

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

MONDAY, THE 31ST DAY OF JULY 2017/9TH SRAVANA, 1939

WP(C).No. 22083 of 2008 (D)  
-----

PETITIONER:  
-----

THE LOTUS CLUB,  
WARRIAM ROAD, ERNAKULAM,  
KOCHI - 682 016,  
REPRESENTED BY ITS HONY, SECRETARY, K.RAMACHANDRAN.

BY ADVS.DR.K.B.MUHAMED KUTTY (SR.)  
SRI.K.M.FIROZ

RESPONDENTS:  
-----

1. THE INTELLIGENCE OFFICER (I.B)  
DEPARTMENT OF COMMERCIAL TAXES,  
MATTANCHERRY. OFFICE OF THE,  
DEPUTY COMMISSIONER INTELLIGENCE,  
COMMERCIAL TAXES, ERNAKULAM.
2. THE DEPUTY COMMISSIONER,  
COMMERCIAL TAXES, ERNAKULAM.
3. THE COMMISSIONER OF COMMERCIAL TAXES,  
THIRUVANANTHAPURAM.
4. THE STATE OF KERALA,  
REPRESENTED BY SECRETARY TO GOVERNMENT,  
TAXES DEPARTMENT, SECRETARIAT,  
THIRUVANANTHAPURAM.

R1 BY ADV. SENIOR GOVERNMENT PLEADER SRI.GOVINDAN C.K

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON  
26-07-2017, ALONG WITH WP(C)22084/2008, WP(C)22085/2008,  
WP(C)22253/2008, THE COURT ON 31.07.2017 DELIVERED THE  
FOLLOWING:

APPENDIX

PETITIONER EXHIBITS:  
-----

EXHIBIT	P1	TRUE COPY OF PENALTY ORDER FOR THE YEAR 99-2000 DATED 18.9.2003
EXHIBIT	P2	TRUE COPY OF THE REVISION ORDER NO.STRP 254,255, 256 & 257/2003 DATED 22.9.2004
EXHIBIT	P3	TRUE COPY OF THE ORDER NO.R1.63057,58,59&60/2004 DATED 19.5.2007
EXHIBIT	P4	TRUE COPY OF THE CONSTITUTION OF THE CLUB WHICH IS REGISTERED UNDER THE TRAVANCORE COCHIN LITERARY, SCIENTIFIC AND CHARITABLE SOCIETIES ACT, 1955, REGISTRATION NO.ER-28/88
EXHIBIT	P5	TRUE COPY OF THE JUDGMENT NO.O.P 14937/93 OF THIS HON'BLE COURT IN TRIVANDRUM CLUB VS. STATE OF KERALA DATED 14.9.1998
EXHIBIT	P6	TRUE COPY OF THE JUDGMENT NOS.RN.17/2003 & RN.46/2004 OF CALCUTTA CLUB DATED 3.7.2006

RESPONDENTS EXHIBITS: NIL  
-----

//TRUE COPY//

PA TO JUDGE

bng

**A.MUHAMED MUSTAQUE, J.**

=====

**W.P.(C).Nos.22083/2008, 22084/2008, 22085/2008  
& 22253/2008**

~~~~~

Dated this the 31<sup>st</sup> day of July, 2017

**J U D G M E N T**

These bunch of writ petitions are filed by the Lotus Club, a club registered under the Travancore-Cochin Literary, Scientific and Charitable Societies Act, 1955, challenging penalty orders imposed on them for different assessment years under Section 45A of the Kerala General Sales Tax Act, 1963 (for short, the “KGST Act”) for want of registration under the Act. It is requisite under Section 13 of the KGST Act that every dealer whose total turnover is not less than Rs.1 lakh (as amended with effect from 1.4.1984), to get registered under the KGST Act. Lotus Club is a social club. It had no registration under the KGST Act. The club serves foreign liquor to guests and its members on recouping cost. The club never treated the said activity as sale within the meaning of KGST Act. Therefore, they have not taken any registration.

2. An Intelligence Officer attached to the Sales Tax Department conducted an inspection in the year 1993 and issued notices to the

- : 2 : -

petitioner, purportedly, asking the petitioner about the running of the restaurant by the club. The petitioner, relying upon the judgment of the Hon'ble Supreme Court in **Joint Commercial Tax Officer, Harbour Division II, Madras v. The Young Men's Association (Regd.) Madras and others [AIR 1970 SC 1212]** responded to the notices by stating that the supply to members by members' club of refreshment is not sale and the petitioner cannot be termed as a dealer. It appears that for more than a decade, no further proceedings were taken in the matter. The present action is initiated based on the summons issued by the Intelligence Officer, Mattanchery in the year 2003. Taking note of the fact that the petitioner is bound to take registration, penalty proceedings were initiated under Section 45A of the KGST Act for the periods - 1997-98, 1998-99, 1999-2000 and 2000-2001. In these separate writ petitions, the petitioner challenges the penalty orders, which had attained finality through different hierarchy.

3. Heard Dr.K.B.Mohamedkutty, learned Senior Counsel appearing for the petitioners and Shri Govindan C.K., learned Senior Government Pleader, appearing for the respondents. The learned Senior Counsel, relying upon the judgments of the Hon'ble Supreme Court in

- : 3 : -

**Hindustan Steel Ltd. v. The State of Orissa [(1970) 25 STC 211]**, and of this court in **State of Kerala v. Jyothy Laboratories Ltd. [(2011) 46 VST 330 (Ker)]** and **Nilkamal Plastics Ltd. v. Asst.Commissioner-1, Commercial Taxes, Special Circle Mattanchery [(2016) 24 KTR 193 (Ker)]** and an unreported judgment of this court in W.P.(C).No.11148/2011 dated 14/6/2017, argued that since there is no element of *mensrea*, penalty could not have been ordered against the petitioner. The learned Counsel pointed out various circumstances relating to the case to butteress his contention. It is also pointed out that the Department itself was in dilemma whether the petitioner is liable to get registered under the KGST Act or not and therefore, without finding any intention to evade registration on the part of the petitioner, the penalty could not have been ordered against them. The learned Counsel, particularly, relied upon the observation in the proceedings of the Deputy Commissioner in the revision petitions filed against the original orders of penalty. It was observed by the Deputy Commissioner that no *mensrea* can be successfully alleged against the petitioner for not taking registration, filing returns and paying tax, especially, when the

- : 4 : -

assessing authority failed to follow-up the matter from the year 1993 onwards. It is also argued that the finding has become final and the Department has chosen to challenge that finding and therefore, that finding would operate against the very foundation of the claim of the Department.

4. The learned Special Government Pleader by pointing out to the definition of sale under Section 2(xxi) of the KGST Act argued that the explanation 2 to Section 2(xxi) abundantly make it clear that the activities of a club by way of supply or distribution of goods to its members for cash or for deferred payment or other valuable consideration is deemed to be sale. He pointed out that this explanation was brought in by an amendment by and Act 17 of 1984 with effect from 1.4.1984. Therefore, it is submitted that the petitioner with an intention to evade tax, contravened statutory mandate to obtain registration.

5. It is to be noted that the Deputy Commissioner also observed in the revision petitions that no successful *mensrea* can be alleged against the petitioner, nevertheless, found violation of the provisions contained in Section 13 of the KGST Act and Rule 21 of the KGST Rules. The Deputy Commissioner, thereafter, reduced the penalty to Rs.1 lakh. The original

- : 5 : -

authority, in fact, ordered penalty equal to the tax payable. The observation as such cannot be subjected to any challenge by the Department. The Department can sustain only a challenge against the final decision in the matter. Thus, this court is of the view that the observation of the Deputy Commissioner as such would not preclude the Department from defending its case on the ground of wilful evasion of the statutory provisions to get registration under the Act.

6. The judgments relied upon by the learned Senior Counsel would have to be distinguished from the facts involved in this case. If there is a serious *bona fide* dispute as to the mandate to get registration, no doubt, without there being a decision on that point, a person cannot be directed to get registration under the KGST Act. It is to be noted that the judgment of the Hon'ble Supreme Court in the **Young Men's Association's** case [AIR 1970 SC 1212] relied upon by the petitioner was rendered in the year 1970. Thereafter, an amendment was brought into the statutory provisions defining 'sale' in the year 1984. That amendment makes it clear that the petitioner's activities would fall within the definition of sale. Ignorance of law is not an excuse. One's ignorance cannot be taken as a

**- : 6 : -**

defence to avoid any penalty being imposed on them. It is not a case where the petitioner could not get registered themselves on account of genuine dispute regarding their responsibility to get registration under the Act. When the amendment was brought in the year 1984, law assumes that the petitioner has knowledge. If the petitioner is legally bound to take registration, whatever be the good faith they may have, there is a clear violation of the statutory provision. Section 45A(g) of the KGST Act, in fact, clearly delineates a provision for penalty consequent upon contraventions of the Act and Rules made thereunder. In such circumstances, it can only be presumed that the petitioner had wilfully contravened the provisions. It is only when there is a serious *bona fide* dispute of coverage, the petitioner can have an excuse to avoid penalty. In the light of the discussions as above, I am of the considered view that no interference is called for in the matter. Thus, affirming the impugned orders, the writ petitions are dismissed.

Sd/-

**A. MUHAMED MUSTAQUE, JUDGE**

ms