P. Vijayakumar Vs. Intelligence Officer, Investigation Branch, Commercial Taxes and ors.

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Court : Kerala

Decided On : Oct-17-2002

Reported in : [2006]143STC145(Ker)

Judge : C.N. Ramachandran Nair, J.

Acts : Kerala General Sales Tax Act, 1963 - Sections 2 and 45A

Appeal No. : O.P. No. 20422 of 2000 (F)

Appellant : P. Vijayakumar

Respondent : intelligence Officer, Investigation Branch, Commercial Taxes and ors.

Advocate for Def. : Sojan James, Government Pleader

Advocate for Pet/Ap. : K.C. Balagangadharan,; S. Soman and; Usha Ravindran,

Judgement :

C.N. Ramachandran Nair, J.

1. The petitioner is challenging exhibit P10 order of the Commissioner of Commercial Taxes confirming penalty of Rs. 75,800 levied under Section 45-A of

the Kerala General Sales Tax Act, 1963 for unaccounted sale of goods effected by the petitioner which led to evasion of tax. The petitioner is a dealer in electrical goods and also plastic furniture. The case of the department is that the petitioner purchased plastic chairs from Nilkamal Plastics Ltd., Mumbai, and sold the same to Holy Trinity School, Kanjikode in Kerala which was not accounted as local sales nor tax paid by the petitioner. Therefore a penalty of Rs. 75,800 was imposed on the petitioner treating the entire transaction as unaccounted sales. The petitioner's contention is that the petitioner acted as an agent of the manufacturer and there was no purchase and resale of the articles by the petitioner. On the other hand, the department proceeded on the presumption that the petitioner purchased the articles in his own account and resold the goods to the school. There is also a finding by the authorities below that the manufacturer's ledger account shows direct sale to M/s. Vijaya Electricals, that is the petitioner's concern.

2. At the time of hearing, counsel for the petitioner, relying on the invoice, lorry receipt and other documents produced, contended that the goods are directly sent by the manufacturer to Holy Trinity School, Kanjikode. The petitioner's contention is that the transaction is an agency transaction and not a purchase and sale as assumed by the departmental officers. The Government pleader on the other hand, contended that the petitioner's case of agency was not proved with any acceptable evidence. According to him the petitioner is a dealer in plastic chairs and sales are in his own account. On going through the impugned orders and other records I find that the petitioner has not produced any evidence to substantiate the claim of agency. Explanation 5 to Section 2(xxi) of the Kerala General Sales Tax Act, 1963 gives rise to a presumption of two sales even in the case of agency. The said section is extracted hereunder.

Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, two independent sales or purchases shall, for the purposes of this Act, be deemed to have taken place,--

(a) when the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser, or

(b) when the goods are transferred from the seller to a buying agent and from the buying agent to his principal, if the agent is found in either of the cases aforesaid ;

(i) to have sold the goods at one rate and to have passed on the sale proceeds to his principal, at another rate, or

(ii) to have purchased the goods at one rate and to have passed them on to his principal at another rate, or

(iii) not to have accounted to his principal for the entire collections or deductions made by him in the sales or purchases effected by him on behalf of his principal, or

(iv) to have acted for a fictitious or non-existent principal :

Provided that the deduction or addition, as the case may be, of the commission agreed upon and specified in the accounts and incidental charges incurred by the agent which are specified in the accounts and which the assessing authority considers legitimate shall not be deemed to be a difference in the rates referred to in Sub-clauses (i) and (ii).

It is admitted that the petitioner paid the purchase consideration to the supplier. The petitioner claims to have acted as an agent. However, there is no agreement or correspondence to indicate that the petitioner is appointed as an agent either for one transaction or on a regular basis. If the petitioner claims to be an agent, it is for the petitioner to prove the same with evidence. I find that the burden to prove his case is on the petitioner and he has not discharged that burden. The petitioner should have produced the agency agreement or other authorisation and should have proved with accounts that the receipts and payments do not establish purchase and sales under the above referred Explanation to the term 'sale'. The more important aspect is the consideration received by the petitioner which by itself would establish the relationship between the petitioner and the supplier. If the petitioner purchased the goods at one price and sold it to the buyer at another price, two sales have to be presumed. It is also not known as to whether the consideration to the petitioner for the services rendered by him was in the form of commission and if so, who paid it. Petitioner has not even ventured to prove that he got only a commission. Above all the purchase order received from the buyer at the time of receipt of advance if any made by the buyer to the petitioner is not produced to substantiate his contention. The transaction took place sometime in May, 1996 and at this distance of time I do not think, the petitioner should be given one more opportunity to procure evidence to substantiate his contention. The counsel for the petitioner relied on the decisions of the Supreme Court in English Electric Company of India Ltd. v. Deputy Commercial Tax Officer [1976] 38 STC 475 and in South India Viscose Ltd. v. State of Tamil Nadu [1981] 48 STC 232. According to the petitioner the transaction being inter-State sale, there is no attempt to evade tax and the penalty imposed is therefore unsustainable. The legal proposition canvassed by the counsel for the petitioner is a settled position of law and there is no dispute about that. However, the question that remains is whether on the facts inter-State sale stands proved. Though a case of agency is put forward by the petitioner, the petitioner could not prove the same with any evidence or supporting accounts. Agency is a relationship which is the result of an agreement between parties and there is no presumption about it unless proved by the party claiming it. In fact evidence of financial arrangement under the Explanation referred to above also would have helped the petitioner to establish the transaction as an agency. The petitioner did not prove this either. Therefore, I feel the transaction being unaccounted purchase and sale penalty was rightly levied. The petitioner's claim of agency as well as inter-State sale stand disproved. However, in the absence of any positive case of evasion, I feel levy of penalty equal to the amount of tax will serve the ends of justice. The penalty imposed is therefore reduced to 50 per cent. The petitioner is stated to have paid an amount of Rs. 25,000 under exhibit P9 order of this Court during the pendency of this petition. The petitioner shall pay the balance amount with applicable interest within one month from today.

The original petition is disposed of as above.

Order on C.M.P. No. 34222 of 2000 in O.P. No. 20422 of 2000 dismissed.