(2012) 10 KL CK 0010

In the High Court Of Kerala

Case No : S.T. REV. No''s. 25, 26, 27, 28, 29, 30 and 31 of 2012

K.P. Varghese APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 19-10-2012

Acts Referred:
Kerala General Sales Tax Act, 1963 — Section 41, 45A, 7

Citation : (2013) 63 VST 268

Hon'ble Judges : Thottathil B. Radhakrishnan, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : Harisankar V. Menon, Mahesh V. Menon and Smt. Meera V. Menon, for the Appellant; Sojan James, Special Government Pleader (Taxes), for the Respondent

Judgement

K. Vinod Chandran, J.—These revisions are filed against penalty orders issued by the Intelligence Officer (IB), Commercial Taxes, Thiruvananthapuram for non-registration of the business run by the revision petitioner in the name of Welgate Audio and Video Complex, and for evasion of tax. The common orders of the Tribunal for the years 1998-99 to 2003-04 are challenged in STREV Nos. 25 of 2012 to 30 of 2012. The separate order of the Tribunal for the year 2004-05 involving the very same facts has been challenged in STREV No. 31 of 2012. The substantial questions of law raised by the revision petitioner against the common order of the Tribunal are as hereunder: (a) Whether, on the facts and in the circumstances of the case, has not the Appellate Tribunal failed to notice that the entire proceedings are finalized without verifying the books of accounts of the revision petitioner, which are in the custody of the criminal court?

(b) Has not the Appellate Tribunal failed to notice that the revision petitioner is entitled to pay tax under the compounding scheme envisaged by section 7 of the KGST Act?

(c) Has not the Appellate Tribunal failed to take note that the entire proceedings are taken not on the basis of valid details so as to arrive at suppression of taxable turnover?

For the year 2004-05, the revision petitioner has raised an additional question of law as hereunder:

(d) Has not the Appellate Tribunal failed to notice that there is no basis for arriving at the alleged suppression?

Admittedly, the revision petitioner had been carrying on the business in the name of M/s. Welgate Audio and Video Complex. The revision petitioner has a case that his business involved only lending of compact discs (CD) and that the same was not taxable and if at all taxable, the turnover was below the limit prescribed under the Kerala General Sales Tax Act (hereinafter referred to as "the KGST Act"). Quiet interestingly, the revision petitioner also had a contention that he had paid tax under the compounding provision of the KGST Act for the year 1993-94. It is not discernible as to how any such payment was made without registration and without permission of the assessing officer. The main thrust of the argument put forward by the learned counsel Sri Harisankar V. Menon appearing for the assessee; in tandem with the questions of law raised, is that the assessment was made without verification of the books of account of the revision petitioner which were in the custody of the criminal court. The allegation of evasion of tax is not on the basis of any valid material, is the specific contention. The questions of law raised are all with respect to the facts and this court is called upon to look into whether the Tribunal''s order is vitiated by an erroneous appreciation of facts bordering on perversity. It is trite that without any such finding of the Tribunal''s order being vitiated by reason of perversity, this court cannot interfere, with the findings of facts recorded by the lower authorities, sitting in the revisional jurisdiction conferred u/s 41 of the KGST Act.

2. The appellant was not a registered dealer and it appears that he raised a contention with respect to payment of tax under the compounding provisions of the Act, that too in the year 1993-94. The allegations in all the revisions are with respect to the years after 1998-99. The Intelligence Wing of the Commercial Taxes Department gathered details from the income tax returns of the appellant which revealed a pattern of evasion practised by the revision petitioner during the subject years. Relying on the returns filed before the income tax authorities and adopting the income conceded before the income tax authorities, evasion of tax under the sales tax enactment was noticed and penalty proceedings were initiated u/s 45A of the Act. In certain years, the profit and loss account prepared by the revision petitioner''s chartered accountant was scrutinized and sales turnover as also rent collection detected therein were adopted as the sales turnover. This was the turnover conceded before the income tax authorities and on which income tax was paid.

3. For the year 2004-05, it was also revealed that the company had effected purchase of rights of feature films from movie distributors for making video copies in cassettes, compact disks and digital discs for sale. The movies so

recorded were sold under the trade mark "Welgate Group" to one M/s. Welgate Marketing who sold the video cassettes through sub-distributors. Huge turnover was detected in the said year and the revision petitioner along with his wife was revealed to have been conducting all those 12 units which purchased video rights of films and the distribution and sale of the copies were carried on.

4. The objection to the notice for the years 1998-99 to 2003-04, contended that the income of the proprietary concern, which had 11,400 registered members, was only derived from lending activities which do not come within the purview of the KGST Act. There was also a statement that the revision petitioner had paid some fixed amounts to the sales tax authorities as per the scheme of compounding on account of Welgate Audio and Video Complex. However, no proof was produced. As noticed above when the contention of the revision petitioner was that he was not assessable to tax at all, it is not known as to why or how he has paid tax under the compounding scheme. The intelligence officer also found that lending of cassettes would come under the "transfer of rights of used goods" and is a taxable event under the Act. There is no challenge from the said finding. He also found that the admission with respect to payment of tax under the compounding scheme would in fact go contrary to the statement made by the petitioner regarding his business being not taxable. It was also found that in the profit and loss statement filed along with the income tax returns, the revision petitioner had showed separately the income with respect to sales turnover and rent collection. These were the figures adopted to impose penalty at double the tax sought to be evaded in all the years.

5. For the year 2004-05, as noticed above, there was a huge turnover suppression resulting from purchase of video rights of films and sale of video cassettes/discs under such rights. On calling for objections, the revision petitioner produced audited financial statement of the company for the year 2004-05 disclosing the turnover of Rs. 59,86,657.68 as against the turnover of Rs. 9,60,00,000 adopted by the Department. The documents which were recovered from the business premises were the basis of such adoption of turnover made by the Department. The recovered documents revealed the details of showroom stock sold to various distributors and total cost of the compact discs. Though the documents as such were denied, the contention was that it was only projected proposals for marketing and sales which failed to materialise. It is also noticed by the intelligence officer that the copies of the recovered records though tendered to the revision petitioner, the same were not acknowledged by him. But for the mere assertion that the recovered records dealt with the marketing projections, no serious attempt has been made to dispute the figures with reliable evidence. At the hearing, the revision petitioner merely reiterated his objections raised earlier. Based on the various recovered documents including check registers, inter-State purchase details, various agreements entered into with distributors, the details of stock retained by the company, etc., tax evasion of Rs. 88,32,000 was detected for the said years and penalty imposed at double the tax so evaded.

6. The revision petitioner was before the revisional authority under the KGST Act wherein the revisional authority noticing the entire facts and circumstances opined that the imposition of maximum penalty is not warranted and reduced the penalty imposed in all the years to the actual amounts sought to be evaded. In appeal, before the Tribunal, the very same contentions were reiterated. The Tribunal having gone through the rival contentions, found that the basis of the initiation of proceedings u/s 45A was the sales suppression and tax evasion found by the Intelligence Wing of the Commercial Taxes Department based on the income tax returns of the revision petitioner. The Tribunal also found that in most of the years what was adopted was the turnover reported by the revision petitioner before the income tax authorities. The income conceded before the income tax authorities was only with respect to the turnover of the business of the revision petitioner. For the other years, the profit and loss account of the revision-petitioner, discloses the sales turnover as also rent collection. It was these figures that was adopted by the intelligence officer for imposing penalty. Noticing that the revisional authority had granted substantial relief by way of modifying the penalty to the actual amount of tax sought to be evaded, the appeals were dismissed.

7. Before us, it was strenuously contended by the learned counsel that a glance at the books of accounts, which were recovered by the police and are now kept with the office of the Chief Judicial Magistrate Court, Thiruvananthapuram, would definitely upset the applecart in so far as the enormity of the turnover adopted by the Department. Learned counsel hence would pray for a remand of the matter to the original authority for reconsideration based on the books of accounts. We are not persuaded to make such a remand. At the persuasion of the learned counsel, we, however, by an interim order dated April 14, 2012 directed the Inspecting Assistant Commissioner to verify such records retained in the court of Chief Judicial Magistrate and file a report before this court. The report of inspection has been submitted by the Inspecting Assistant Commissioner dated October 4, 2012. He has reported that the entire records were verified on September 25, 2012 in the presence of the Head Ministerial Officer of the court and also the revision petitioner, between 11 a.m. to 4 p.m. The material objects available with that court was verified by the Intelligence Officer along with the analysis report of C-DAT. It was revealed that such report of the C-DAT indicates only hard discs containing image files, picture files and movie files. There is no whisper about any accounts of the dealer. The revision petitioner would reiterate the refrain of accounts read in CD form having been taken by the police and kept with the court. The entire documents, the discs and the computer available with the criminal court have now been examined. The refrain is akin to flogging a dead horse. We do not think, the revisional jurisdiction conferred on us could be invoked to interfere with the factual findings, recorded by the three lower authorities concurrently and with elaborate discussions.

8. The verification of the books of accounts or the lack of it projected by the

revision petitioner is merely a mirage and there cannot be any verification for the simple reason of the books of accounts being not in existence. It was asserted to be in the custody of the criminal court, which now, has been found to be not so available. The questions of law regarding compounding of tax and the entitlement of the petitioner for such privileges under the KGST Act would lay bare the mutually destructive contention in so far as it is fairly clear and evident that the revision petitioner had not applied for or obtained any registration under the KGST Act. The petitioner also has a very flimsy contention that he had paid tax at the compounding rate for the year 1993-94. The revision petitioner does not have any such case for the subject years in which penalty has been imposed. In any event the revision petitioner could not have paid tax under the compounding scheme without registration. The revision petitioner also, but for his assertion failed to produce any material to evidence such payment.

9. The Appellate Tribunal has conscientiously examined the case and come to the conclusion that the adoption of turnover by the intelligence officer is based on valid documents recovered from the business premises of the revision petitioner and was also based on the income tax returns and the profit and loss statement appended to such returns. The alleged suppression has been found to be one eminently emanating from the materials on record. This court does not find any reason to interfere with the factual findings recorded by the Tribunal. The learned counsel makes a passionate plea for reduction of the quantum of penalty imposed. We find that the first revisional authority has modified the penalty imposed considerably, in our opinion; a measure of indulgence which we would say was misplaced. But the State having not challenged it, we are of the opinion that the facts and circumstances does not compel us to make any further modifications. The above sales tax revisions are rejected. No costs.