued.

19. Reading of the above paragraph clearly indicates, it is not the mere evasion of tax, upon which the officer concluded that maximum penalty u/s 45A deserves to be imposed but various other relevant facts were considered. There is neither

erroneous appreciation of the material nor wrong procedure adopted. On the other hand, there is proper assessment of the material by him in arriving at the amount payable as penalty u/s 45A of the Act which is reflected in the detailed discussion made at paragraph 17 of the order. We find no good ground to interfere with the quantum of penalty imposed by the officer. None of the grounds raised by the revision petitioner are sustainable. Accordingly, revision petitions are dismissed.

However, so far as the composition of offences u/s 47 of KGST Act, it is always open to the petitioner to seek the remedy available in accordance with the procedure contemplated before the authority concerned and the authority shall dispose of the same in accordance with the procedure applicable.