
(2011) 03 KL CK 0020

In the High Court Of Kerala

Case No : O.T. Rev. No's. 23, 25 and 27 of 2011

K.V. Paul

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 14-03-2011

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 6(5)

Citation : (2011) 46 VST 86

Hon'ble Judges : C.N. Ramachandran Nair, J;B.P. Ray, J

Bench : Division Bench

Advocate : E.P. Govindan and Smt. G. Deepa, for the Appellant; Mohammed Rafeeq, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The connected revisions are filed against the orders of the Tribunal confirming assessments under the Kerala Value Added Tax Act, 2003 (hereinafter called, "the Act") for two assessment years 2007-08 and 2008-09, and modifying penalty for the assessment year 2008-09. We have heard advocate Sri E. P. Govindan appearing for the petitioner and the Government Pleader Sri Mohammed Rafeeq, appearing for the State. The petitioner, a dealer in paints, hardwares, etc., was claiming the benefit of lower rate of tax at 0.5 percent u/s 6(5) of the Act on the ground that its turnover for the year would be below Rs. 50 lakhs. The payment of tax u/s 6(5) continued by the petitioner for 2008-09 until the assessing officer issued notice on November 3, 2008 pointing out that the petitioner is not eligible for payment of tax at 0.5 percent of the turnover u/s 6(5) of the Act, because the petitioner's turnover, even according to the petitioner's accounts, exceeded Rs. 50 lakhs on January 1, 2008, itself. In other words, the petitioner ceased to be a dealer eligible for the benefit u/s 6(5) from January 1, 2008 onwards and as required under rule 12(7) of the Kerala Value Added Tax Rules, 2005 hereinafter called "the Rules", the petitioner ought to have, within 15 days therefrom, started paying tax at the rate

provided u/s 6(1) of the Act. The petitioner not only did not start paying tax at the rate provided u/s 6(1) from January 1, 2008 onwards, that is even for part of the assessment year 2007-08, but continued to avail of the benefit u/s 6(5) by filing quarterly returns and paying tax even for the assessment year 2008-09, until the assessing officer issued notice proposing assessment and levy of penalty. It is only after receipt of notice, the petitioner filed revised returns and remitted tax, that too after availing of input-tax credit, to which the petitioner was not entitled. Therefore the assessing officer made assessments by disallowing input-tax credit claimed and demanded differential tax and also levied penalty at three times the amount of tax sought to be evaded in the regular returns filed as provided u/s 22(7) of the Act. First appeals filed against the assessments and penalty orders were dismissed, against which second appeals were filed before the Tribunal. Before the Tribunal, the petitioner challenged the assessments with regard to disallowance of input-tax credit. So far as penalty is concerned, the petitioner contended that no penalty could be levied because accounts disclosed turnover, though the petitioner did not file returns and remit tax at the appropriate rate. The Tribunal, however, rejected the petitioner's claim for input-tax credit for the periods up to filing of revised returns, that is up to November 2008, thereby first appellate authority's orders confirming the assessments were upheld. So far as penalty is concerned, the Tribunal substantially allowed the appeals by holding that penalty could not be levied u/s 22(7), but at the same time, the Tribunal sustained the penalty at equal the amount of tax u/s 67 of the Act, as against three times the tax levied towards penalty by the assessing officer u/s 22(7) of the Act. It is against these orders these revisions are filed by the petitioner-assessee.

2. The first question raised pertains to disallowance of input-tax credit which is claimed by the petitioner for the period commencing from January 1, 2008 onwards because the petitioner's annual turnover exceeded Rs. 50 lakhs disentitling the petitioner for the benefit of payment of tax at 0.5 percent u/s 6(5) of the Act from January 1, 2008 onwards. While the case of the petitioner is that input-tax credit is an entitlement of the dealer who starts paying tax u/s 6(1) of the Act, the contention raised by the Government Pleader is that so far as a dealer claiming benefit of payment of lower rate of tax at 0.5 percent u/s 6(5) is concerned, the provisions in the Rules have to be strictly followed for change over to the scheme of payment of tax u/s 6(1) and input-tax credit can be claimed strictly in accordance with Rules. Since the VAT Act is a recent legislation, the High Court decisions are lacking on all these matters, and therefore we have to refer to statutory provisions.

3. Admittedly the petitioner was remitting tax u/s 6(5) at the lower rate of 0.5 percent of the turnover from the beginning of the financial year 2007-08 because as estimated by the petitioner, the petitioner's annual turnover in the year would be below Rs. 50 lakhs. However, the question to be considered is as to how the petitioner should switch over from the scheme of payment of tax u/s 6(5) to payment of tax u/s 6(1) on the petitioner's turnover exceeding Rs. 50 lakhs in

the course of a year. As on December 31, 2007, the petitioner had crossed the turnover of Rs. 50 lakhs and therefore from January 1, 2008 onwards the petitioner ceased to be eligible to pay tax u/s 6(5) and under the statute the petitioner should pay tax on various goods sold by it at the appropriate rate as provided under various Schedules and notifications to the Act, subject of course to the petitioner's entitlement for input-tax credit. Even though the Act does not specifically provide the procedure for switching over from payment of tax u/s 6(5) to section 6(1), on the dealer exceeding turnover of Rs. 50 lakhs, in the course of a year, rule 12(7) and (8) provide the procedure to be followed by a dealer and the assessing officer for such switching over. For easy reference rule 12(7) and (8) is extracted hereunder:

12. Determination of input-tax credit in respect of opening stock.--

(1) to (6)

(7) Where a dealer who had opted for payment of tax under subsection (5) of section 6 or u/s 8 changes over to the payment of tax under sub-section (1) of section 6, he shall submit an application in form No. 25A along with a stock inventory on the date of change over, duly certified by a chartered accountant or a cost accountant, where the dealer is covered by the provisions of section 42, and a statement of the purchase bills issued by registered dealers paying tax under sub-section (1) of section 6, within fifteen days from the date of change over.

7A.

(8) Where the dealer referred to in sub-rule (7) or in sub-rule (7A) has submitted the statements as required by the said sub-rule, the assessing authority shall verify the claim and, where it is satisfied that the claim is in order, permit the dealer to claim input-tax credit in respect of such goods held as opening stock in three equal monthly instalments commencing from the return period subsequent to the date of order allowing such input-tax credit.

4. Sub-rule (7) of rule 12, which is mandatory in nature, specifically provides that within 15 days from the date of crossing of turnover limit of Rs. 50 lakhs, a dealer has to submit an application in form No. 25A along with a stock inventory on the date of change over duly certified by a chartered accountant or cost accountant and along with such form, the dealer has to furnish a statement of purchase bills issued by the registered dealers paying tax under sub-section (1) of section 6. The above procedure is admittedly applicable to the petitioner because the petitioner is covered by section 42 of the Act as its turnover exceeded Rs. 40 lakhs requiring statutory audit for the petitioner. What is provided under sub-rule (8) of rule 12 is that on receipt of statutory form and the statement and other details and auditor's certificate from the dealer, as provided under sub-rule (7) above, the assessing officer should verify the claim and if he is satisfied that the claim is in order, he should permit the dealer to claim input-tax credit in respect of such goods held as opening stock in three

equal monthly instalments, commencing subsequent to the order allowing such input-tax credit. What is clear from this provision is that entitlement to claim input-tax credit on the turnover crossing Rs. 50 lakhs for a dealer converting from the scheme of payment of tax u/s 6(5) to section 6(1) is not automatic and it is only on the assessing officer approving the claim made by the dealer under sub-rule (7) through an order and the benefit of input-tax credit itself can be availed of by the dealer for the return period after the date of the order issued by the assessing officer under sub-rule (8). What we notice in this case is that even though the petitioner's turnover exceeded Rs. 50 lakhs on December 31, 2007, the petitioner did not comply with sub-rule (7) of rule 12 within 15 days from the date of crossing Rs. 50 lakhs and in fact even after the close of the financial year 2007-08, the petitioner did not intimate the assessing officer about the turnover crossing Rs. 50 lakhs in the preceding year. On the other hand, until the notice was issued by the assessing officer on November 3, 2008, proposing to assess the entire turnover from January 1, 2008 to November 30, 2008 in terms of section 6(1) of the Act, the petitioner did not file revised returns voluntarily and remit tax. As already found by us above, entitlement for input-tax credit for the dealer paying tax u/s 6(5) of the Act will commence only after the assessing officer passes orders assessing under rule 12(8) and demanding tax u/s 6(5) until then and on the petitioner starting filing of returns for the next month onwards, which in this case is from December, 2008 onwards. Admittedly the petitioner is given input-tax credit from December, 2008 onwards and all the statutory authorities disallowed the petitioner's claim for input-tax credit because of the failure on the part of the petitioner to comply with rule 12(7) above stated and the consequent inability for the officer to grant approval under rule 12(8). We are in complete agreement with the orders of the statutory authorities including that of the Tribunal because for a dealer paying tax u/s 6(5) to claim input-tax credit on conversion to the system of payment of tax u/s 6(1), he should satisfy the statutory conditions provided under rule 12(7) and it is the duty of the assessing officer to pass orders granting the benefit to the dealer as required under rule 12(8) and it is only on the assessing officer passing the order, the dealer will get the benefit of input- tax credit. However, in our view, delay in the officer passing the orders on form No. 25A submitted under rule 12(7) will not debar the dealer from claiming the input-tax credit for the following months which the dealer can claim by filing returns and claiming input-tax credit in accordance with the procedure provided therein. In other words, pending orders on rule 12(7) application, the dealer can claim input-tax credit in the returns filed after filing form 25A. We therefore confirm the orders of the Tribunal and reject the revisions on this issue.

5. The next issue pertains to the orders of the Tribunal modifying the penalty order sustained in first appeal by exonerating the petitioner from penalty u/s 22(7) but by refixing the penalty u/s 67 to equal the amount of tax as against three times the tax levied towards penalty u/s 22(7) of the Act. The contention raised by counsel for the petitioner is that the Tribunal has no jurisdiction to fix

for the first time penalty u/s 67 of the Act. There is force in this contention because penalty challenged before the Tribunal was levied u/s 22(7) whereunder the penalty levied is three times the tax and if the Tribunal felt that penalty should have been levied only u/s 67 and not u/s 22(7), they should have remanded the matter. The Government Pleader submitted that violation by the petitioner is covered not only by section 22(7) but also by section 67 as well. However, the Government Pleader cannot argue for sustaining penalty levied u/s 22(7) because State has not so far filed any revision for restoring the said penalty. We have to consider the issue in the above situation. The relevant provisions relating to penalty are extracted hereunder for easy reference:

22. Assessment in case of non-filing of return and filling of defective return.---(1) to (6)

(7) Where on scrutiny of returns or verification of accounts in any proceedings under this Act, in respect of dealers paying tax under sub-section (5) of section 6, it is found that the amount of tax, if any, paid by such dealer is less than the amount of tax he is liable to pay on finalising such proceedings, the assessing authority shall direct the dealer to pay difference of tax between the amount of tax already paid and that fixed in such proceedings, together with thrice the amount of such difference as penalty.

67. Imposition of penalty by authorities.--(1) Notwithstanding anything contained in section 71 if any authority empowered under this Act is satisfied that any person,--

(a) being a person required to register himself as a dealer under this Act, did not get himself registered; or

(b) has failed to keep true and complete accounts; or

(c) has failed to submit any return as required by the provisions of this Act, or the rules made thereunder; or

(d) has submitted an untrue or incorrect return; or

(e) has made any bogus claim of input tax credit, special rebate or refund; or

(f) has continued the business during the period of suspension of registration; or

(g) has failed to return the unused statutory forms and declarations under this Act after the cancellation or suspension of the registration; or

(h) has not stopped any vehicle or vessel when required to do so; or

(i) has failed to comply with all or any of the terms of any notice or summons issued to him by or under the provisions of this Act or the Rules made thereunder; or

(j) has acted in contravention of any of the provisions of this Act or any rule made thereunder, for the contravention of which no express provision for

payment of penalty or for punishment is made by this Act; or

(k) has abetted the commission of the above offences; or

(l) has abetted or induced in any manner another person to make and deliver any return or an account or a statement or declaration under this Act or Rules made thereunder, which is false and which he either knows to be false or does not believe to be true, such authority may direct that such person shall pay, by way of penalty, an amount not exceeding twice the amount of tax or other amount evaded or sought to be evaded where it is practicable to quantify the evasion or an amount not exceeding ten thousand rupees in any other case:

Provided

6. During hearing Government Pleader contended, and we feel, that the Tribunal's conclusions are not correct because section 22(7) exclusively provides for penalty for violations by dealers remitting tax at the lower rate of 0.5 percent u/s 6(5) of the Act. The contention of petitioner's counsel is that section 22(7) only deals with a case of penalty where a dealer remitting tax u/s 6(5) does not disclose full turnover or in other words there is suppression of turnover in the returns filed and failure in regard of payment of tax on such turnover. We are unable to accept this contention because all cases of non-payment and short payment of tax by dealers paying tax u/s 6(5) are covered u/s 22(7). One situation is a case where a dealer whose turnover is below Rs. 50 lakhs suppresses part of his turnover leading to non-payment of tax even at lower rate of 0.5 percent on such suppressed turnover. The next situation is a case where a dealer who is not entitled to continue to enjoy the benefit of payment of tax at lower rate of 0.5 percent on his turnover crossing Rs. 50 lakhs in the course of a year continues to pay the same rate of tax u/s 6(5) to which he is not entitled. This is a case where the petitioner continued to claim the benefit u/s 6(5) without being entitled to the same and so much so it is a violation that squarely attracts penalty provided u/s 22(7). What is conveyed in the second part of the sub-section by levy of penalty at three times the difference in tax as against the maximum penalty provided at twice the amount of tax in section 67 is that State expects from a dealer availing lower rate of tax at 0.5 percent a higher degree of honesty and statutory compliance in regard to filing of returns and payment of tax. It is also to be noted that assessing officer is not left with any discretion to reduce the penalty from the statutory amount at three times the amount of tax evaded. The tax evaded with reference to which penalty has to be levied u/s 22(7) is the differential tax, that is the difference between the tax remitted by the dealer along with return and the tax determined by the officer in the course of assessment which is done by bringing to tax escaped turnover at concessional rate or the differential tax levied on account of dealer's turnover exceeding Rs. 50 lakhs making him liable for payment of tax u/s 6(1). We therefore hold that both the situations referred above are covered by section 22(7), that is non-payment of tax u/s 6(5) on any part of the turnover even when the dealer's turnover continues to be within Rs. 50 lakhs or the failure of the dealer to switch

over to the scheme of payment of tax from section 6(5) to section 6(1) on the dealer's turnover crossing Rs. 50 lakhs and in both the situations penalty should be levied under the above provision. In principle, we therefore hold that the finding of the Tribunal that penalty in this case cannot be levied u/s 22(7) is not sustainable.

7. The finding of the Tribunal that there is violation of section 67 is correct. However, the Tribunal lost sight of the fact that the violations covered by section 67 are general in nature and it covers even a violation for which penalty u/s 22(7) is specifically provided. A combined reading of section 22(7) and section 67 will lead to the conclusion that for all violations of the provisions of the Act and Rules not elsewhere specifically provided, penalty could be levied u/s 67 and for specific violations like the one covered by section 22(7), penalty should be considered and levied under the said provision. Since in this case, the violation is specifically covered by section 22(7), penalty has to be levied under the said provision, no matter but for the said provision, violation would have been punishable u/s 67 of the Act.

8. Counsel for the petitioner referred to the decision of the Supreme Court in *Sree Krishna Electricals Vs. State of Tamil Nadu and Another*, wherein the Supreme Court exempted a dealer from penalty for the reason that turnover was included in the accounts and the dealer only claimed exemption. Even though on facts, the case before us is not similar, in this case what we notice is that dealer has remitted tax and interest on receipt of assessment order. Further the State has not so far challenged the order of the Tribunal converting penalty levied u/s 22(7) to one u/s 67. We therefore do not want to disturb the orders of the Tribunal reducing the penalty to equal the amount of tax, though in law the same is not sustainable for the reasons stated above. We also direct the State to treat the matter as concluded by accepting the order of the Tribunal with regard to penalty as well. Revision petitions are dismissed, but by stating the position of law as above.