A. Kamarudeen Vs. Assistant Commissioner (Assmt.) and ors.

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Court : Kerala

Decided On : Jun-02-2004

Reported in : (2007)7VST51(Ker)

Judge : G. Sivarajan, J.

Acts : Kerala General Sales Tax Act, 1963 - Sections 2 and 45A; Central Sales Tax Act, 1956 - Sections 10A

Appeal No. : O.P. No. 4437 of 1998 (C)

Appellant : A. Kamarudeen

Respondent : Assistant Commissioner (Assmt.) and ors.

Advocate for Def. : S. Soman, Sr. Government Pleader

Advocate for Pet/Ap. : K.B. Muhamed Kutty, Adv.

Judgement :

G. Sivarajan, J.

1. The matter arises in proceedings under Section 45A of the Kerala General Sales Tax Act, 1963 (for short, 'the Act'). The first respondent, on the basis of a statement dated January 5,1990 given by the petitioner to the Enforcement Directorate on an inspection conducted in the petitioner's premises issued a notice

under Section 45A of the Act on January 25, 1997 to the petitioner proposing to impose a penalty of Rs. 30,938 for the assessment year 1987-88 and another sum of Rs. 93,688 for the assessment year 1988-89. According to the petitioner he had not effected any transactions which are exigible to tax under the Act. It is the case of the petitioner that the statement was given by him to the enforcement officials only under threat and coercion. The petitioner in his objection has also stated that the petitioner had obtained raw cashewnut rejections from various factories in Kollam and he supplied the same to a Bombay party as their agent, that the sale proceeds were received by way of telegraphic transfers which were encashed through the petitioner's savings bank account and the said sale proceeds were handed over to various factories from where he had procured the raw cashewnuts. It is further stated that the petitioner had received only a sum of Rs. 1,500 by way of monthly remuneration. This explanation of the petitioner was not accepted since the petitioner has not adduced any materials in that regard. The assessing authority took the view that in view of the categoric admission that the amounts shown in the pass book represented the sales proceeds of cashewnuts, petitioner will come squarely within the definition of 'dealer' in Section 2(viii) of the Act and therefore the petitioner was bound to take out registration under the Act, to file monthly returns and to pay the tax due thereon. Since the petitioner had not done any of these matters, proceedings under Section 45A of the Act were taken and penalty proposed for the aforesaid two years was imposed.

2. The petitioner filed revisions against the penalty orders (exhibits P1 and P2). The first revisional authority found that there are materials for imposition of penalty under Section 45A of the Act. However, the quantum of penalty to be imposed (twice the tax sought to be evaded) was reduced to an amount equal to the tax sought to be evaded. This was confirmed in further revision by the second respondent.

3. I have heard Dr. K.B. Mohamed Kutty, learned Counsel appearing for the petitioner and Shri S. Soman, Senior Government Pleader, for the respondent.

4. Counsel for the petitioner submits that the petitioner was not at all liable to be proceeded under the Act since the petitioner had never entered into any

transaction exigible to tax under the Act. It is further stated that even assuming that the petitioner had entered into transactions as stated in the statement given to the Enforcement Directorate, it is still evident that the transactions represented by the amounts received by way of telegraphic transfers from the Bombay party can never be treated as transactions falling under the Act. In other words, the contention of the counsel is that the transactions in question can be treated only as inter-State transactions in respect of which penalty proceedings, if any, have to be taken under Section 10A of the Central Sales Tax Act, 1956. Counsel further submits that in this case even though the Enforcement Directorate had obtained the statement as early as in 1990, proceedings under Section 45A of the Act was initiated only after a long lapse of seven years and that too without making a proper enquiry by the assessing authority which is evident from the order of the first revisional authority. Counsel accordingly submitted that this is not a case for imposing penalty under the Act and that at any rate, having regard to the fact that no assessment proceedings were initiated based on the statement, the penalty sustained by the first revisional authority is illegal, arbitrary and excessive.

5. Government Pleader appearing for the respondents, on the other hand, submits that the petitioner himself had admitted in the statement submitted before the Enforcement Directorate that the amounts received by way of telegraphic transfers from the Bombay party represent the sale proceeds of cashewnuts and therefore since even if the petitioner had entered into only one or two transactions, he is still a 'dealer' within the definition of Section 2(viii) of the Act. Government Pleader further submits that all the explanations offered by the petitioner were considered by the first revisional authority and it reduced the quantum of penalty equal to the tax sought to be evaded. Government Pleader further submits that in the instant case assessment proceedings were not taken presumably for the reason that the sales tax liability is compensated by way of imposition of penalty. Government Pleader further submits that it is not as if the petitioner was not dealing in cashewnuts; subsequent to the detection by the Enforcement Directorate, petitioner had taken registration under the Act from the year 1991-92 with registration No. 12010784, which would also show that the petitioner had been engaged in the business of purchase and sales of cashewnuts.

6. I have considered the rival submissions. Respondents had not furnished any material other than the statement obtained by the Enforcement Directorate based on the entries in the bank pass book of the petitioner to the effect that the petitioner had effected sale of cashewnuts to a Bombay party on two occasions. In the first revisional order also it is stated that this is the only material and that the assessing authority did not conduct any independent enquiry in the matter. One more important fact is that though the statement was obtained by the Enforcement Directorate from the petitioner as early as on January 5, 1990, interestingly, proceedings under Section 45A of the Act was taken in January, 1997. One would have thought that the penalty proceedings were deferred for the reason that assessment proceedings are initiated against the petitioner on the basis of the statement dated January 5, 1990.

7. Government Pleader, at the instance of the court, had contacted the assessing authority and got the information that final assessment proceedings has not yet been completed. It is not stated as to whether assessment proceedings are initiated based on the statement and as to why it was not completed and further, whether it can be completed now. Respondent has not filed any counter-affidavit in respect of any of these matters. It is not clear as to why the assessment proceedings, if any, taken against the petitioner, were not completed yet. I do not think it necessary to deal with all these aspects of the matter in these proceedings, for, assessment proceedings and penalty proceedings are distinct and different. The fact that assessment proceedings are not taken or completed is not a ground to say that penalty proceedings cannot be initiated or completed. I have pointed out these facts only to show that the assessing authorities are not serious about the matter.

8. It has come out from the records that the petitioner had effected sale of cashewnuts to a Bombay party and had received sale proceeds in his favour by way of telegraphic transfers. The explanation of the petitioner, as already noted, was that he had procured cashewnut rejections from the factories in Kollam and sold the same to a Bombay party; sale proceeds received from the Bombay party were realised and it was made over to the respective factories and the petitioner had received only a sum of Rs. 1,500 as monthly remuneration. This explanation

offered by the petitioner, as already noted, has not been accepted by the authorities since no material supporting the said explanation was made available before the authorities. In other words, the fact remains that the petitioner had admittedly effected certain transactions which are exigible to tax under the Act. Whether the transactions in question can be treated as transactions of the petitioner or that of the factories in Kollam is yet another matter. The definition of 'dealer' in Section 2(viii) of the Act would bring within its fold transactions of the nature effected by the petitioner. In such circumstance, it is immaterial as to whether the goods which were sold by the petitioner belong to him or some other principals. In the circumstances, the petitioner cannot say that the transactions in question are not exigible to sales tax and that he cannot be made liable in respect of the said transactions.

9. A further question was posed by the counsel for the petitioner. His case is that even assuming that he is liable to pay tax in respect of the transactions, his liability can only be under the CST Act, for the reason that admittedly the transactions in question were between the petitioner and the Bombay party and without anything more, it can be treated only as inter-State transactions. But then a question may arise as to whether the Bombay party had come to Kerala and purchased the cashewnuts from the petitioner or whether the petitioner has taken the goods from Kerala to Bombay and sold the same there or as to whether the goods were sold by way of inter-State transaction. All these matters, I do not think it necessary to consider, for the petitioner did not produce before the authorities materials in respect of the transactions and in the absence of material one has to assume that the transactions are effected in the State itself.

10. However, all the facts which I have stated earlier has got an impact in regard to the quantum of penalty to be imposed for these two years. Petitioner was under the bona fide impression that the transactions as explained by him were not exigible to tax under the Act or that he was not obliged to take registration under the Act. In the absence of materials other than the statement given by the petitioner and in the absence of an enquiry conducted by the assessing authority independently about the transactions of the petitioner and in view of the further fact that the authorities have not taken care to make the assessment under the Act

on the disputed transactions, the circumstances warrant a lenient view to be taken in the matter. It is not as if a quantification of the evasion is not possible, but under Section 45A of the Act a discretion is given to the authority to impose penalty up to twice the tax sought to be evaded. Keeping in mind the principles laid down by the Supreme Court in Hindustan Steel Ltd. v. State of Orissa [1970] 25 STC 211 and by a division Bench of this court in P.D. Sudhi v. Intelligence Officer, Agricultural Income-tax and Sales Tax, Mattancherry [1992] 85 STC 337 (Ker), I am of the view that the penalty imposed by the first revisional authority and sustained by the Board of Revenue requires modification. In the circumstances of the case, the penalty imposed for the years 1987-88 and 1988-89 is reduced to Rs. 10,000 and Rs. 20,000, respectively. Orders passed by the authorities are modified as above.

11. Writ petition is disposed of as above.