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(2009) 11 KL CK 0036

In the High Court Of Kerala

Case No : S.T. Rev. No. 219 of 2009

Joy Alukkas Traders APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 11-11-2009

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 17(1), 17(3), 19(1), 2, 23(3)
Kerala General Sales Tax Rules, 1963 — Rule 30

Citation : (2009) 11 KL CK 0036

Hon'ble Judges : V.K. Mohanan, J;C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Harisankar V. Menon and Meera V. Menon, for the Appellant; Muhammed Rafiq, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The question raised in the revision filed by the Assessee is whether the Sales Tax Appellate Tribunal was justified in upholding the order of the Deputy Commissioner issued u/s 35 of the Kerala General Sales Tax Act, 1963 (for short ''the K.G.S.T. Act'') wherein he directed revision of Assessee''s assessment for the year 2003-2004 at the compounded rate as provided u/s 7(1)(a) of the K.G.S.T. Act by taking into account the turnover of all the branches of the Assessee in Kerala.

2. We have heard Advocate Sri Harisankar V. Menon appearing for the revision Petitioner and the Government Pleader appearing for the Respondent.

3. The facts leading to the controversy are the following:

The Assessee is engaged in the business of gold jewellery. It has it''s head office at Ernakulam and three branches in the State at Kottayam, Angamaly and Thodupuzha. The Assessee holds single registration under the K.G.S.T. Act with branch certificate for each of the three branches. During the assessment year 2003-2004, the Assessee made an application before the Assessing Officer in

Form No. 21 for payment of tax at compounded rate as provided u/s 7(1)(a) of the K.G.S.T. Act for two branches located at Kottayam and Angamaly. Even though the scheme for payment of tax under compounding rate u/s 7(1)(a) is in lieu of tax payable u/s 5(1) by the dealer for his total turnover which would include turnover of head office and all branches in the State, the Assessing Officer, without noticing the statutory scheme, ordered the Assessee to pay tax under the compounding scheme only for the two branches applied for by them. Approval for payment of tax u/s 7(1)(a) was granted by the assessing officer by issuing Form No. 21A based on which Assessee started remitting tax. Since the compounding scheme for payment of tax was granted only for two branches, the Assessee started filing regular returns and remitting tax thereon for the business carried on in the head office and another branch. After the end of the year, the assessment was completed by the assessing officer u/s 17(3) of the K.G.S.T. Act wherein tax is computed under the compounding scheme for two branches and tax is assessed u/s 5(1) for the head office and another branch based on the turnover determined by him, which is in partial modification of turnover returned by the Assessee. The assessment was scrutinised by the Deputy Commissioner and on scrutiny of the assessment by the Deputy Commissioner, he noticed that the assessment is not in accordance with the charging provisions of Sections 5(1) and 7(1)(a) of the Act inasmuch as, there is no provision for compounding of part of the turnover and payment of tax for the balance turnover. He, therefore, initiated proceedings u/s 35 and ordered revision of assessment by directing assessment u/s 7(1)(a) in terms of the request made by the Assessee and accepted by the officer, but by including the business of all Branches of the Assessee in terms of Section 7(1)(a) of the K.G.S.T. Act.

4. The Assessee filed appeal against the order of the Deputy Commissioner issued u/s 35 contending that the order is time barred and that the regular assessment completed by the assessing officer is permissible under the provisions of the Act and Rules. On the question of limitation, the contention of the Assessee was that the mistake, if any, is in the permission granted by the officer on application filed by the Assessee for compounding under Rule 30 of the K.G.S.T. Rules and so much so, the revision, if any, u/s 35 should have been on the approval granted by the officer for compounding, i.e., with reference to the compounding order in Form No. 21A and demand in Form No. 22, for payment at compounded rate, with reference to which the matter was time barred. However, the Tribunal found that the order revised by the Deputy Commissioner was a regular assessment which was completed u/s 17(3) which led to reduced payment of tax on account of misapplication of the compounding scheme by the assessing officer and the order directing revision of assessment u/s 35 was issued by the Deputy Commissioner within the time frame prescribed therein. The Tribunal, accordingly, rejected the challenge against the order of the Deputy Commissioner on ground of limitation. So far as the challenge against the order on merits, the Tribunal concurred with the findings of the Deputy Commissioner because, according to them, the partial compounding is not permissible u/s 7(1)

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(a) and Assessee''s request for the same is impermissible u/s 7(1)(a) read with Section 5(1) of the Act. It is against these findings of the Tribunal, the Assessee has filed this revision.

5. The first question to be considered is whether the partial compounding applied for by the Assessee and approved by the assessing officer is permissible under the provisions of Section 7(1)(a) of the Act which are extracted herein below for easy reference:

7. Payment of tax at compounded rates.--(1) Notwithstanding anything contained in Sub-section (1) of Section 5,

(a) any dealer in gold or silver ornaments or wares may, at his option, instead of paying tax in accordance with the provisions of that sub-section, pay tax at two hundred per cent of the tax payable by him as conceded in the return or accounts for the tax paid for the immediate preceding year whichever is higher.

Explanation.-- For the purpose of this clause ''tax payable as conceded in the return or account for the immediate preceding year'' means tax payable on the sales turnover under Sub-section (1) of Section 5 and the tax payable on the purchase turn over u/s 5A:

Provided that where during the preceding year, the dealer had not transacted business for any period the tax payable for the whole year shall be calculated proportionately on the basis of the tax payable for the period during which such dealer had transacted business:

Provided also that where such a dealer acquires any running business or a branch of a business with respect to gold, silver ornaments or wares during the year, the amount of compounding tax payable in respect of such business shall be calculated in accordance with the provisions of this clause as if it were an independent business, taking into account the turnover conceded in the return or accounts thereof for the previous year with respect to that business or on the quantum of compounded tax fixed for the previous year in accordance with Clause (a);

Provided also that where a dealer paying tax in accordance with the provisions of this sub-section opens a new branch during a year, such branch shall be treated as if it were an independent place of business and the provisions of this sub-section shall apply to it accordingly.

6. It is very clear from the above provisions that the payment of tax at compounded rate u/s 7(1)(a) is an option given to the Assessee to pay tax under the compounding scheme in lieu of tax payable u/s 5(1) of the Act. Therefore, necessarily, the scope of Section 7(1) has to be considered with reference to the main charging section otherwise applicable to the Assessee, which is Section 5(1). There is no dispute that the liability for sales tax for a dealer u/s 5(1) is on the total turnover u/s 2(xxvi) which means the aggregate turnover in all goods of a dealer at all places of his business in the State. Therefore, the compounding,

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as an alternate method of payment of tax u/s 7(1)(a), is for the business as a whole irrespective of the number of branches maintained by the Assessee. In fact, Section 7(1)(a) provides for payment of tax at compounded rate only in respect of one line of business, i.e., any gold or silver ornaments or wares and if Assessee is engaged in any other line of business, the compounding u/s 7(1)(a) will apply for only business in gold and silver ornaments and wares. In other words, in the same line of business, viz., gold and silver ornaments, the Assessee cannot opt to pay tax under compounding scheme for some branches and pay tax on the turnover for the other branches u/s 5(1) of the K.G.S.T. Act. Under the second and third provisos to Section 7(1), compounding is to be done by including the turnover of branches maintained where business carried on is in gold and silver ornaments and wares. Therefore, the assessing officer clearly committed violation of statutory provisions by allowing payment of tax at compounded rate u/s 7(1)(a) in respect of gold business in two branches and by permitting payment of tax u/s 5(1) on the turnover of gold and silver ornaments in the head office and another branch. The Assessee, who is engaged only in the business of gold and silver ornaments and wares, is liable to be assessed u/s 7(1)(a) for the entire turnover covering the head office and all the branches in the State. However, if the Assessee is engaged in the other line of business, i.e., business other than in gold and silver ornaments and wares, then in respect of such other line of business, the Assessee is entitled to pay tax u/s 5(1) along with payment of tax at the compounding rate u/s 7(1)(a) in respect of the jewellery business carried on all the branches. The Deputy Commissioner, therefore, rightly found that the assessment completed is against the scheme of charging section u/s 7(1)(a) of the Act. Since the regular assessment has led to loss of revenue, the Deputy Commissioner rightly directed revision of assessment. We therefore hold that the Tribunal rightly confirmed the order of revision on merit.

7. The next contention raised by counsel for the Petitioner is that the mistake, if any, is in the approval granted by the assessing officer in Form No. 21A permitting the payment of tax at compounded rate only for two branches and simultaneously, permitting the Assessee to pay tax u/s 5(1) for the head office and another branch and so much so, the order prejudicial to the interest of the revenue requiring correction through revision u/s 35 is Form No. 21A. According to counsel, since the Deputy Commissioner has not revised the said order, he has no jurisdiction to revise the regular assessment made in consonance with the compounding scheme approved by the assessing officer. The Government Pleader, on the other hand, contended that Form No. 21A is only an approval granted on application filed under Rule 30 and in such case, the dealer is permitted to file return under Sub-clause (5) of Rule 30 in Form No. 9 on which the assessment has to be made by the assessing officer u/s 17(1) or 17(3) of the Act. It is clear from Form No. 21A and Form No. 22 issued under Rule 30 that the payment of tax based on the approval and the demand notice are only provisional and the same has to find acceptance in a regular assessment. In

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other words, even if there is a mistake or omission in the approval granted by the assessing officer, it is within his powers to modify such order and demand the tax escaped under the compounding scheme in regular assessment or later by revising assessment u/s 19(1). The power of the Deputy Commissioner u/s 35, of course, can be exercised in respect of any order passed by the assessing officer which is prejudicial to the interest of the revenue. Therefore, the approval granted in Form No. 21A and the demand notice issued under Form No. 22 also could be corrected by initiating proceedings u/s 35 if the Deputy Commissioner is of the view that approval granted and the demand tax are detrimental to the interest of the revenue. However, failure or omission on the part of the Deputy Commissioner in interfering at that stage does not bar him from scrutinising the correctness of the regular assessment completed u/s 17(3). We have already found that the monthly payment of tax based on the approval for compounding granted by the assessing officer in Form No. 21A and the demand notice issued under Form No. 22 are only provisional and the same should find acceptance in a regular assessment. When a regular assessment is completed by the assessing officer, his earlier orders issued in Form No. 21A and Form No. 22 for payment of tax under compounding scheme do not survive any longer because the final assessment supersedes all those proceedings. No purpose will be served by modifying those orders which have lost significance once assessments are made. Therefore, we are of the view that the Deputy Commissioner is competent to revise an assessment prejudicial to the interest of the revenue, no matter, such assessment is completed based on an erroneous compounding order passed by the Officer in Form No. 21A which was not cancelled or revised by the Deputy Commissioner. There is no dispute that the order issued by the Deputy Commissioner u/s 35 is within the time for revision of regular assessment passed by the assessing officer u/s 17(3). So much so, the Tribunal rightly rejected the Assessee''s challenge against the order of the Deputy Commissioner on the ground of limitation.

8. The last contention raised by the Assessee''s counsel is that the compounding scheme is a contract between the Department and the Assessee and the same, when incorporated in assessment, cannot be revised by the Deputy Commissioner in exercise of suo motu revisional power u/s 35 of the K.G.S.T. Act. Counsel has relied on a Division Bench decision of this Court reported in Jyothish Kumar v. State of Kerala (1994) 95 S.T.C. 527 and that of the Supreme Court in State of Kerala and another Vs. Builders Association of India and others, . In this case, the scheme of compounding for payment of tax had been opted by the Assessee and accepted by the Department. However, the question to be considered is whether a wrong order passed on a compounding application which has resulted in reduced payment of tax at compounded rates in violation of the statutory provisions could be corrected by a higher authority exercising supervisory jurisdiction over the assessing officer. We are unable to accept the proposition that an option exercised by Assessee to pay the tax under compounded scheme, accepted by the officer amounts to a contract between the

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Assessee and the assessing officer. The assessing officer is the first authority created under the statute to determine the tax payable under the Act, which includes the scheme of payment of tax at the compounding rate provided u/s 7(1)(a). The entire scheme of levy, payment and recovery of tax and the procedure to be followed are exhaustively dealt with in the statutory provisions. If there is any violation of the provisions of the Act in regard to the filing of the application for compounding by the Assessee and acceptance of the same by the officer, leading to loss of revenue, the Deputy Commissioner u/s 35 has full power to interfere with the orders issued by the Assessing Officer and correct the same within the time stipulated under the Act. In other words, in our view, the compounding scheme for payment of tax opted by the Assessee and accepted by the officer, does not achieve finality, because it is subject to supervisory jurisdiction by the Deputy Commissioner. Therefore, if the scheme approved by the officer is in violation of the charging provision, then the Deputy Commissioner has power u/s 35 to correct the same which extends to even correction of final assessment wherein tax is finally determined. In our view, no contract between Assessee and Assessing Officer is conceived under the Act and no order of the officer prejudicial to the Revenue is immune from scrutiny by the Deputy Commissioner u/s 35 of the Act. We therefore decline to interfere with the order of the Tribunal on this ground also. Consequently, we dismiss the Tax Revision Case.

9. We notice that the Assessee will have liability to pay interest partly because of the mistake committed by the officer in approving the compounding applied for by the Assessee in violation of the charging provision. We therefore direct the assessing officer to limit levy of interest u/s 23(3A) or Section 23(3) at compensatory rate of 12% per annum, for the entire period of delay.

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