(2006) 04 KL CK 0007

In the High Court Of Kerala

Case No : S.T. Rev. No. 34 of 2006

Abdul Majeed A.M. — APPELLANT

Vs

State of Kerala — RESPONDENT

Date of Decision : 03-04-2006

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 5(1), 7, 7(7), 7(7A)

Citation : (2006) 2 KLJ 200 : (2006) 3 KLT 548 : (2007) 6 VST 417

Hon'ble Judges : K.S. Radhakrishnan, J;K.M. Joseph, J

Bench : Division Bench

Advocate : T.M. Sreedharan, for the Appellant; Raju Joseph (G.P. for Taxes), for the Respondent

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, J.—Petitioner is a P.W.D. Contractor and a registered dealer under the Kerala General Sales Tax Act, 1963. Assessment year in question relates to 1998-1999. Final assessment was completed on estimate basis fixing the turnover at Rs. 2 lakhs as per order dated 27-2-2004. Sales Tax was assessed at the rate of 8% on the above turnover along with surcharge at 10%. Assessee filed appeal against the said order before the Appellate Assistant Commissioner, Commercial Taxes, Kannur. Appeal was disposed of by order dated 20-07-2004 along with appeal for the year 1999-2000. Assessment was modified with a direction to the assessing authority to verify the statements issued by the awarder after granting credit for the tax recovered and paid by the awarder. Appellate Assistant Commissioner passed a common order in S.T.A. Nos. 398/04 and 398A/04 on 20-07-2004 directing the assessing authority to modify the assessment for both the years. Assessing authority then passed a fresh assessment order on 14-09-2004 directing the taxable turnover of Rs. 24,67,530/-. However, instead of levying tax at 2% on the entire turnover assessing authority bifurcated the turnover in a sum of Rs. 15,89,436/- attributable to construction of drain and culvert at Payyoli road and at Kizhur road and levied tax at 5% thereon u/s 7(7A) of the Act. In respect of the balance amount of Rs. 8,78,099/- tax was levied at 2% u/s 7(7) and raised a demand of Rs. 54,920/-. Aggrieved by the same assessee filed appeal S.T.A. No. 808/04 before the Appellate Assistant Commissioner which was rejected. Matter was taken up in appeal before the Sales tax Appellate Tribunal. Tribunal sustained the levy of tax at 5% in respect of the contract payments received for construction of drain and culvert amounting to Rs. 15,89,436/-. Aggrieved by the same this revision has been preferred. Sri. T.M. Sreedharan, counsel appearing for the petitioner submitted that the levy of tax at 5% in respect of the contract payments received for construction of drain and culvert by invoking Section 7(7A) of the Act cannot be justified. Counsel submitted that the construction of culvert and drain is only a civil work and hence the Appellate Tribunal was not justified in holding that the same will not come within the provisions of Section 7(7) of the Act. Counsel submitted that the point raised is covered by the decision of this court in Philipose v. State of Kerala (1O K.T.R. 150), Counsel submitted that construction of drains, culverts etc. will form part of construction work of road. Reference was also made to the meaning of the expression "road" in various Dictionaries which states that road is a specially prepared way between places for the use of pedestrians, riders, vehicles etc. Counsel submitted in order to construct a road between two places it is highly necessary to construct drain on either side of the road and also construction of culverts if such construction is warranted for the use of the road. In any view of the matter, counsel submitted if the assessee''s work will not fall u/s 7(7) the assessee should have been given option to go for regular assessment u/s 5(1) rather than demanding tax at the compounded rate u/s 7(7A) especially when the assessee has not opted for compounded rate u/s 7(7A).

2. Sri. Raju Joseph, learned Special Government Pleader for Taxes on the other hand contended that the petitioner is not justified in taking into account item which is not mentioned in sub-section (7) of Section 7 of the Act. Section 7(7) takes in civil works of construction of bridges, roads etc. Later vide Act 23 of 1993 railway tracks, walls, including sea walls were also included. If the legislature wanted to include drains and culverts the same could have been included in Section 7(7). Counsel submitted what is shown in Section 7(7) is specific and the assessee cannot insist inclusion of any of the items not mentioned in the Section. Counsel further submitted that after having opted for payment of tax at compounded rate u/s 7 and 7(7A) assessee cannot revert back to Section 5(1) assessment.

3. We have called for the files and perused the application made by the assessee in Form No. 21B. Assessee has filed an application in Form No. 21B for permission to pay at the rate specified u/s 7 and 7(7A). Rule 30A states that notwithstanding anything contained in Rule 30, every contractor engaged in civil works of construction of building, bridge, road or dam may opt to pay tax in accordance with sub-section (7) of Section 7 in respect of each such contract. Sub-rule (2) of Rule 30 states that application for permission to pay tax under

Sub-section (7) of Section 7 shall be in Form No. 21 B and shall be filed before the assessing authority in duplicate before the receipt of the contract amount or any instalment thereof. Assessee has also filed the declaration in Form No. 21 C. On verification of the declaration it was noticed that the construction of drain and culvert would fall u/s 7(7A) and therefore to be assessed to tax at 5%. Notice dated 23-8-2004 was then issued to the assessee calling for objection, if any, to the proposal. Notice was duly served on 26-8-2004 but assessee did not file any objection to the proposal.

4. The only question to be considered is whether the construction of drain or culvert is to be treated as forming part of construction work of roads which has been assessed u/s 7(7A) of the Act. The items mentioned in Section 7(7) are specific such as building, bridges, roads, railway tracks, walls, including repair or maintenance of such civil works which do not take in drains or culverts. This court is not justified in adding items which the legislature in its wisdom has not included.

5. We find it difficult to accept the contention of the assessee that he has not opted for assessing him at the compounded rate u/s 7(7A). We have perused Form No. 21 B dated 15-3-2004 submitted by the assessee for permission for payment of the tax under sub-section 7/7A of Section 7. Further a registered notice with acknowledgment due dated 23-8-2004 was sent to the assessee calling for objection, if any, for the proposal to impose tax at the rate of 5%. Notice was served on the assessee on 26-8-2004 but the assessee did not file any objection. The above facts would clearly show that the assessee had opted for compounding under sub-section (7)/7A) of Section 7. We are of the view, option once exercised under the statutory form No. 21 B is final and binding on the assessee. The assessee cannot later fall back on the general assessment u/s 5(1) of the Act. We are therefore in agreement with the orders of the assessing authority and that of the Tribunal. Assessing authority has rightly taxed the turnover at the rate of 5% in accordance with Section 7(7A) holding that drains and culverts cannot be considered as civil works coming with the purview of Section 7(7) of the Sales Tax Act. Revision therefore lacks merits and the same would stand dismissed.