(2014) 01 KL CK 0050

In the High Court Of Kerala

Case No : WP (C) No. 920 of 2007 and W.A. No. 989 of 2010

Commercial Tax Officer APPELLANT

Vs

V.N. Pavithran RESPONDENT

Date of Decision : 03-01-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 2, 6, 8
Kerala Value Added Tax Act, 2003 — Section 11, 11(2), 11(5), 12, 12(1)(b)

Citation : (2014) 45 GST 34

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

Bench : Division Bench

Advocate : Bobby John Pulikkaparambil, Advocate for the Appellant; E.P. Govindan, Advocate for the Respondent

Judgement

Dr. Manjula Chellur, C.J.—Revenue is before us aggrieved by the judgment of the learned Single Judge dated 07.04.2010 in WP(C) No. 920 of 2007. The relevant provisions that have to be taken into consideration apart from relevant documents are Section 11(2), 11(5) and Section 12(1)(b) read with first proviso of Kerala Value Added Tax Act, 2003. The relevant notification considered by the Department is Ext. P6, SRO No. 324/2005. Sub-section (x) of Section (2) defines ''capital goods''. The entire issue revolves round whether the respondent assessee is entitled for rebate so far as entry tax paid by him by virtue of above two sections and also the notification, SRO No. 324/2005. The brief facts that lead to the filing of the writ petition are as under.

2. Admittedly the respondent dealer is conducting a quarry and crusher unit and for the said business of him, he purchased Hydraulic Excavator from Bangalore and brought it to Kerala. It is not in dispute that entry tax came to be paid as per Ext. P3. Initially when Form 25 claim made by the dealer in accordance with the procedure contemplated u/s 11 of the Act., such rebate was allowed as per Ext. P5 to him by the Department. Later, by virtue of orders at Ext. P1, after issuing show cause notice and hearing the explanation of the dealer, orders came to be

passed by the Commercial Tax Officer withdrawing the benefit of rebate given under Ext. P5. Ext. P1 order became the subject matter of challenge before the learned Single Judge.

3. In the writ petition the contention of the writ petitioner was that interpretation of SRO No. 324/2005 by the Commercial Tax Officer at Ext. P1 was erroneous, totally ignoring the provisions of Kerala Value Added Tax Act i.e. Sections 11(2), 11(5) and 12(1)(b) read with first proviso. Learned Judge by referring to Section 12 of the Act opined that Ext. P1 is an erroneous order of the officer and proceeded to allow the writ petition. Aggrieved by the same, the Department is before us in the above appeal.

4. According to the learned Government Pleader, the procedure applicable to claim input tax credit applies to the claim made by the dealer so far as rebate applicable to him as indicated at Section 12 of the Act, therefore, one has to read Section 12 along with Section 11 keeping in mind the nature of capital goods involved especially with reference to SRO No. 324/2005 where the goods in question was treated as capital goods. In other words, it was in the negative list, therefore, the rebate is not allowable to the dealer in this case. Hence he seeks to set aside the judgment of the learned Single Judge.

5. As against this, the argument of the learned counsel appearing for the dealer is, as long as the goods ultimately purchased i.e. granite metal are taxable and if output tax liability is imposed on the dealer, automatically he is entitled for input tax credit, therefore, the benefit of rebate has to be extended to the dealer as provided u/s 12 as similar procedure applicable to claim input tax credit is applicable to claim of rebate as well. He also took us through Notification SRO No. 324/2005, Clause 7 of the items and also the last paragraph of the order at Ext. P1 to contend that there was no application of mind to the facts of the case by the officer who passed Ext. P1, therefore, as long as the produced goods are taxable, he is liable to output tax credit and automatically entitles to input tax credit, therefore, automatically, irrespective of notification at SRO No. 324/2005, he is entitled for rebate by virtue of first proviso to Section 12 of the Act.

6. We have gone through the order at Ext. P1, P5, Notification SRO No. 324/2005, Sections 11(2), 11(5) and 12(1)(b), so also the first proviso. Sections 11(2) and 11(5) read as under:

11(2) In respect of capital goods purchased by a dealer, the value of which exceeds such limit as may be prescribed input tax credit will be allowed over a period of three years from the date of commencement of commercial production or from the date from which the capital goods are put to use, whichever is later, in such manner and subject to such conditions as may be prescribed.

Provided that input tax credit on capital goods for industrial units including those which have undertaken expansion, diversification or modernisation shall be allowed over a period twelve months from the date of commencement of commercial production or from the date from which the capital goods are put to use, whichever is earlier from 1st day of April, 2006.

Provided further that no input tax credit shall be allowed with respect to capital goods used exclusively for the manufacture of goods having no taxable consequence under this Act or the Central Sales Tax Act, other than zero rated sales and in cases where it is only partly used for such purposes, input tax credit shall be proportionately disallowed to that extent.

11(5) No input tax credit shall be allowed for the purchasers,--

(a) from an unregistered dealer or from a dealer not liable to tax u/s 6 or from a dealer whose registration has been cancelled;

(b) from a dealer paying presumptive tax under sub-section (5) of section 6;

(c) from a dealer paying compounded tax u/s 8;

(d) of goods from outside the State in the course of inter State trade or commerce or otherwise in respect of tax paid on such purchase;

(e) of goods which are used in the manufacture, processing or packing of goods specified in the First Schedule and the Fourth Schedule;

(f) of goods specified in the Fourth Schedule;

(g) of goods which are used as fuel in motor vehicles or vessels, or stores;

(h) of motor vehicles where such motor vehicle is sold as a used motor vehicle except where such motor vehicle is purchased as a used motor vehicle.

Explanation:--For the purpose of clause (g) "stores" shall not include spare parts or tools in relation to any goods to which the provisions of this section applies.

(j) which relates to goods sold by a principal through his agent in respect of which the principal has claimed input tax credit or vice versa,

(k) of goods remaining unsold at the time of closure of business;

(l) of goods which are used in the manufacture, processing or packing of goods, where such manufactured, processed or packed goods remain unsold at the time of closure of business;

(m) of goods where tax invoice in the prescribed form is not available with the dealer or there is evidence that the same has not been issued by the selling dealer;

(n) by a dealer who is exempted from payment of tax;

(o) of goods notified under clause (x) of section 2;

Provided that where a dealer remits differential tax in accordance with the provisions of the Act, he may, for the period up to 30th September, 2010, issue debit note for the tax amount subsequently remitted, to the purchasing dealer to claim input tax credit to the extent of the tax covered in the debit note subject to such condition as may be prescribed.

7. SRO No. 324/2005 is issued by virtue of powers under Clause (x) of Section (2) of the Act. Again item No. 7 at SRO No. 324/2005 refers to several kinds of machinery and it also refers to similar machinery used in connection with supply of labour and services. There is specific reference to JCB excavator as capital goods which is marked in the negative list. In other words, whatever benefit available will not be available so far as purchase of JCB excavator is the meaning of this SRO No. 324/2005.

8. Argument of the learned counsel for the respondent/dealer is to the effect that by virtue of Section 12(1)(b) along with first proviso, whatever is applicable to claim of input tax credit automatically applies to rebate, therefore, once he pays output tax credit, he has to get the input tax credit. Therefore, rebate automatically will come to him. Section 12(1)(b) along with first proviso reads as under:

12. Special rebating in certain cases.-(1) In calculating the net tax payable by a dealer for a return period, there shall be deducted from the tax payable for the return period, a sum equal to,--

(b) the tax paid u/s 3 of the Tax on Entry of Goods into Local Areas Act, 1994 (15 of 1994) on the import of any goods, other than those included in the fourth schedule;

where such goods are intended for resale or for use in the manufacture of taxable goods or for use in the execution of works contract or for use as containers or packing materials for the packing of taxable goods in the state:

Provided that where the special rebate is in respect of capital goods, the same shall be allowed over a period of three years and all the conditions and restrictions applicable to input tax credit under sub-section (2) of section 11 shall apply to the special rebate under this section also.

Reading of Section 12(1)(b) clearly indicates that the special rebate available in respect of capital goods also can be allowed over a period of three years and all the conditions available for claiming input tax credit applies mutatis mutandis to the claim of rebate also. We fail to understand this argument of the learned counsel appearing for the respondent/dealer for the simple reason that at Clause 7 of the items described under SRO No. 324/05 it is explicitly clear that JCB excavator is in the negative list. Therefore, once it is notified as negative item described as capital goods, automatically the benefit of input tax credit so also the benefit of rebate are not available to him, though the procedure to claim such rebate has to be in accordance with the procedure to claim input tax credit. Mere payment of output tax credit will not automatically make the dealer entitle for rebate for the reason that the procedure to be followed is the same as claim for input tax credit. There is no specific statutory provision or notification of the

Department indicating that once output tax liability is attached to the dealer, automatically he is entitled for rebate provided u/s 12(1)(b) of the Act. In that view of the matter, we are of the opinion, the learned Single Judge was not justified in quashing Ext. P1 extending the benefit of rebate to the dealer as available u/s 12(1)(b) of the Act. Hence the Writ Appeal is allowed.

In view of the decision in Thressiamma L. Chirayil Vs. State of Kerala, the entry tax act came to be quashed. Again the question would be whether the entry tax already paid by the dealer should be refunded to him or to be adjusted for future assessment. The matter is pending consideration before the Apex Court. Therefore the refund of entry tax is subject to the result of litigation pending before the Apex Court challenging the decision of this Court in Thressiamma L. Chirayil''s case (supra).

