**(2017) 01 KL CK 0080**

**In the High Court Of Kerala**

**Case No :** W.P.(C).Nos. 806 of 2017-A and 35319 of 2016-L

I.K. Muneer APPELLANT

Vs

The Commercial Tax Officer RESPONDENT

**Date of Decision :** 20-01-2017

**Acts Referred:**
Kerala Value Added Tax Act, 2003 — Section 55, Section 74

**Citation :** (2017) 1 KLT 605

**Hon'ble Judges :** Mr. K. Vinod Chandran, J.

**Bench :** Single Bench

**Advocate :** Sri. Bobby John and Sri. S. Ajayghosh Kumar, Advocates, for the Petitioner; Sri. V.K. Shamsudheen, Government Pleader, for the Respondent Nos. 1 to 4; Sri. R.S. Kalkura, SC, for the Respondent No. 5

**Final Decision :** Allowed

## Judgement

Mr. K. Vinod Chandran, J.—The identical petitioner is aggrieved with two inter connected actions of the Commercial Taxes Department, which have to be dealt with separately.

2. The petitioner, in W.P.(C) No.806 of 2017 is aggrieved with the assessment order, under the Kerala Value Added Tax Act, 2003 [for brevity "KVAT Act"], for the year 2014-15 as passed by Exhibit P6. The assessment was re-opened on the basis of a compounding effected, on an offence detected. The pre-assessment notice also made proposals for re-opening on other counts also. The petitioner, as of now, is aggrieved with the re-opening made on the compounding made and accepted by the petitioner on the ground that the turnover computed as suppressed by the Intelligence Officer and the Maximum Retail Price (MRP) taken to estimate the sales turnover of the suppressed opening stock.

3. The petitioner also submits that a rectification application was filed from the compounding application on the assessment being finalised. The challenge against the compounding fee determined is also on the ground of irregularity in

computing the suppressed turnover and erroneously applying the MRP to arrive at the sales turnover. The rectification application was dismissed as per Exhibit P2. The petitioner is said to have filed a revision before the Deputy Commissioner as per Exhibit P3 against the rejection of the rectification application, which was filed to rectify the order of compounding. The petitioner contends that while the revision is pending, there could be no recovery made as per Exhibit P6 assessment, since if the revision is allowed in favour of the petitioner and the compounding fee reduced; the assessment also would be proportionately reduced. The learned Counsel relies on a Division Bench decision of this Court in Trichur Auto Spares v. State of Kerala [(2014) 22 KTR 508 (Ker)] to contend that the order of compounding though on the option and admission of the assessee, could be challenged by the assessee.

4. The learned Government Pleader submits that compounding cannot be disturbed going by the decision of the Division Bench in Jaya Jewellers v. The Commissioner of Commercial Taxes in W.P.(C) No.19641 of 2003 dated 20.09.2007. The learned Government Pleader would submit that the turnover computed as suppression and the sale price proposed to be assessed for the suppression detected were specified in the penalty notice and the same was also evident from Exhibit P1. It is also submitted that the value of closing stock detected as suppressed came to only Rs.2,30,000/- while the total suppressed turnover came to more than Rs.59,00,000/-. Further, it is submitted that Exhibit P1 was passed after notice of proposal for penalty and the order too was handed over to the petitioner; on the basis of which the petitioner had made the deposit of the compounding fees. There was no appeal filed against Exhibit P1. Only at the stage of finalisation of assessment, the petitioner turned around and sought for rectification of the compounding order, which is not permissible under the Act.

5. Jaya Jewellers was a case in which the Division Bench held so:-

"12. Admittedly, the business premises of the petitioner was inspected by the Sales Tax Officers on 13.10.1997. After such inspection, they have found out not only certain anomalies in the stocks but also non-maintainability of books of accounts by the dealer as required under the Rules. Nearly after five days from the date of inspection, the petitioner had filed an application before the authorities expressing his willingness to compound the offence departmentally. There was no threat or coercion from the side of the authorities, directing the petitioner to make any application after the date of inspection. If for any reason, the authorities had compelled the petitioner to make an application for compounding the offence departmentally, it was open to the petitioner to have filed a complaint against the authorities before the superior forum. But, in fact, the petitioner had filed an application before the authorities concerned to compound the offence departmentally. Once the offer is made, it is for the prescribed authority to determine whether the offence should be compounded or not. The process of compounding would be complete only when the money offered is accepted by the authority concerned. Once the compounding of the offence is complete, the person who has committed or reasonably suspected of having committed an offence under the Act cannot be aggrieved person".

(emphasis supplied)

6. It was categorically held that the process of compounding would be complete when the fee offered is accepted by the authority concerned and when payment has been made, then there is no further scope for a challenge against the compounding order.

7. The learned Counsel would urge that apparently there is a conflict with the later Division Bench in Trichur Auto Spares, which held so:

"8. It is clear from a reading of Section 74 that an assessee who opts for the benefit of the said provision, accepts the commission of the offence alleged to have been committed by it. Once it does that, the competent authority proceeds to determine the compounding fee payable by the assessee in accordance with clause (a) or (b) of sub-section (1) of the said Section. We feel that in such a situation, it will not be open to an assessee who opts for compounding under the said Section, and thereby avoids adjudication proceedings for penalty and prosecution under the Act, to turn around and contest the order of the competent authority accepting its application for compounding the offence. We are of the view that the scheme of composition of offences under Act does not permit an assessee to approbate and reprobate. No doubt it may be open, in cases of patent mistakes in the quantification of the compounding fee payable, for an assessee to contest the order of the competent authority in an appeal under Section 55 of the Act but that recourse can be had only in cases where the mistake is one that is relatable solely to the quantification of the compounding fee and does not militate against the admission by the assessee of its having committed the offence alleged against it. The legal justification for such an appeal would be the contention that while the assessee has admittedly compounded the offence, the department has no right to demand or collect any amount towards compounding fee, as is in excess of what is authorised by the statutory provision".

(emphasis supplied)

This court is of the opinion that on a closer reading of the two decisions, there would be no conflict found in the principles laid down.

8. Trichur Auto Spares looked into the appeal provision contained in Section 55 of the KVAT Act and the provision of composition, Section 74, to find that nothing excludes the right to challenge the order passed under Section 74. The assessee having agreed for compounding, could not resile from the admission of the offence as such. However, the scheme of compounding, relatable to Section 74, provides for a discretion on the Officer to decide on the compounding fee subject to a maximum as prescribed. Necessarily when a discretion is involved, it has to be exercised by the officer on the well-accepted principles and norms for such

 

exercise; an arbitrary exercise leading to a possible challenge. Even if there is no appeal, definitely an order of compounding could be challenged under Article 226 of the Constitution, but only to the extent of the fixation of the compounding fees. The Division Bench in Trichur Auto Spares found that there is no exclusion in section 55 from filing an appeal against the order passed under Section 74. It was also found that it will not be open to an assessee to opt for compounding and turn around and contest the order of the competent authority accepting its application for compounding of offence. What could be challenged in an appeal under Section 55 is an issue solely relatable to the quantification of the compounding fee and does not militate against the admission by the assessee of it having committed the offence alleged against it.

9. It is also to be noticed that in Trichur Auto Spares after accepting the offence, the Intelligence Officer issued an order of compounding and even before the compounding fees were paid, the assessee challenged it in appeal. In Jaya Jewellers, there was an admission made, offence compounded and remittance of the compounding fee; against which an appeal was filed, which was held by the Division Bench to be not maintainable. If any challenge has to be made, even going by Trichur Auto Spares, the same could only lead to consideration of patent mistakes in the fixation of the compounding fee payable. In the present case the petitioner paid the compounding fees without any challenge; which concludes the exercise.

10. The petitioner herein accepted the offence and agreed for compounding. Exhibit P1 order of compounding was issued and the petitioner remitted the entire amounts. Only on assessment being proceeded with on the basis of the offence detected, a rectification application was made. Obviously, a rectification application is not maintainable and the assessee, even going by Trichur Auto Spares, had to file an appeal under Section 55. The rectification having been rejected, the assessee was in a revision. The prayer in the writ petition is for keeping the assessment proceedings in abeyance while the revision is considered. The rectification itself being not permissible or maintainable, the revision attempted is futile.

11. The assessee, as is seen from the revision filed, is also not aggrieved by the computation of the compounding fee but of the computation of suppression made of turnover and the sale price taken to arrive at the sales turnover; on the suppressed turnover. This was intimated to the assessee by the penalty authorities, after which the assessee accepted the offence and agreed to compound the offence. The assessee was issued with an order of compounding, in which also the computation of suppressed turnover and the sale price taken were clearly laid out. The assessee did not choose to file appeal from the said order and paid the amounts determined as compounding fees. In such circumstance, this Court is of the opinion that the assessee''s case falls under the declaration made by the Division Bench in Jaya Jewellers. There is absolutely no reason why the assessment order should be kept in abeyance, till a revision

 

which has been held to be not maintainable, is disposed of. W.P.(C) No.806 of 2017 is, hence, dismissed.

12. W.P.(C) No.35319 of 2016 is filed against the communication at Exhibit P3, blocking the online facility of the petitioner, who is a registered dealer. The respondent-State has not been able to point out any provision to carry out such an action. In such circumstance, the petitioner shall be allowed to operate the online facility as a registered dealer. W.P.(C) No.35319 of 2016 is allowed.

13. Ordered accordingly. Parties are left to suffer their respective costs.

 