(2015) 09 KL CK 0021

In the High Court Of Kerala

Case No : W.P. (C) No. 20229 of 2015

Attinkara Electronics Division, Pathanamthitta — APPELLANT

Vs

State of Kerala and Others — RESPONDENT

Date of Decision : 16-09-2015

Acts Referred:
Karnataka Value Added Tax Act, 2003 — Section 16, 19, 23, 24, 25

Citation : (2015) 5 KHC 574

Hon'ble Judges : Anil K. Narendran, J.

Bench : Single Bench

Advocate : M. Gopikrishnan Nambiar, P. Gopinath, P. Benny Thomas, K. John Mathai, Joson Manavalan and Kuryan Thomas, for the Appellant; S. Sudheesh KumarAdvocateGovernment Pleader, for the Respondent

Judgement

Anil K. Narendran, J.—The petitioner, a registered dealer under the Kerala Value Added Tax Act, 2003 (hereinafter referred to as ''the KVAT Act'') has filed this writ petition seeking a writ of certiorari to quash Ext. P6 communication dated 18/05/2015 issued by the 4th respondent and seeking a writ of mandamus commanding the said respondent to take back Ext. P5 appeal on the file of the Kerala Value Added Tax Appellate Tribunal and to post the same for hearing by the Bench of the Tribunal. The petitioner has also sought for a writ of mandamus commanding the 2nd respondent to rectify the mistake in Ext. P3 order expeditiously. Going by the averments in the writ petition, the petitioner''s business premises was inspected by the 3rd respondent on 18/08/2009, which resulted in initiation of penalty proceedings under sub-sections (8) and (10) of Section 44 of the KVAT Act, on the ground that one of the godowns where the petitioner had stored some goods was not specifically included in the certificate of registration. The 3rd respondent issued Ext. P1 order dated 06/10/2009 under sub-sections (8) and (10) of Section 44 of the KVAT Act, read with Rule 61 of KVAT Rules, imposing a penalty of Rs. 8,33,450/- being 50% of the value of goods, for the offence of storing and stocking unaccounted goods in the undeclared godown.

2. Aggrieved by Ext. P1 order, the petitioner filed Ext. P2 appeal dated 16/12/2009 before the Deputy Commissioner (Appeals), Kollam, under Section 55 of the KVAT Act. Though the initial hearing with regard to stay of collection of penalty was heard by the Deputy Commissioner (Appeals), the files relating to Ext. P2 appeal was later transferred to the Deputy Commissioner, Commercial Taxes, Pathanamthitta, the 2nd respondent herein, consequent to the amendment of Section 55 of the KVAT Act, vide the Kerala Finance Act, 2014. As per the amendment so made, the appeals pending as on the date of the Kerala Finance Bill, 2014 would stand transferred from the Office of the Appellate Deputy Commissioner to the jurisdictional Deputy Commissioner and the said authority shall consider the same as if it is an appeal filed before it. However, the 2nd respondent by Ext. P3 order dated 04/02/2015 dismissed Ext. P2 appeal treating it as a revision filed under Section 57 of the KVAT Act. On noticing the said irregularity, the petitioner filed Ext. P4 rectification petition, under Section 66 of the KVAT Act, pointing out that, in view of the third proviso to Section 55 of the KVAT Act, the 2nd respondent ought to have disposed of Ext. P2 as if it is an appeal filed before it.

3. Though the 2nd respondent heard Ext. P4 rectification petition on 21/05/2015, no orders were passed. In view of the time limit prescribed under Section 60 of the KVAT Act for filing appeal, the petitioner filed Ext. P5 appeal before the Appellate Tribunal on 11/05/2015. However, the same was returned along with Ext. P6 communication dated 18/05/2015 of the 4th respondent, stating that the petitioner has to move a revision before the Commissioner, Commercial Taxes, under Section 59 of the KVAT Act, against Ext. P3 order passed by the 2nd respondent. Aggrieved by Ext. P6, the petitioner is before this Court in this writ petition seeking various reliefs.

4. A counter-affidavit has been filed by the 2nd respondent supporting the stand taken by the 4th respondent in Ext. P6 that, in order to challenge Ext. P3 order, the petitioner has to move a revision before the Commissioner, Commercial Taxes, under Section 59 of the KVAT Act.

5. I heard arguments of the learned counsel for the petitioner and also the learned Senior Government Pleader appearing for the respondents.

6. The main issue that arises for consideration in this writ petition is as to the legality or otherwise of Ext. P6 communication issued by the 4th respondent by which Ext. P5 appeal filed by the petitioner before the Appellate Tribunal under Section 60 of the KVAT Act has been returned, stating that the petitioner has to file a revision against Ext. P3 order, before the Commissioner of Commercial Taxes, under Section 59 of the KVAT Act.

7. As borne out from Ext. P1 order, penalty proceedings under Section 67 of the KVAT Act was initiated against the petitioner, based on an inspection conducted in its business place on 18/08/2009. The petitioner was issued with a notice dated 18/08/2009 of the Intelligence Officer, Squad II, Pathanamthitta, alleging

that, the godown at Lord''s Arcade Thiruvalla, is not declared and entered in the certificate of registration. Based on the physical stock of goods stored in the said godown, the Intelligence Officer proposed to impose a penalty of Rs. 8,33,450/-, under sub-section (8) of Section 44 of the KVAT Act, being 50% of the value of the taxable goods not accounted for, and to treat the said stock as stock out side the regular books of account. To the said notice, the petitioner submitted its objection dated 31/08/2009 and the Intelligence Officer by Ext. P1 order imposed a penalty of Rs. 8,33,450/-, under sub-section (8) of Section 44 of the KVAT Act, being 50% of the value of the taxable goods not accounted for, and treated the said stock as stock out side the regular books of account, under sub-section (10) of Section 44 of the KVAT Act. Ext. P1 order of penalty was under challenge in Ext. P2 appeal dated 16/12/2009 filed before the Deputy Commissioner (Appeals), Kollam, under Section 55 of the KVAT Act.

8. During the pendency of Ext. P2 appeal, Section 55 of the KVAT Act was amended by the Kerala Finance Act, 2014, with effect from 01/04/2014. By the aforesaid amendment, the words and figures "other than those under sub-section (3), sub-section (8) or sub-section (9) of Section 16, sub-section (8) of Section 19" in sub-section (1) of Section 55 have been substituted by the words and figures "other than those under Section 16, Section 19, sub-sections (8) and (9) of Section 44, Section 49, Section 67, Section 68, Section 69 and Section 70". Similarly, the figures and words "48, 49, 67, 69, 70, 70A and 72" in the first proviso to sub-section (1) of Section 55 have been substituted by the figures and words "48, 70A and 72". Further, a proviso has been inserted after the second proviso to sub-section (1) of Section 55. Section 55 of the KVAT Act after its amendment reads thus;

"55. Appeals to the Deputy Commissioner (Appeals) and Assistant Commissioner (Appeals).- (1) Any person aggrieved by any order issued or proceedings recorded *[other than those under Section 16, Section 19, sub-sections (8) and (9) of Section 44, Section 49, Section 67, Section 68, Section 69 and Section 70] passed by an authority empowered to do so under this Act not being an authority above the rank of an Assistant Commissioner may, within a period of thirty days from the date on which the order was served on him, appeal against such order,

(i) to the Deputy Commissioner (Appeals), if the order was passed by an authority of the rank of an Assistant Commissioner; and

(ii) to the Assistant Commissioner (Appeals), if the order was passed by an authority of the rank of a Commercial Tax Officer:

Provided that orders passed under Sections *[48, 70A and 72] shall be appealable only to the Deputy Commissioner (Appeals).

Provided further that the Deputy Commissioner (Appeals) and Assistant Commissioner (Appeals) may admit an appeal presented after the expiration of the said period if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the said period.

*[Provided also that where an order of the assessing authority which has become not appealable with effect from 1st April, 2014 by virtue of the Kerala Finance Bill, 2014 is pending in appeal under this section, such appeal shall stand transferred to the appropriate authority under this Act and such authority shall consider the same as if it is an appeal filed before it.]

Provided also that no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax or other amounts admitted by the appellant to be due or such installment thereof as might have become payable, as the case may be, where the appeal is against an assessment completed under sub-section (6) of Section 23, or under Section 24 or Section 25."

[*substituted/inserted by the Kerala Finance Act, 2014]

9. In view of the amendment made to sub-section (1) of Section 55 of the KVAT Act, an order imposing penalty under sub-section (8) of Section 44 or under Section 67 of the KVAT Act became not appealable, with effect from 01/04/2014. However, the third proviso to sub-section (1) of Section 55 provides that, where an order of the assessing authority which has become not appealable with effect from 01/04/2014 by virtue of the Kerala Finance Bill, 2014 is pending in appeal under that Section, such appeal shall stand transferred to the appropriate authority under the KVAT Act and such authority shall consider the same as if it is an appeal filed before it. Therefore, on Ext. P3 appeal being transferred to the 2nd respondent, the said authority should have considered the same as if it is an appeal filed before it. Instead, the 2nd respondent while passing Ext. P3 order, treated Ext. P2 appeal as a revision filed under Section 57 of the KVAT Act. The procedure adopted by the 2nd respondent while disposing Ext. P2 appeal is per se illegal and even contrary to the mandate of the third proviso to sub-section (1) of Section 55 of the KVAT Act.

10. On noticing the irregularity in Ext. P3 order passed by the 2nd respondent, the petitioner filed Ext. P4 rectification petition under Section 66 of the KVAT Act, pointing out that, in view of the third proviso to Section 55 of the KVAT Act the 2nd respondent ought to have disposed of Ext. P2 appeal as if it is an appeal filed before it. Since no orders were passed on the said application, the petitioner filed Ext. P5 appeal before the Appellate Tribunal on 11/05/2015, within the prescribed time limit of 60 days. However, the said appeal was returned along with Ext. P6 communication dated 18/05/2015 of the 4th respondent, stating that the petitioner has to move a revision before the Commissioner, Commercial Taxes, under Section 59 of the KVAT Act. The aforesaid reasoning of the 4th respondent in Ext. P6 is also legally per se illegal and even contrary to the third proviso to Section 55of the KVAT Act.

11. On 06/07/2015, when this writ petition came up for admission, this Court directed the learned Government Pleader to get instructions and the matter was posted after ten days. Thereafter, on 20/07/2015, this Court issued ''notice on

admission'' to the respondents by speed post. Thereafter, the 2nd respondent has passed Ext. P7 order dated 25/07/2015 in Ext. P4 rectification petition filed by the petitioner. In the aforesaid order, the reasoning of the 2nd respondent is that, since the Deputy Commissioner is having only revisional powers by virtue of Section 57 of the KVAT Act, an appeal filed before the Deputy Commissioner (Appeals) before the introduction of the Kerala Finance Act, 2014, which stands transferred to the Deputy Commissioner in view of the amendment so made will attain the status of a revision, since the files which became not appealable alone are transferred to the Deputy Commissioner.

12. The aforesaid reasoning of the 2nd respondent is per se arbitrary and patently illegal. By virtue of the amendment made to sub-section (1) of Section 55 of the KVAT Act, an order imposing penalty under sub-section (8) of Section 44 or under Section 67 of the KVAT Act became not appealable, with effect from 01/04/2014. Therefore, with effect from the aforesaid date, a dealer who is aggrieved by an order imposing penalty under sub-section (8) of Section 44 or under Section 67 of the KVAT Act has to avail the revisional jurisdiction provided under Section 57 of the KVAT Act, by filing an application for revision. However, in the case of an appeal already pending before the Deputy Commissioner (Appeals) and Assistant Commissioner (Appeals), arising out of orders issued under sub-sections (8) and (9) of Section 44, Section 67, etc., an exception is carved out in the third proviso to sub-section (1) of Section 55 of the KVAT Act, by providing that the pending appeal shall stand transferred to the appropriate authority under the KVAT Act and such authority shall consider the same as if it is an appeal filed before it. Therefore, on such an appeal being transferred to the appropriate authority, namely, the Deputy Commissioner, the said authority has to consider the same as if it is an appeal filed before it. In that view of the matter, the reasoning of the 2nd and 4th respondents to the contra cannot be sustained in law.

13. In the result, this writ petition is disposed of setting aside Ext. P6 communication issued by the 4th respondent and directing the said respondent to take back Ext. P5 appeal on the files of the Kerala Value Added Tax Appellate Tribunal and to post the same for hearing by the Bench of the Tribunal, treating Ext. P3 order passed by the 2nd respondent as one arising out of an appeal filed under sub-section (1) of Section 55 of the KVAT Act, in view of the third proviso to Section 55 of the said Act.

14. The learned counsel for the petitioner would submit that, when the matter was pending before the First Appellate Authority, the petitioner has deposited a sum of Rs. 2,18,781/- being 25% of the disputed penalty. The learned counsel for the petitioner would submit further that, the petitioner is prepared to furnish bank guarantee for the remaining portion of penalty and that, till Ext. P5 appeal is resubmitted before the Tribunal, which also contains an application for stay, all recovery proceedings pursuant to Ext. P1 penalty order, which is confirmed in Ext. P3 order may be kept in abeyance. Considering the facts and circumstances

of the case, I deem it appropriate to stay of all recovery proceedings pursuant to Ext. P1 and P3 orders for a period of two months on the petitioner furnishing bank guarantee for 75% of the penalty amount, within a period of two weeks from the date of receipt of a certified copy of this judgment, so as to enable the petitioner to resubmit Ext. P5 appeal and to move the stay petition before the Kerala Value Added Tax Appellate Tribunal.

No order as to costs.