

(2014) 04 KL CK 0075
In the High Court Of Kerala
Case No : O.T. Rev. No. 1 of 2013

Ahamed Kabeer

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 3(a), 6A
Kerala Value Added Tax Act, 2003 — Section 23, 24, 24(1), 47(2), 47(6)

Citation : (2015) 77 VST 388

Hon'ble Judges : Manjula Chellur, C.J;A.M. Shaffique, J

Bench : Division Bench

Advocate : K.P. Abdul Azees and C. Amrita, Advocates for the Appellant; Bobby John Ambooken, Government Pleader, Advocates for the Respondent

Judgement

A.M. Shaffique, J.—This revision is filed by the assessee against the order dated October 22, 2012 in T.A. (VAT) No. 398 of 2012 of the Kerala Value Added Tax Appellate Tribunal, Ernakulam. The issue relates to the assessment year 2005-06. The petitioner is a dealer in coconut and arecanut. According to him, during the period 2005-06, he purchased arecanut from unregistered dealers under section 6(2) of the Kerala Value Added Tax Act (hereinafter referred to as "the KVAT Act"). Produce was sent to agents outside the State of Kerala for consignment sales under section 6A of the Central Sales Tax Act. During the return period August 2005 and December 2005, when the arecanuts were being transported from Kerala to Karnataka two offences were detected and security deposits were collected from the petitioner under section 47(2) of the KVAT Act. The security deposits were subsequently converted to penalty under section 47(6) of the Act. Annexures A and B are the penalty orders. According to the petitioner, since he has no local sales of arecanut within the State he has no obligation to pay tax under the KVAT Act.

2. Since penalty was imposed on him, his monthly returns for October 2005 to March 2006 were rejected and the assessing officer resorted to the best

judgment assessments under section 24 of the KVAT Act for the said months. The assessing officer added two times of purchase turnover of arecanuts as taxable under section 6(2) and two times of the value of inter State stock transfer as turnover under section 6(1) of the KVAT Act. Annexure C is the common assessment order. According to the petitioner, the return under the CST Act for the year 2005-06 was accepted by the assessing authority and annexure D is the said assessment order. Challenging the orders passed by the assessing officer under the KVAT Act, the petitioner filed appeal before the Deputy Commissioner (Appeals) and the order was modified by reducing the addition to equal of the purchase turnover under section 6(2) of the KVAT Act and the value of stock transfer for the purpose of assessment under section 6(1) of the KVAT Act, 2003. The assessee was allowed special rebate on the turnover added under section 6(2) of the KVAT Act.

3. The assessee preferred a further appeal before the Tribunal which came to be dismissed, against which this revision is filed.

4. The Tribunal held that the assessee has not raised a contention before the lower authorities that the assessing authority is not legally justified in estimating turnover suppression for local sales under the KVAT Act on the basis of the offence detected on inter-State movement under the CST Act.

5. According to the petitioner, the Tribunal committed serious error of law in rejecting the returns filed by the assessee under the KVAT Act for the offence committed under the CST Act. Specific reference is made to rule 39(5)(i) and (iii) of the KVAT Rules, 2005 in order to contend that the authorities below did not consider the said provision while upholding the order passed by the assessing officer. The revision petitioner has raised the following questions of law :

"(a) Is not the order of the Tribunal a perverse order by holding that the issue with regard to the legality of the estimation towards suppression on local sales under the Kerala Value Added Tax Act, 2003 on the basis of offences detected on the transaction under the Central Sales Tax Act was not raised before the lower authorities when there are clear materials to the effect that this issue was raised before the first appellate authority?

(b) Is not the Tribunal wrong in holding that an issue which was not raised before the lower authorities cannot be raised before the Tribunal first time?

(c) Has not the Tribunal, committed an error of law in holding that the assessment made under section 24 of the Kerala Value Added Tax Act, 2003 is sustainable when omission or suppression has been detected only on transactions under the Central Sales Tax Act and no omission and suppression has been detected on local sales liable to tax under the Kerala Value Added Tax Act, 2003?

(d) Has not the Tribunal committed an error in law by completely ignoring rule 39(5)(i) and (iii) of the Kerala Value Added Tax Rules, 2005 without limiting the

addition of suppression to the return periods only of which offences" have been detected, when the assessing authority completed the assessment on the basis of the monthly return period?"

6. Heard learned counsel for the revision petitioner and the learned Government Pleader appearing on behalf of the respondent-Revenue. It is, *inter alia*, contended that the offence is detected on the transaction under the CST Act and merely for the reason that the same was not raised before the lower authorities, there was nothing wrong in the Tribunal to have decided a question of law. That apart, it is contended that when an assessment is made under section 24 of the KVAT Act on the ground that there is omission or suppression, it has to be a transaction under the KVAT Act and in so far as the transaction in question was under the CST Act, no authority vests with the Sales Tax Department to impose penalty on the assessee.

7. The Tribunal, on perusal of the records, found that the assessee's contention that he has no local sales and that the suppression was detected on inter-State sales was not raised before the authorities below. Apparently, whether the assessee was doing an inter-State sales or not is a question of fact. The Tribunal further found that the assessee was in the habit of transporting goods much more than the quantity declared in the transporting documents and the under-valuation pointed out by the assessing authority will prove that there is, omission and suppression by the assessee and therefore the assessing officer was justified in invoking section 24 of the KVAT Act.

8. In regard to the contention that estimation of the turnover ought to have been limited for August and December alone, since detection was only made during the said period, the Tribunal proceeded on the basis that the assessee was indulging in a vivid pattern of suppression by under-invoicing and transporting goods much in excess than what was permitted. Since sufficient relief was granted by the first appellate authority by reducing the penalty, the Tribunal did not interfere with the same.

9. Before proceeding further, it would be useful to refer to rule 39(5)(i) and (iii) of the Kerala Value Added Tax Rules, 2005 (hereinafter referred as "the KVAT Rules") which reads as under :

"39(5)(i) : Where in an audit under section 23, any irregularity as specified under sub-section (1) of section 24 is detected and such irregularity relates to one return period only and does not disclose any pattern of suppression, the best judgment assessment shall be limited to the return period to which the irregularity relates.

....

39(5) (iii) : Where the irregularity relates to suppression of taxable turnover and a pattern of suppression is clearly made out, the best judgment assessment shall be in respect of all the return periods to which the pattern is applicable."

10. The learned counsel for the assessee relied upon the judgment of this court in *Bhavani Tea and Produce Co. Ltd. Vs. State of Kerala*, wherein a Division Bench of this court held that when the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings, there is no reason why such a question should not be allowed to be raised. The Division Bench relied upon the judgment of the Supreme Court in *State of Kerala Vs. Cardamom Planters' Association*, . Another judgment relied upon is *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, ; AIR 1961 SC 1633. That was also a case in which the Supreme Court held that even if a contention is not urged before the Tribunal, on a question of law, it could be raised before the High Court. It is held that when a question of law is raised before the Tribunal and not considered, it must be deemed to have been dealt with by it and therefore one arising out of its order. Another judgment relied upon is *Sahney Steel and Press Works Limited and Another Vs. Commercial Tax Officer and Others*, wherein it is held that when goods are moved from one State to another, the sale transaction amounts to inter-State sales under section 3(a) of the Central Sales Tax Act. Reliance is also placed on the judgment in *English Electric Co. of India Ltd. and Another Vs. The Deputy Commercial Tax Officer and Others*, wherein it is held that if the movement of goods was an incident of or occasioned by the sales itself, it would be taxable under section 3(a) of the Central Sales Tax Act. In *Indian Oil Corporation Ltd. and Another Vs. Union of India (UOI) and Others*, also it is held that when the sales were clearly inter-State sales, the State of Uttar Pradesh has no jurisdiction to assess the petitioner to sales tax under the State Act.

11. The propositions are well accepted. The question would be whether the factual situation available in the case calls for such a consideration.

12. The main contention urged by the petitioner is that he had no local sale of arecanut and no local sale is detected. He was only involved in inter-State stock transfer and his CST assessment has been completed, and therefore turnover estimated and assessed under section 6(1) of the KVAT is illegal. That apart, since the return period is the calendar month, the omission and suppression should have been restricted to return period of August and December alone.

13. No doubt, as contended by the learned counsel for the revision petitioner, the discrepancy had been noticed only on two occasions. On August 14, 2005, the consignments of arecanuts were detained by the Commercial Tax Officer, Malappuram, for the reason that the quantity transported was 300000 ripe arecanuts whereas the documents accompanying the consignment showed it as 100000. Similarly, when another vehicle was intercepted by the Commercial Tax Inspector of the sales tax check-post, Tholpetty on May 7, 2005, the vehicle contained excess quantity of 43 bags of tender arecanuts over and above the quantity declared in the delivery note and permit. This fact cannot be disputed. The assessing officer observed that the modus operandi practised by the assessee throughout the year was transportation of materials in excess of the

quantity permitted as per the delivery note. It is stated that the quantity transported in excess was three times the conceded quantity. Further, it is observed that compared to the market value of raw arecanuts, the price conceded by the dealer per nut was very low. Therefore, it was observed that, in the absence of filing F form declaration for March 2006, the turnover involved has to be treated as inter-State sales and assessed under the Central Sales Tax Act at 10 per cent. It was in this background that the returns filed by the dealer was rejected and best judgment assessment was made under section 24 of the Act. However, the first appellate authority observed that when the suppression detected was only Rs. 99,050, the addition of Rs. 4,31,29,920 was excessive and reduced the addition to equal the amount of purchase turnover and inter-State stock transfer.

14. It is not in dispute that the assessing officer proceeded on the basis that KVAT Act and Rules enable the assessing authority to reject the return for all return periods of the year if a pattern of suppression is detected in terms of rule 39(5) of the KVAT Rules. In such circumstances, the assessing officer opined that when a pattern of suppression can be established on the basis of two instances spreading over different months of a financial year, the proposed addition is reasonable. It is also indicated that the detection was noticed while transporting goods through different check-posts at Vazhikadavu and at Tholpetty. It is also found that the modus operandi practised by the dealer was to transport twice the quantity conceded.

15. The Tribunal did not consider the legality of the estimation on the ground that such a contention was not raised before lower authorities. This finding apparently appears to be incorrect as the main contention urged by the assessee is that the transaction in question was inter-State stock transfer and the CST assessment order was completed on June 15, 2010. In fact, this aspect of the matter ought to have been considered by the Tribunal in accordance with the procedure prescribed. If the assessee has a case that he has no local sales at all and therefore the turnover estimated under section 6(1) of the KVAT Act is bad in law, the said contention ought to have been considered by the Tribunal.

16. A perusal of the judgments relied upon by the learned counsel for the revision petitioner clearly indicates that even if an issue was not raised before the lower authorities, if it is a pure question of law to be considered based on the available materials, the same could be considered by the appellate authority as well. That apart, the Tribunal is also a fact-finding authority and it is open for the Tribunal to verify the records and materials available to find out whether any factual situation is available to substantiate the question raised by the assessee even though such question is raised for the first time. But, if fresh facts are necessary for such adjudication, then alone the Tribunal can desist from adjudicating such issues.

17. Another contention urged by the revision petitioner is regarding the assessment made under section 24 of the KVAT Act, when the omission or

suppression is detected only with reference to transactions under the CST Act. Apparently this is the issue which ought to have been considered by the Tribunal. But the Tribunal proceeded on the basis that the assessee was in the habit of transporting goods much more than the quantity declared in the transporting documents and he had undervalued the goods. Hence assessment under section 24 of the KVAT Act was sustainable. This, according to us, is a question to be considered taking into account the overall factual situation in the case. According to the assessee, he has no local sales. No local sales is detected by the Intelligence Officer. All the goods were transported through check-posts and twice it was detected that the quantity transported was in excess of the quantity specified in the delivery note. In so far as the assessee had transported his goods only through check-post, one cannot assume that at all point of time he had transported goods much more than the quantity declared. It is relevant to note that the first appellate authority found that considering the suppression detected, the addition made did not have a reasonable nexus to the same. Therefore when the authorities under the KVAT Act proceeds on the basis that despite the suppression being detected only twice, taking into consideration the manner in which goods were being transported, the assessment could be made under section 24 of the KVAT Act cannot be found to be unreasonable which requires interference.

18. In regard to the question that the Tribunal has completely ignored rule 39(5) (i) and (iii) of the KVAT Rules, without limiting the addition to the return period for which the offences were detected, a bare reading of the provision will clarify the point in issue. Rule 39(5)(i) clearly indicates that if any irregularity, as specified under section 24(1) is detected relates to one return period only and does not disclose any pattern of suppression, the best judgment assessment shall be limited to the return period. Apparently, the authorities have proceeded on the basis that the facts disclose a pattern of suppression which enable them to make best judgment assessment without any limitation. In that view of the matter, we do not think that there is any illegality on the part of the authorities to have made best judgment assessment for the whole period.

19. But, having regard to the fact that the Tribunal failed to consider the question relating to the estimation made by the assessing officer in relation to the fact that the assessee has no local sales at all and therefore the turnover estimated under section 6(1) of the Act is bad in law, the same is required to be considered in accordance with the procedure prescribed. It was not proper on the part of the Tribunal to have rejected the contention on the ground that such a contention was not raised earlier. In fact, the grounds raised clearly disclose that such a contention had been taken by the assessee. Even otherwise, when a question of law is raised before the Tribunal, the same is required to be considered in accordance with law. In the result the revision is allowed setting aside the impugned order and directing the Tribunal to consider the matter afresh in the light of the observations made above.