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Court : Kerala

Decided On : Feb-29-2008

Reported in : (2009)19VST396(Ker)

Judge : C.N. Ramachandran Nair, J.

Acts : Kerala General Sales Tax Act, 1963 - Sections 19C and 45A; Cooperative Societies Act

Appeal No. : O.P. Nos. 22747, 23869 and 24838 of 1999 and 3738, 3758, 6325, 6855, 6897, 6937, 7321, 12775 and 129

Appellant : K.i. Thavoo

Respondent : inspecting Asst. Commissioner (ib), Commercial Taxes and anr.

Advocate for Def. : Tekchand, Government Pleader

Advocate for Pet/Ap. : S.K. Devi and; Frankur D. Jayan, Advs.

Judgement :

C.N. Ramachandran Nair, J.

1. These connected cases are filed challenging penalty levied under Section 45A of the Kerala General Sales Tax Act, 1963 for evasion of tax by the petitioners for the assessment years 1993-94 to 1996-97. The nature of transactions and the findings based on which penalty is levied on all the petitioners are the same and therefore, there is no need to go to the separate orders challenged in each of the original petitions. Exhibit P3 challenged in O. P. No. 23869 of 1999 is the very same order under challenge in O.P. No. 24838 of 1999 because the said order is common for both the petitioners. Since the findings in exhibit P3 are illustrative of the case pertaining to all the petitioners and orders passed in the other cases are on same lines, I proceed to dispose of the cases by considering the challenge against exhibit P3.

2. Counsel appearing for all the petitioners in the connected cases, counsel appearing for the society involved and the Government Pleader are heard. The substance of the allegation by the Intelligence Wing of the Sales Tax Department which investigated and issued penalty orders is as follows. During the relevant years co-operative societies enjoyed sales tax exemption on sale of note books under SRO. No. 1727 of 1993. In order to get the benefit of sales tax exemption on the manufacture and sale of note books, the petitioners who were engaged in the manufacture and sale of note books, camouflaged their transactions of purchase, manufacture and sale of note books as done by Kunnamkulam Book Binding Co-operative Society Ltd. which was a registered dealer under the KGST Act. However, the Intelligence Wing of Sales Tax Department collected details of demand drafts (DDs) taken by the said society in the name of the suppliers who sold paper for the manufacture of note books. When society was requested to furnish details of source of funds for the purchase, it was revealed that society never had the funds to make the purchases and the secretary lave statement that it is the petitioners who really purchased paper for making note books by taking DD in the name of the society thereby accounting purchase by the society. In fact the society has not accounted any sale of note books. On the other hand, the actual purchasers of paper, namely, the petitioners, manufactured note books and sold the same by accounting the transaction in the name of the society. This led to evasion of sales tax on the entire turnover. The secretary of the society gave statement to the Intelligence Officer that society has not carried on business,

though purchase of paper is accounted in the name of the society. It is conceded by the secretary of the society that all what the society got was one and a half per cent commission from the petitioners for the transactions done by them in the name of the society. Even though the Department established clear case of evasion of tax by the petitioners by using the name of the society and by accounting transactions in the name of the society, some of the petitioners chose to deny the transactions and insisted that the statement of the secretary of the society was inconsistent and not trustworthy. Therefore, after hearing the cases in part, this Court by order dated June 29, 2004 directed the present secretary of the society to file a detailed affidavit confirming whether the society had funds for making purchases and if so, to furnish details of the bank account maintained by the society. However, the President of the society has filed an affidavit virtually accepting the correctness of the statement made by the former secretary to the Intelligence Wing. It is to be noted from the affidavit filed by the society that in spite of specific direction by this Court, the society could not produce details of any bank account or source of funds for the alleged purchases made. Further, the society admittedly has not made any sale of note books and no turnover is returned before Sales Tax Department. Even during hearing, this Court gave an opportunity to the petitioners to file detailed affidavit denying the transactions, but with consequence that if affidavits are found to be false after enquiry through police, those who file false affidavit will face prosecution, no petitioner has come forward with any affidavit denying the transaction. Further it is seen from the adjudication order that many of the petitioners simply sought time for filing objection, but did not choose to file any objection. Another important matter to be noticed is that most of the petitioners were not even members of the said society and counsel appearing for the society also had conceded the same. The Cooperative Societies Act does not authorise outsiders to deal with the society and without membership in the society, the petitioners cannot utilise the service of the society. Therefore, the payment of one-and-a-half per cent commission by the petitioners to the society was only to use the name of the society by which the society permitted to evade payment of sales tax. Obviously the society which is no longer in existence was formed for the fraudulent purpose of evasion of tax and even petitioners have no case that society was engaged in any real business. Therefore, I am of the view that the

principle laid down by the Supreme Court in McDowell's case : [1985]154ITR148(SC) is squarely applicable to the facts of this case and there is no scope for showing any leniency to the petitioners who evaded tax by camouflaging the transactions under cover of the society. The petitioners have, therefore, no escape from liability for penalty under Section 45A of the KGST Act and penalty in principle is rightly levied on the petitioners.

3. The petitioners have also raised a contention that since in individual cases of the petitioners the turnover of business done in the name of the society was below the non-taxable limit, penalty could not be levied for evasion of tax. I am unable to accept this contention because penalty is levied under Section 45A by the Intelligence Officer with reference to petitioner's liability under Section 19C of the KGST Act which is as follows:

Section 19C. Protective assessment. - Notwithstanding anything to the contrary contained in any judgment, decree, order, direction or decision of any court, Tribunal or other authority, where the assessing authority has reason to believe that any person is, or was carrying on business in the name of, or in association with any other person, either directly, or indirectly, whether as agent, employee, manager, power of attorney holder, guarantor or in any other capacity, such person and the person in whose name the registration certificate, if any, is taken, shall jointly and severally, be liable for the payment of the taxes, penalty or other amount due under this Act which shall be assessed, levied and recovered from all or any of such person or persons as if such person or persons are dealers:Provided that before taking action under this section, the persons concerned shall be given a reasonable opportunity of being heard.

4. It is clear from the above provision that where the assessing officer has reason to believe that any person was carrying on business in the name of or in association with any other person in whatever capacity or name, such person and the person in whose name the registration certificate, if any, is taken, shall jointly and severally be liable for payment of taxes, penalty or other amounts due under this Act. The above provision therefore casts joint and several liability on the persons involved in joint transactions leading to evasion of tax. In this case the

admitted fact is that the society had taken registration under the KGST Act and the society allowed it's members and strangers to carry on business in the name of the society, whereas the business is really carried on by such persons and the consequence is evasion of tax. In this case the Kunnamkulam Book Binding Co-operative Society is also a beneficiary of the transaction inasmuch as the society admittedly got one-and-a-half per cent commission for the business done by the petitioners in the name of the society. Since Section 19C authorises levy and recovery of tax and penalty or any other amount payable under the Act from the persons involved jointly and severally, the petitioners and the society are jointly and severally liable. Probably recovery is not initiated against the society because it has no funds, is defunct and is closed. When the transactions leading to evasion of tax were carried out in the name of the society, there is no need to separate the turnover in respect of each one for the purpose of deciding liability for tax for each year. Therefore, the total turnover of business of all the petitioners carried on in the name of the society could be clubbed to determine whether there is tax liability and based on this, penalty also could be levied under Section 45A of the KGST Act. Separate amounts are dealt with in the penalty order only for the purpose of recovery of penalty from each of the petitioners in proportion to business carried on by them in the name of the society.

5. In this view of the matter, I hold that penalty under Section 45A read with Section 19C of the KGST Act was rightly levied on all the petitioners for each of the years irrespective of whether the turnover arrived at in the case of individuals for any year is less than the non-taxable limit. The original petitions are, therefore, devoid of any merit and are dismissed.

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