(2015) 04 KAR CK 0349

In the Karnataka High Court

Case No : Sales Tax Revision Petition No. 171 of 2014

Indus Towers Limited APPELLANT

Vs

State of Karnataka and Others RESPONDENT

Date of Decision : 16-04-2015

Acts Referred:

Karnataka Value Added Tax Act, 2003 — Section 2, 2(28), 30, 35, 35(1)

Citation : (2015) 4 AKR 14 : (2015) 321 ELT 247 : (2015) 51 GST 398 : (2015) 81 VST 505

Hon'ble Judges : Vineet Saran, J;S. Sujatha, J

Bench : Division Bench

Advocate : K.S. Naveen Kumar, for the Appellant; K.M. Shivayogiswamy, Additional Government Advocate, Advocates for the Respondent

Judgement

Vineet Saran, J.—The revision-petitioner is engaged in the business of providing passive infrastructure telecom services to its operators and is registered under the Karnataka Value Added Tax Act, 2003 ("the KVAT Act", for short). The petitioner is assessed to VAT under the provisions of the KVAT Act and has been discharging its tax liability from time to time since its registration on December 4, 2007. The dispute in the present revision petition relates to the month of January 2009. For the said tax period, the petitioner had filed a "nil" return on February 20, 2009, which was within the prescribed twenty days period. It is the case of the petitioner that it was unable to ascertain the turnover for the month in question on account of certain software issues at the head office and therefore, to comply with the filing of the return required by the due date, it had filed a "nil" return. However, subsequently when the correct facts and figures were available with the petitioner, it voluntarily filed a revised return on March 16, 2009 which was without any receipt of intimation or notice from the respondent-authorities. In the said revised return, the petitioner disclosed a turnover of over Rs. 7 crores and discharged the entire tax liability along with interest up to March 16, 2009. The aforesaid facts are not disputed by the parties. It is also not disputed that the revised return, as well as the tax and the interest deposited by the petitioner, were duly accepted by the respondents, meaning thereby that the revised return filed by the petitioner had been accepted by the Department. The validity of the revised return or the tax and interest deposited by the petitioner has not been questioned by the Department at any stage.

2. Then, after a gap of more than three years, on June 18, 2012, a notice was issued requiring the petitioner to submit a reply as to why penalty under section 72(2) of the KVAT Act be not imposed for under-statement of tax liability, which was more than five per cent of the tax paid during the period in question. In response to the same, the petitioner submitted its reply on July 2, 2012. Thereafter, on July 16, 2012, the second respondent/Assistant Commissioner passed an order imposing penalty of Rs. 8,82,408, being 10 per cent of the alleged understated tax liability. On the same date, a demand notice was also issued by the Assistant Commissioner. Challenging the same, the petitioner filed an appeal before the Joint Commissioner (Appeals) which was dismissed on February 15, 2013. A second appeal was filed by the petitioner before the Karnataka Appellate Tribunal which was also dismissed by the Tribunal vide its order dated January 29, 2014. Aggrieved by the said orders, this revision petition has been filed under section 65(1) of the KVAT Act.

3. We have heard Sri K.S. Naveen Kumar, learned counsel for the petitioner as well as Sri K.M. Shivayogiswamy, learned counsel for the respondents at length and perused the records.

4. The facts as stated above are not disputed by the learned counsel for the parties. The question to be now decided by this court is as to whether in the facts and circumstances of the case, when the petitioner had itself voluntarily filed the revised return under section 35(4) of the Act and had also deposited the tax along with interest, which was not as a result of any inspection or receipt of information or evidence by the prescribed authority, could penalty be still imposed under section 72(2) of the KVAT Act.

5. The learned counsel for the petitioner has submitted that imposition of penalty under section 72(2) of the KVAT Act is not automatic, although the liability to pay the interest on the admitted tax for the delayed period may be so. It is thus contended that the petitioner, on having filed the revised return and paid the admitted tax along with interest for the delayed period, and its return having been accepted by the authorities, the question of imposition of penalty under section 72(2) of the Act would not arise. Learned counsel for the petitioner has also submitted that the provisions of section 72(2) of the Act would not be attracted and, in the facts of the present case, the only return which was there for consideration before the authorities was the revised return filed under section 35(4) of the KVAT Act, and there was no under statement of the liability of the petitioner to pay the tax in the said return, and it is only on an understatement of its liability to tax in the return, that penalty could have been imposed.

6. The learned counsel for the respondents has however, submitted that the very fact that in the first return filed on February 20, 2009, the petitioner had declared "nil" tax liability and thereafter, had admitted the tax liability of over Rs. 88 lakhs in its revised return filed on March 16, 2009, would clearly show that there was understatement in the original return to an extent of over five per cent, and the same would attract imposition of penalty under section 72(2) of the KVAT Act. It is further been submitted by the counsel for the respondents that the penalty imposed is civil liability and as such, there is no question of mens rea and once the liability of payment of tax has been accepted by filing a revised return, the imposition of penalty is mandatory.

7. Having heard the learned counsel for the parties and considering the facts and circumstances of the case, we are of the view that the imposition of penalty under section 72(2) of the KVAT Act was not warranted in the present case. For proper appreciation of the facts and law, it would be necessary to consider the provisions of section 2(28) which provides the definition of "return"; section 35 relating to return; section 42(7) relating to payment of tax with revised return; and section 72(2) of the KVAT Act relating to returns and assessment. For ready reference, the relevant sections are reproduced below:

"S. 2(28) ''Return'' means any return including a revised return prescribed or otherwise required to be furnished by or under this Act.

S. 35. Returns.--(1) Subject to sub-sections (2) to (4), every registered dealer, and the Central Government, a State Government, a statutory body and a local authority liable to pay tax collected under sub-section (2) of section 9, shall furnish a return in such form and manner, including electronic methods, and shall pay the tax due on such return within twenty days or fifteen days after the end of the preceding month or any other tax period as may be prescribed.

Provided that...

Provided further that...

(2) and (3)...

(4) If any dealer having furnished a return under this Act, other than a return furnished under sub-section (3) of section 38, discovers any omission or incorrect statement therein, other than as a result of an inspection or receipt of any other information or evidence by the prescribed authority, he shall furnish a revised return within six months from the end of the relevant tax period except when such revised return is on issue of a debit note under section 30, subject to sub-section (2) of section 72.

S. 42. Payments and recovery of tax, penalties, interest and other amounts and issuance of clearance certificates.--(1) to (6)...

(7) A registered dealer, furnishing a revised return in accordance with this Act which shows a greater amount of tax to be due than was paid or payable in

accordance with the original return, shall pay with the revised return the tax so payable in such manner as may be prescribed.

S. 72. Penalties relating to returns and assessment.--(1)...

(2) A dealer who for any prescribed tax period furnishes a return which understates his liability to tax or overstates his entitlement to a tax credit by more than five per cent of his actual liability to tax, or his actual tax credit, as the case may be shall after being given the opportunity of showing cause in writing against the imposition of a penalty, be liable to a penalty equal to ten per cent of the amount of such tax under or overstated."

8. Section 35(1) of the KVAT Act provides for filing of return within twenty days after the end of the preceding month. In the present case, the said period of twenty days was to expire on February 20, 2009, on which date the petitioner had filed its return for the relevant tax period of January, 2009. Sub-section (4) of section 35 provides for filing of revised return which could be filed within six months from the end of the relevant tax period. In the present case, the petitioner had filed the revised return within twenty four days, i.e., on March 16, 2009 and had also deposited the admitted tax and interest for the delayed period. Sub-section (7) of section 42 provides for payment of tax along with the revised return, which the petitioner has undisputedly deposited.

9. Now the question for consideration before us would be, whether it would be the "revised return" furnished by the petitioner to be considered as the "return" under sub-section (2) of section 72 or would it be the "original return" filed on February 20, 2009 to be considered as the "return" for the purpose of the said sub-section. The definition of "return" under sub-section (28) of section 2 clearly means to be a "return" including a "revised return". As such, we are of the firm view that under the KVAT Act, there cannot be any dispute that "revised return" is also a "return".

10. While dealing with cases under the Income-tax Act, the High Court of Karnataka, Punjab and Haryana and Allahabad have held that once a valid revised return is filed by the assessee, it completely effaces or obliterates the original return and therefore, it is only the revised return that has to be taken into account for the purpose of making assessment (viz., Commissioner of Income Tax Vs. Mangalore Chemicals and Fertilizers Ltd., (1991) 96 CTR 198 : (1991) 191 ITR 156 : (1991) 59 TAXMAN 508 ; 1991(59) Taxman 508 (Kar) , Chief Commissioner of Income Tax (Administration) Vs. Machine Tool Corporation of India Ltd., (1992) 108 CTR 110 : (1992) ILR (Kar) 3304 : (1993) 201 ITR 101 : (1993) 67 TAXMAN 363 ; [1993] 67 Taxman 363 (Kar) , Beco Engineering Co. Ltd. Vs. Commissioner of Income Tax, (1984) 41 CTR 249 : (1984) 148 ITR 478 ; [1984] 18 Taxman 44 (P&H) , Dhampur Sugar Mills Ltd. Vs. Commissioner of Income Tax, (1973) 90 ITR 236 .

11. Though the said judgments relate to the Income-tax Act but we are of the opinion that for the purpose of the KVAT Act also, on the same principle, the

original return would be obliterated once the revised return has been filed by the assessee and duly accepted by the Department.

12. Now what we have to see is as to whether there can be two returns under consideration at the same time. Once a revised return has been filed and accepted by the Department, the original return gets obliterated and the only return which remains for consideration would be the revised return, as there cannot be two live returns pending consideration of the Department. In the present case, as a matter of fact, not only the revised return had been filed by the petitioner, but the same was also accepted by the respondents, and the validity of the revised return is not in question or in dispute. Once the revised return has been accepted and acted upon by the parties, then it is only the revised return which has to be taken as the sole return for the purpose of sub-section (2) of section 72.

13. In the light of the aforesaid, we may now proceed to consider the provisions of section 72(2) of the KVAT Act which provides that a dealer, who, for any prescribed tax period, furnishes a return which understates its liability to tax by more than five per cent of its actual liability of tax, shall be liable to a penalty equal to 10 per cent of the amount of such tax understated (only such portion of the said sub-section (2) has been reproduced which is relevant for the purpose of this case). We have already held that for the prescribed tax period, the return to be considered was the revised return filed on March 16, 2009 and not the original return filed on February 20, 009, which had been nullified or obliterated after the filing and acceptance of the revised return. Then, it cannot be said that there was any understatement of the tax liability by the petitioner to any extent in its revised return (which was the only return to be considered), as in terms of the said revised return, the entire tax along with interest, had been paid. In such view of the matter, we are of the opinion that in the facts of the present case, the provision of sub-section (2) of section 72 of the KVAT Act would not be attracted.

14. A Division Bench of this court, in the case of (State of Karnataka v. GMR Energy Limited [2015] 81 VST 500 (Karn)) STRP No. 40 of 2014 (decided on October 9, 2014) was dealing with a case where in the original return filed by the assessee therein, the assessee had declared "nil" sales and "nil" tax and thereafter, filed a revised return within eleven days after the filing of the original return and paid the entire tax with interest for the said eleven days. In such facts, this court held that "...levy of penalty was not justifiable because the assessee had filed a revised return, paid tax and interest within a span of 11 days. Hence, imposition of penalty is not being automatic unless the intention to evade tax is made out or any mala fide act is made out, the penalty cannot be imposed..." Although the reasons for arriving at such conclusion in the aforesaid case were different, but in the said judgment also it has been held that imposition of penalty in the facts similar to the facts of the present case, could not be justified under section 72(2) of the Act. In view of the aforesaid, we allow

this revision petition and set aside the order of the Tribunal as well as the authorities below. There shall be no order as to costs.

