(2023) 10 KL CK 0001

In the High Court Of Kerala

Case No : Other Tax Revision No.193 Of 2017 & Review Petition No.589 Of 2023 In Other Tax Revision No.193 Of 2017

Kalyan Jwellers India Ltd — APPELLANT

Vs

State Of Kerala — RESPONDENT

Date of Decision : 03-10-2023

Acts Referred:
Kerala Value Added Tax Act, 2003 — Section 6, 6(1), 6(2), 8, 8(f), 8(f)(v), 63
Kerala Value Added Tax Rules, 2005 — Rule 10, 10(1)(h), 10(1)(h)(ii)

Citation : (2023) 10 KL CK 0001

Hon'ble Judges : Dr. A.K. Jayasankaran Nambiar, J;Mohammed Nias C.P., J

Bench : Division Bench

Advocate : Arvind P. Datar, S.Anil Kumar, K.S.Hariharan Nair, Mohammed Rafiq

Final Decision : Disposed Of

Judgement

D r. A.K. Jayasankaran Nambiar, J.

1. The petitioner, who is a jeweller and dealer registered under the Kerala Value Added Tax Act [hereinafter referred to as the "KVAT Act"], was paying tax on compounded basis under Section 8 of the Act during the assessment years 2009 – 2010 and 2010 – 2011. For the assessment year 2011 -12 also the petitioner sought and obtained permission to pay tax on compounded basis. It is significant that at the time when the petitioner opted for payment of tax on compounded basis, the relevant portions of Section 8(f) of the KVAT Act read as follows:

"8. Payment of tax at compounded rates

(f) (i) any dealer in ornaments or wares or articles of gold, silver or platinum group metals including diamond may at his option, instead of paying tax in respect of such goods in accordance with the provisions of section 6, pay tax at, -

(a) one hundred and fifteen per cent, in case their annual turnover for the above goods for the preceding year was rupees ten lakhs or below;

(b) one hundred and twenty per cent, in case their annual turnover for the above goods for the preceding year was above rupees ten lakhs and up to rupees forty lakhs;

(c) one hundred and thirty five per cent; in case their annual turnover for the above goods for the preceding year was above rupees forty lakhs and up to rupees one crore; and at

(d) one hundred and fifty per cent; in case their annual turnover for the above goods for the preceding year exceeded rupees one crore;

of the highest tax payable by him as conceded in the return or accounts, or tax paid by him under this Act, whichever is higher, for a year during any of the three consecutive years preceding that to which such option relates;

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(v) Where a dealer had paid tax under this clause for the previous year, the tax payable for the succeeding year under this clause shall be,

(a) one hundred and five per cent of such tax paid during the previous year, in case their turnover for the above goods for the preceding year was rupees ten lakhs or below;

(b) one hundred and ten per cent of such tax paid during the previous year, in case their turnover for the above goods for the preceding year was above rupees ten lakhs and up to rupees forty lakhs;

(c) one hundred and fifteen per cent of such tax paid during the previous year, in case their turnover for the above goods for the preceding year was above rupees forty lakhs and up to rupees one crore; and

(d) one hundred and twenty per cent of such tax paid during the previous year, in case their turnover for the above goods for the preceding year exceeded rupees one crore;

The petitioner accordingly filed returns and paid tax on compounded basis for the months of April, May and June, 2011 as envisaged under the statutory provisions referred above.

2. In May, 2011, consequent to a change in Government, a revised budget was presented and a new Finance Bill was introduced in the Legislative Assembly in July, 2011. This was later passed as the Kerala Finance Act, 2011. The Act brought about a change to the provisions of Section 8(f) and these changes were given retrospective effect from 01.04.2011. The relevant portion of the amended Section 8(f)(v) of the KVAT Act reads as under:

"(v) Where a dealer had paid tax under this clause for the previous year, the tax payable for the succeeding year under this clause shall be calculated at the rates mentioned in item (i) or (ii) below, whichever is higher,--

(i) (a) at the same amount of tax paid during the previous year, in case their turnover for the above goods for the preceding year was rupees ten lakh or above;

(b) at one hundred and five per cent of such tax paid during the previous year, in case their turnover for the above goods for the preceding year was above rupees ten lakh and up to rupees forty lakh;

(c) at one hundred and fifteen per cent of such tax paid during the previous year, in case their turnover for the above goods for the preceding year was above rupees forty lakh and up to rupees one crore; and

(d) at one hundred and twenty five per cent of such tax paid during the previous year, in case their turnover for the above goods for the preceding year exceeded one crore:

Provided that the tax payable under this sub-clause by the dealers covered under Explanation 6 of this clause shall be at the appropriate percentage of tax mentioned in (a), (b), (c) or (d) above, of the tax re-determined under the said Explanation.

(ii) 1.25% of the turnover of sales of the goods covered under this clause, for the previous year."; (emphasis supplied)

3. It is apparent that while at the time of exercising its option for payment of tax on compounded basis for the assessment year 2011– 12, the statutory provision required the petitioner to pay tax @ 125% of the tax paid during the previous year (since their turnover of goods for the preceding year exceeded Rs.1 crore), the amended provisions introduced with retrospective effect required the petitioner to pay tax at the higher of two rates viz (i) 125% of the tax paid during the previous year and (ii) 1.25% of the turnover of sales of the goods for the previous year.

4. The Assessing Authority revised the quantum of compounded tax for the year 2011-12 in the light of the statutory amendment and accordingly the petitioner was directed to pay Rs.13,07,73,895/-instead of Rs.3,00,19,620/- that was computed in accordance with the pre-amended provisions of Section 8(f)(v).

5. The petitioner impugned the revised assessment order before the First Appellate Authority, both on the legality of the assessment as also on the computation shown therein. As regards the latter, it was the contention of the petitioner that the turnover adopted for the year 2010-11 for the computation of the compounded tax for the year 2011-12 erroneously included the turnover in relation to agency sales effected by the petitioner as agent of M/s. Kalyan Jewellers, Kollam and Erode and M/s. Kalyan Jewellers Salem (P) Ltd., Thiruvananthapuram, which resulted in compounded tax being demanded in the year 2011-12 on the same turnover from the petitioner as well as its sister concerns referred above thereby resulting in double taxation.

6. The Appellate Authority allowed the appeal and directed the Assessing Authority to recompute the compounded tax by permitting the petitioner to revise the return for the year 2010-11 in the context of the amendment made in Section 8(f)(v). On the aspect of inclusion of agency sales in the turnover of the petitioner for the year 2010-11, the First Appellate Authority found as follows in its order dated 30.10.2014 (Annexure V):

“The appellant had produced before the undersigned valid declaration in Form 25F in support of their claim to prove the sales effected through the principles for an amount of Rs.3050414268/-. Request of the appellant to revise the return with supporting documents to prove the exempted turnover in view of the amendment in S.8(f) of the KVAT Act, by incorporating turnover conceded in the previous as a criteria for fixing compounded tax for the current year. It is proper and genuine on the part of the assessing authority to provide an opportunity to the appellant to file a revised return with supporting documents.

Out of the total sales through the principal for Rs.338,27,43,222/- only a turnover of Rs.30,50,414,268/- alone is supported by valid declaration in Form 25F. The same have suffered tax at the hands of the principal and this turnover was also taken into account for computing their compounded tax liability for the year 2011-12.

In view of the above the undersigned is satisfied that the averments of the appellant is genuine. Therefore the compounded tax payable for 2011-12 is refixed as shown below.

Total turnover conceded in the annual return Rs.10461911623.00

Turnover included in the return of the principal

For the computation of compounded tax 3050414268.00

Turnover of sale of own goods of the appellant 7411497355.00

Tax due @ 1.25% 92643717.00

Cess payable @ 1% 926437.00

Total 93570154.00

Monthly compounded tax payable:

93570154.00
7797512.00

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The assessing authority is directed to give an opportunity to the appellant to file a revised return for the year 2010-11 with supporting documents within 2 months from the date of this order. Appeal stands allowed.”

7. Annexure V order of the First Appellate Authority was challenged by the State before the Appellate Tribunal. The State contended that the First Appellate Authority was not justified in directing the Assessing Authority to permit a revision of the return for the year 2010-11 since the Assessing Authority had earlier rejected the request of the petitioner for revising returns by its order dated 30.09.2011 and that order has not been challenged by the petitioner. The State also disputed the claim of the petitioner for exclusion of turnover pertaining to agency sales. The Appellate Tribunal allowed the appeal preferred by the State and set aside the order of the First Appellate Authority. The finding of the Appellate Tribunal with regard to the claim for exclusion of turnover pertaining to agency sales is as follows in paragraphs 11 and 12 of its order which read as under:

“11. Main ground urged before the First Appellate Authority was that Rule 10 (h) of the Rules becomes applicable while determining turnover of sales under Sec. 8 (f) (v) (ii) and therefore the turnover which had suffered tax at the hands of the principal should be excluded from computation of turnover of sales. Deduction of turnover worth Rs.305,04,14,268/- (Rupees Three hundred and five crores four lakhs fourteen thousand two hundred and sixty eight only) was claimed as sales by the respondent to its principal for which the principal has paid tax. These contentions were accepted by the First Appellate Authority and the turnover so covered by Form 25F declarations were deducted from the total turnover conceded int eh annual returns of the respondent. According to us this was not correct. As rightly pointed out by the respondent, Sec. 6 (1) and Sec. 8 (f) provide different modes of assessment. As per Sec. 6 (1) every dealer covered by Sub-section (1) shall be liable to pay tax on his sales or purchases of goods as provided in the Act and the liability to pay tax shall be on the taxable turnover. The words, 'on the taxable turnover' were introduced by Act 39 of 2005 w.e.f. 1.4.2005. Thus, as per Sec. 6 (1), a dealer is liable to pay tax on his taxable turnover. Rule 10 provides for determination of taxable turnover. Sub rule (1) of Rule 10 of the Rules provides for deduction of certain amounts specified therein from the total turnover of the dealer to arrive at the taxable turnover. Sub-clause (h) (I) & (ii) of Rule 10 (1) provide for deduction of turnover of sales or purchases made by a dealer through his agent in respect of which tax has been paid by the agent and turnover of sales or purchases made by an agent on behalf of any principal in respect of which tax has been paid by the principal.

12. The deduction provided for under Rule 10 (1) (h) (I) & (ii) of the Rules from the total turnover of the dealer is for arriving at the taxable turnover of the dealer for assessment under Sec. 6(1) and not for computation of compounded rates of tax under Sec. 8. As mentioned earlier, both Sec. 6 (1) and Sec. 8 provide for different modes of assessment and the procedure prescribed for

determining the tax payable under Sec. 6 (1) cannot be adopted for determining the quantum of tax payable at compounded rates under Sec. 8, unless specifically provided for by the provisions. In Sec. 6 (1) the words used are 'taxable turnover' and in Sec. 8 (f) (v) (ii) 'turnover of sale of the goods'. As per Subclause (ii) of Sec. 8 (f) (v) tax payable is at the rate of 1.25% of the turnover of sales of the goods covered under this clause, for the previous year. Thus tax was to be fixed on the basis of turnover of sales for the previous year. The provision does not differentiate between sales interse agent and principal or vice versa or by a dealer to outside customers. Whatever may be the nature of sales, 1.25% of total turnover of sale of goods of the previous year was the basis for fixing tax to be paid on compounded rates. If tax so fixed is higher than the tax payable under Subclause (I) of Sec. 8 (f) (v) then the dealer opting for composition will have to pay tax in accordance with Subclause (ii).”

8. In the Revision before us, of the Questions of law raised for our consideration and numbered as 'A' to 'I', we find that Questions 'A' to 'F' have to be answered against the assessee and in favour of the revenue both on account of the fact that the said Questions do not arise from issues raised by the State in their appeal before the Tribunal, as also because the said issues are covered in favour of the State by the Division Bench judgment of this Court in The Commercial Tax Officer v. M/s. Chungath Jewellery - [(2021) 94 GSTR 33, Kerala]; the SLP preferred against which judgment was dismissed by the Supreme Court vide its order dated 11.12.2021 in SLP: Nos.020076 – 020088 of 2021.

9. As regards Questions 'G', 'H' & 'I' in the O.T. Revision, they read as under:

“G. Was not the Hon'ble Appellate Tribunal justified in overlooking the position of law that the Appellate Authority was within its power to accept Form 25F declaration (if that was needed in proof of agency) in an appeal on the principles stated in the principles stated by the Hon'ble Supreme Court in State of Orissa Vs Babu Lal Chappolia 18 STC 17 (SC).

H. Even assuming that the assessing authority was empowered to revise Annexure-1 order, was the Hon'ble Appellate Tribunal justified in neglecting to examine the relevant agreement, which was vital for the purpose of deciding the actual liability under Section 8?

I. Ought not the Hon'ble Appellate Tribunal to have found that the amendment by the Kerala Finance Act, 2011 [Act 16 of 2011] spoke about sales of the goods for the previous year for the purpose of computation of the compounded tax for the subsequent year for the first time and so where serious mistake in the computation of sales or turnover, that mistake needed to be remedied.”

Contentions of Counsel:

10. The submissions of Sri.Aravind P. Datar, the learned senior counsel, assisted by Adv. Sri.S.Anil Kumar appearing on behalf of the petitioner, briefly stated, are as follows:

? There was no bar on the First Appellate Authority to entertain Form 25F and allow the deduction where appropriate tax has been paid on purchases made by the agent and subsequent sales tax was paid by the principal. In the instant case, the petitioner had paid tax while purchasing gold from the State Bank of India as an agent of its sister concerns and converted the same into ornaments. For accounting purposes, the purchases made on behalf of the sister concerns and delivered to them were recorded a sales to the sister concerns in view of the provisions of the Companies Act, 1956. It is trite that there can be no stock transfer as the petitioner was a limited company and of the sister concerns, one is a limited company and the other is a partnership firm. There is also no dispute that sales tax was paid by the two sister concerns on their sale of the same jewellery. Reliance is placed on the decision in Kedarnath Jute Manufacturing Company Limited v. CIT – [(1971) 82 ITR 363 (SC)] in support of the contention that the entitlement of a tax deduction cannot be based merely on a view taken by an assessee or the entries made by it in the books of accounts. The decision in Sundaram Finance v. State of Kerala – [AIR 1966 SC 1178] is relied upon to contend that the Court can determine the nature of a transaction in the light of surrounding circumstances, whatever may be the form of the documents.

? The Form 25F had to be filed before the First Appellate Authority since the retrospective amendment to Section 8(f)(v) sought to take Financial year 2010-11 as the base. Since the earlier year was adopted as the base and the turnover of the earlier year became a relevant factor for the purposes of Section 8(f)(v), it was open to the petitioner to demonstrate that certain amounts shown in its account would not come within the ambit of “turnover” for the purposes of the KVAT Act. It is submitted that Section 8 deals with compounded rate of taxation. The charging provision [Section 6(1)] imposes tax on the taxable turnover and not on turnover simplicitor. It follows therefore that Rule that specifies the turnover that is relevant for tax can have application irrespective of the manner in which the tax liability is determined whether under a normal assessment under Section 6 or a compounded assessment under Section 8 of the KVAT Act.

? On first principles, once the purchases made by the petitioner as an agent had suffered tax and the sister concerns also paid tax on their sales, the petitioner is entitled to file Form 25F with regard to such transactions. The First Appellate Authority had therefore excluded the amount of Rs.305 crores [as against the claim for Rs.338 crores] from the computation of turnover since the Form 25F produced by the petitioner clearly indicated that on the said amount tax had already been paid by the sister concerns of the petitioner and therefore the same transaction could not have been included in the turnover of the petitioner.

11. Per Contra, the submissions of Sri.Mohammed Rafiq, the learned Special Government Pleader on behalf of the State, briefly stated, are as follows:

? The contention of the petitioner that it was effecting purchases as an agent for the sister concerns envisaged under Rule 10(1)(h) of the KVAT Rules is misconceived. If the goods are purchased by the agent on behalf of the principal, deduction of turnover has relevance only in cases where such purchases are effected from unregistered dealers which are exigible to tax under Section 6(2) of the KVAT Act on condition that such tax is paid by the principal. In the instant case, the purchases effected by the petitioner are from State Bank of India after paying tax under Section 6(1). Therefore the situations envisaged in Rule 10(1)(h)(ii) for deducting the turnover do not apply. This is also for the reason that the purchase bills obtained by the petitioner were not endorsed with the legend "on account of the principal" and further there was no delivery note under cover of which the goods were delivered to the sister concerns.

? The submission of the petitioner that the transaction to the sister concern was recorded as a sale only in view of the provisions of the Companies Act, 1956 was not one that was raised before the authorities below and hence it was not open to the petitioner to raise such a contention in a Revision under Section 63 of the KVAT Act.

? The Appellate Tribunal had correctly allowed the Second Appeal preferred by the State by accepting the contention that the First Appellate Authority had exceeded its jurisdiction in accepting Form 25F since the question of revision of turnover for the year 2010-11 was a concluded matter as the order passed by the Assessing Authority rejecting the request of the petitioner for revision of returns had attained finality. It is contended that once the returns were not permitted to be revised for the year 2010-11, a different figure of turnover cannot be adopted for the purposes of determining tax liability for the next year namely, 2011-12.

Analysis and Findings;

12. On a consideration of the rival submissions, we find that the sole issue that arises for our consideration is whether the Appellate Tribunal was right in setting aside the order of the First Appellate Authority that found that since an amount of Rs.305 crores was established to represent the turnover in relation to sales effected to its sister concerns by the petitioner who had effected purchases of the goods in question as an agent of the said sister concerns, the same had to be excluded from the turnover of the petitioner while computing its revised liability to tax on compounded basis for the assessment year 2011-12.

13. We find from the facts before us that while the petitioner had shown the agency sales affected to its sister concerns as part of its turnover in its accounts, as also in the returns filed before the KVAT authorities during 2010-11, the mistaken turnover shown did not have any implication for the payment of tax on compound basis for the said year because the payment of tax under Section 8(f)(v) was only in relation to the tax paid by the petitioner for the immediately preceding year i.e. the petitioner was statutorily obliged to pay only 125% of tax paid during 2009-10, irrespective of its actual sales turnover for the year 2010-11. It is also not in dispute that the petitioner had discharged its tax

liability for the year 2010-11 in accordance with the statutory provisions then in force.

14. The mistaken turnover declared for the year 2010-11 assumed significance only in the wake of the amendment effected to Section 8(f)(v) in the year 2011-12 and when the petitioner was obliged to make payment of tax on compounded basis by taking the higher of two figures viz. (i) 125% of the tax paid during the previous year (2010-11) and (ii) 1.25% of the turnover of sales of goods for the previous year (2010-11). It is while reckoning the latter that the Assessing Authority proceeded to calculate 1.25% of the turnover shown in the returns for 2010-11 that included even the turnover attributable to agency sales.

15. The First Appellate Authority found that since the petitioner had obtained the statutorily prescribed Form 25F to claim exemption of the agency sales turnover from its declared turnover for the year in question, the same could be excluded for the purposes of computation of tax in terms of Section 8(f)(v) for the year 2011-12. The Appellate Tribunal, however, set aside the order of the First Appellate Authority on the finding that Form 25F had relevance only in a situation where the assessment to tax was in terms of Section 6 of the KVAT Act and not in situations where the payment of tax was on compounded basis under Section 8(f)(v) of the KVAT Act.

16. We do not for a moment deny that the payment of tax on compounded basis is an optional course of action for an assessee and he who chooses to opt for the same cannot wriggle out of it when he perceives its terms as rigid or unfair. In the instant case, however, we are called upon to decide whether an assessee who has shown certain amounts as turnover in its return filed for a previous year, which turnover was not relevant for payment of tax in that year, can be permitted to demonstrate that the turnover was mistakenly included in its returns and therefore should not be reckoned for the payment of tax for the subsequent year when the turnover of the previous year became a relevant factor for payment of tax. For the reasons that are to follow, we feel that the assessee in the instant case can and should be permitted to do so.

17. Sections 6 and 8 of the KVAT Act only manifest the Scheme of taxation under the KVAT Act which permits an assessment to tax on different basis. An assessee is given an option of either maintaining detailed accounts and complying with elaborate statutory procedures so as to enable the tax administration to arrive at a correct determination of his tax liability or opt for payment of tax in accordance with a formula that requires him to keep only those records that will help the tax administration to determine the tax liability in accordance with that formula.

18. In the instant case while the turnover of the assessee was a factor for determination of tax liability in terms of Section 6 of the KVAT Act, it was not a relevant factor for determination of tax liability, in terms of the formula under Section 8(f) of the KVAT Act in 2010-11 as also till later in the assessment year 2011-12. It was only after the assessee had exercised its option to pay tax on

compounded basis for 2011-12 that Section 8(f)(v) was amended to make the turnover of the previous year a part of the formula for determination of tax liability in terms of Section 8(f)(v). In our view, when the turnover of the previous year is suddenly introduced as a new factor in the formula for determining tax liability in terms of the compounding provisions, it would be grossly unfair to deny an assessee the opportunity to demonstrate that any amount shown in his accounts/return does not represent his turnover. By adopting a correct figure of the turnover, the assessee does not upset the tax payment for the previous year or seek a revision of the return that was filed for the previous year, when the figure of turnover was not relevant for the purposes of tax payment. He merely seeks to clarify the position as regards actual turnover of the previous year for the purposes of determining his compounded tax liability for the next year.

19. We are also of the view that merely because the Form 25 declaration is prescribed under the KVAT Rules in connection with a determination of tax liability in terms of Section 6 read with Rule 10 of the KVAT Act and Rules it does not mean that the facts intended to be proved through it cease to exist or be relevant merely because the assessment is on a different basis, and in accordance with a formula which treats that fact as relevant and incorporates it as a component. In other words, we cannot accept the submission of the learned Government Pleader that by producing Form 25 declarations, the petitioner was virtually trying to compute his taxable turnover under the KVAT Act, which is not a relevant concept for the purposes of payment of compounded tax under Section 8(f)(v) of the KVAT Act. We are of the view that the petitioner was only demonstrating through a mechanism provided under the Statute itself that the amounts covered by valid Form 25 declarations did not constitute his turnover for the purposes of the KVAT Act. Rule 10 permits deduction of certain amounts from an assessee's turnover and also excludes certain amounts from entering into the computation of turnover. What admittedly does not constitute turnover that can be assessed in the hands of the petitioner under the KVAT Act, cannot be treated as turnover for any purpose under the said Act, including an assessment in terms of Section 8(f)(v) of the Act on compounded basis. Since the genuineness of the Form 25 declarations provided by the petitioner is not in doubt, we are of the view that the exclusion of the turnover covered by the said declarations is in order. Form 25 declarations are intended to prove that amounts covered by them do not form part of the turnover of an assessee since they form part of another person's (the declarant's) turnover. When an assesee furnishes a declaration in Form 25 to his assessing officer, he seeks to exclude the amount covered by the Form 25 declarations from the computation of his turnover for the purposes of assessment to tax. It is not a case where the assessee initially includes an amount in his turnover and then seeks exemption/deduction of that amount for computing his taxable turnover. The amounts covered by the Form 25 declaration do not form part of his turnover at all. This being the case, we are of the view that the amounts covered by Form 25 declarations cannot form part of the

assessee's turnover even for the purposes of Section 8(f) of the KVAT Act. We therefore set aside that part of the impugned order of the Tribunal that set aside the finding of the First Appellate Authority on this issue and answer Questions 'G' to 'I' in favour of the assessee and against the State.

The O.T. Revision is disposed as above, by answering Questions 'A' to 'F' against the assessee and in favour of the State and answering Questions 'G' to 'I' in favour of the assessee and against the State.

