

**(2015) 02 KL CK 0188**

**In the High Court Of Kerala**

**Case No :** Writ Petition (C) Nos. 3740, 4664, 6433, 6434, 6435, 7451, 21591, 21596 of 2012, 128, 6680, 9278, 9456 and 14691 of 2013

Malabar Gold

APPELLANT

Vs

Asst. Commissioner, Commercial Taxes and Others

RESPONDENT

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**Date of Decision :** 24-02-2015

**Acts Referred:**

Kerala Value Added Tax Act, 2003 — Section 12, 55, 6, 60, 8(f)

**Citation :** (2015) 2 ILR Ker 964 : (2015) 2 KHC 835 : (2016) 89 VST 193

**Hon'ble Judges :** A.K. Jayasankaran Nambiar, J

**Bench :** Single Bench

**Advocate :** S. Anil Kumar (Trivandrum) and K.S. Hariharan Nair, for the Appellant; George Mecheril, Spl. Government Pleader, Advocates for the Respondent

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## **Judgement**

A.K. Jayasankaran Nambiar, J.—The petitioners in all these writ petitions are dealers in gold and jewellery, who had opted to pay tax at compounded rates under Section 8(f) of the Kerala Value Added Tax Act, 2003 [for short, "KVAT Act"] during the assessment year 2011 - 2012. During the year in question, the provisions of Section 8(f) were amended and the issue involved in these writ petitions is with regard to the effect the said amendment had on the option for compounding exercised by the petitioners. It would be apposite, therefore, to first notice the statutory provisions as they stood during the assessment year 2011 - 2012. The provisions of Section 8(f) as they stood on 01.04.2011 were 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 on 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.;

Explanation 1:- Where a dealer had not transacted any business for the last three years consecutively, the highest tax paid or payable for the year during the year or years he transacted business shall be considered for the above purpose.

Explanation 2:- [Where during any such preceding year, the dealer had not transacted business for any period in that financial year, the tax payable for the twelve months shall be calculated proportionately on the basis of the tax payable or the turnover conceded, as the case may be, for the period during which such dealer had transacted business.;

Explanation 3:- Dealers opting for payment of tax under this clause shall pay compounded tax in respect of all their branches existing in the year to which the option relates.

Explanation 4:- Where a dealer has not opted to pay compounded tax with respect to a new branch opened in 2008-09, the compounded tax payable for such branch for the year 2008-09 shall be notionally fixed as the average of the compounded tax paid for the principal place and branches in that year and if the new branch opened is the first branch, the compounded tax payable for it shall be the same as that payable for the principal place of business.;

Explanation 5:- Where a dealer opens a new branch in the current year, the additional compounded tax payable under this clause in respect of such branch shall be the average of the tax payable by him in respect of his principal place of business and all branches. [xxx]

Explanation 6:- Where a dealer has opted for payment of tax under this clause for the first time in 2010-11 and has commenced business only in 2009-10 and the tax payable as per return or account during 2009-10 is less than the output tax payable, then the tax payable for 2009-10 shall be notionally re-determined on the basis of output tax for determining the tax liability for 2010-11.;

Explanation 7:- Tax payable as conceded in the accounts includes the tax payable

on suppressed turnover subsequently detected also.;

Explanation 8:- Where a dealer who had opted and paid tax under this clause during previous years with respect to a branch that had remained closed during the whole of the year 2009-10, for the purpose of determining the compounded tax payable for 2010-11, the tax paid in respect of that branch shall not be reckoned.

Provided that a dealer who opts for payment of tax under this clause may collect tax on the sales at the rate not exceeding the rate prescribed for the commodity under this Act, but where the tax so collected during the year is in excess of the tax payable for the year under this clause, the tax collected in excess shall be paid over to Government in addition to the tax payable under this clause.

(ii) The assessing authority, for valid and sufficient reasons, such as shifting of place of business, holding of stock exceeding double the quantity held in the previous year, furnishing of false information, suppression of relevant information, failure to furnish such information demanded, may refuse permission to pay tax under this section and cancel the permission if any granted:

Provided that no orders under this sub-clause shall be issued without giving the dealer an opportunity of being heard and without prior approval of the District Deputy Commissioner.

(iii) Notwithstanding anything contained in sections 55 or 60 of this Act, orders under sub-clause (ii) shall be appealable only to the Appellate Tribunals.

(iv) In case where permission has been cancelled, the amount, if any paid based on the permission, shall be apportioned against the output tax due of the dealer.

(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 five 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:

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.;

(vi) Where a dealer who opts for compounding under this clause has been transacting business under a brand name, the compounded tax payable under this clause shall not be less than the compounded tax payable and the business been run as a branch of the franchisee or of other franchisees."

2. By the Kerala Finance Bill, 2011 (Bill No. 426 of the 12th Kerala Legislative Assembly), certain provisions of Section 8(f) were amended. These assessments came into force with immediate effect on account of the declaration under the Kerala (Provisional Collection of Taxes) Act. The amendments briefly stated were as follows:

(ii) in clause (f), -

In sub-clause (i), in Explanation 6, for the figures "2009-10" and "2010-11", wherever they occur, the figures "2010-11" and "2011-12" shall respectively be substituted;

After sub-clause (i), the following sub-clause shall be inserted, namely:--

"(ia) Notwithstanding anything contained in this clause, a dealer shall not be allowed to opt for the payment of tax under this clause unless he has conducted business up to a full year as on the first day of April of the year to which the option relates.";

(c) In sub-clause (v),-(i) In item (a), for the words "one hundred and five per cent of such", the words "the same amount of" shall be substituted;

(ii) In item (b), for the words "one hundred and ten per cent", the words "one hundred and five per cent" shall be substituted;

(d) Sub-clause (vi) shall be omitted;"

3. Thereafter, there was a change in Government in May, 2011, and consequent to that, a new Finance Bill was introduced, which was later passed as the Kerala Finance Act, 2011 (Act 16 of 2011). By the said Act, the provisions of Section 8(f) of KVAT Act were further amended with effect from 01.04.2011, to read as follows:

"(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 below;

(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 rupees 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.";

4. It is significant to note that, Section 12 of the Kerala Finance Act, 2011 (Act 16 of 2011), provided for validation of actions taken under the provisions of Kerala Finance Bill, 2011 (Bill No. 426 of the 12th Kerala Legislative Assembly). The said validation clause read as under:

"12. Validation -(1) Notwithstanding the lapse of the Kerala Finance Bill, 2011 (Bill No. 426 of the 12th Kerala Legislative Assembly) (hereinafter referred to as the said Bill) and the cesser of force of law of the declared provisions of the said Bill, anything done or any action taken, including the levy and collection of tax or duty, during the period from the 1st day of April, 2011 to the 19th day of July, 2011, by virtue of the declared provisions contained in the said Bill, under the Kerala Surcharge on Taxes Act, 1957 (11 of 1957) or under the Kerala Stamp Act, 1959 (17 of 1959) or under the Kerala General Sales Tax Act, 1963, (15 of 1963) or under the Kerala Tax on Luxuries Act, 1976 (32 of 1976) or under the Kerala Value Added Tax Act, 2003 (30 of 2004) (hereinafter referred to as the "respective Acts"), as they stand amended by the said Bill, shall be deemed to be and to have always been, for all purposes, validly and effectively done or taken under the provisions of the respective Acts, as if the said amendments had been in force at all material times.

(2) Notwithstanding anything contained in the respective Acts during the period from 1st April, 2011 to the 19th day of July, 2011 during which the declared provisions contained in the said Bill was in force, anything done or any section taken by virtue of the said provisions of the said Bill, shall be deemed to have been validly done or taken under the respective Acts and no action shall lie against any dealer or authority on the ground of short levy or refund of excess tax or duty and tax or duty collected, if any, by a dealer or an authority, as the case may be, shall be paid over to the Government."

5. The petitioners herein filed their applications for payment of tax at compounded rates before the official respondents within the time stipulated

under the KVAT Act and Rules. In many of the cases, the authorities concerned considered the applications, and granted permission to the petitioners to pay tax at the compounded rates as per the provisions in force during the period between 01.04.2011 and 19.07.2011. In some cases, although the petitioners had filed their applications within the period envisaged in the Statute, the authorities concerned did not pass orders on the said applications immediately, but passed orders only subsequently, after the coming into force of the Finance Act, 2011. Even in such cases, however, it is not in dispute that the petitioners, after filing their applications, went ahead and filed the necessary returns in accordance with the provisions of the Act and Rules and also paid tax in accordance with the returns filed. A tabulated chart showing the details of the applications filed by the petitioners in the various writ petitions, and the date on which the orders were passed on the said applications by the respondents is given below:--

6. Consequent to the enactment of the Finance Act, 2011, the respondents took the stand that, on account of the amendments introduced by the Finance Act, 2011 with effect from 01.04.2011, the petitioners would be liable to pay tax at the higher rate as per the amended provisions. This led to the issuance of the orders and demand notices that are impugned in these writ petitions.

7. It is the case of the petitioners that, on account of their applications having been accepted by the respondents before the enactment of the Finance Act, 2011 or alternatively, in view of their having commenced payment of tax, in accordance with their returns filed as per the pre-amended provisions, and the same having been accepted by the respondents, it was not open to the respondents to demand a differential tax from them in terms of the amended provisions of Section 8(f) of KVAT Act. The petitioners would, in particular, rely on the validation clause in the Finance Act, 2011, which clearly stated that anything done, or any action taken, including the levy and collection of tax or duty during the period from 01.04.2011 to 19.07.2011, by virtue of the declared provisions contained in the Kerala Finance Bill, 2011 (Bill No. 426 of the 12th Kerala Legislative Assembly), as they stood amended by the said Bill, would be deemed to be and to have always been, for all purposes validly and effectively done or taken under the provisions of KVAT Act, as if the said amendment had been in force at all material times. It is pointed out that the validation clause envisaged that no action would lie against any dealer or authority on the ground of short levy, or refund of excess tax or duty, and tax or duty collected, if any, by a dealer or an authority as the case may be, would be paid over to the Government.

8. It is the contention of the petitioners, therefore, that on account of the validation clause in the Finance Act, 2011, their payment of tax at compounded rates as per the pre-amended provisions, stood validated, and they could not be fastened with any demand for differential tax. The petitioners would place reliance on the decision of the Supreme Court in Varkisons Engineers Vs. State of

Kerala and Another, (2009) 16 SCC 120 : (2009) 6 UJ 2577 : (2009) 25 VST 1 as also the decision of this Court in Baniyas Granite Industries Vs. Agricultural Income Tax and Commercial Tax Officer .

9. Per contra, the stand of the Government is that, insofar as the Finance Act, 2011 made the amendments, that it introduced, effective from 01.04.2011, the petitioners, who had opted for payment of tax at compounded rates, could not be heard to complain of the enhanced rate that was introduced with retrospective effect by the Finance Act, 2011. In other words, the contention of the State Government is that, insofar as the petitioners had opted for payment of tax at the compounded rate, any amendment to that rate, effected by a subsequent amendment to the Act, was necessarily binding on the petitioners. This was especially so because the power of the State Legislature, to introduce amendments to the Act with retrospective effect was well settled and could not be called in question by the petitioners.

10. I have heard Sri. Raju Joseph, the learned senior counsel and Sri. Anil Kumar, the learned counsel appearing for the petitioners and Sri. George Mecheril, the learned Special Government pleader appearing on behalf of the State Government/respondents.

11. On a consideration of the facts and circumstances of the case as also the submissions made across the Bar, I find that in the instant writ petitions, the petitioners had exercised their option, to pay tax in accordance with the provisions of Section 8(f) of KVAT Act, at a time when the Finance Act, 2011 had not yet been enacted. Their applications, seeking permission for payment of tax at compounded rates, were all preferred within the time permitted by the KVAT Act and Rules. In some cases, the applications were acted upon, and permission granted to them by the respondent authorities. In other cases, while the orders permitting them to pay tax at compounded rates were passed much later, it is not in dispute that, the petitioners had, in the meanwhile, effected payment of tax at compounded rates, in accordance with the applications preferred by them and within the time stipulated in the Act and Rules for payment of tax. In my view, the act of the respondents in granting permission to pay tax at compounded rates to some of the petitioners, and the payment of tax at compounded rates, in accordance with the applications filed by them before the authorities, by those petitioners, in respect of whom no formal orders were passed by the respondents on their applications, both resulted in a finalisation of the terms on which the petitioners were to discharge their tax liability, in accordance with Section 8(f) of KVAT Act, for the year in question. It is trite that, when an assessee opts to pay tax at compounded rates, and such an option is accepted by the authorities under the KVAT Act, either expressly through an order or impliedly through their conduct, there comes into existence a contract from which neither side can resile. This legal position with regard to the binding nature of compounding proceedings has been reiterated in a number of judgments of the Supreme Court, the latest being the decision in Bhima

Jewellery Vs. Assistant Commissioner (Assessment) . I am of the view, therefore, that there was no justification in the respondents proceeding against the petitioners with a demand for differential tax based on the amended provisions introduced through the Finance Act, 2011.

12. There is yet another aspect to be noticed. The Finance Act, 2011, when enacted, contained a validation clause that made it clear that, the passage of the Finance Act would not affect any action taken in terms of the provisions of the Kerala Finance Bill, 2011 (Bill No. 426 of the 12th Kerala Legislative Assembly). In the instant cases, the payment of tax at compounded rates, and the acceptance of the said tax by the respondents, all took place when the provisions of the Kerala Finance Bill, 2011 (Bill No. 426 of the 12th Kerala Legislative Assembly), were in force. That being the case, by virtue of the validation clause in the Finance Act, 2011, those actions cannot be revisited, and it would be legally impermissible, and patently unfair, to permit the respondents to proceed against the petitioners with a demand for differential tax under Section 8(f) of the Act.

13. I must now advert to the decisions relied upon by the learned Special Government Pleader in support of his contentions. In the judgment dated 24.02.2012 of a Division Bench of this Court in O.T. Rev. No. 3 of 2010, the Division Bench was dealing with a case of dealers in gold jewellery who had opted for payment of tax at compounded rate for the year 2007 - 2008, in accordance with the provisions of Section 8(f) of the KVAT Act as it then stood. The facts in that case would clearly reveal that, the dealers while effecting payment of tax had erroneously paid tax at 150% of the highest tax paid for the three preceding years, instead of paying tax at 200% of the highest tax paid for the turnover conceded in any of the three preceding years. It would appear that, by virtue of the provisions of the Finance Bill, which later became entrenched in the Act consequent to the passing of the Finance Act for the said year, the dealers were legally obliged to pay tax at 200% of the highest tax paid for the turnover conceded in any of the three preceding years. Under those circumstances, the contention of the dealers that, the erroneous payment of tax at 150%, in lieu of 200%, was to be sustained on account of the mistake committed by the dealers, was not accepted by this Court. It was found that, insofar as the dealers had opted to pay tax at compounded rates, they were bound by the higher rate that was introduced by the Finance Act, and their ignorance of the higher rate could not be an excuse for not making the said rate applicable to the tax that was to be paid by them. The said decision of the Division Bench can be of no assistance to the respondents in the present writ petitions where the facts are clearly distinguishable and the Finance Act, 2011 contained an express clause that validated action taken as per the provisions of the Kerala Finance Bill, 2011 (Bill No. 426 of the 12th Kerala Legislative Assembly). The other decision relied upon is that of the Division Bench of this Court in Sasi Vs. The Commercial Tax Officer, (2010) 1 KLT 661 : (2010) 32 VST 463 where the Division Bench found that when a compounding application had

been permitted on the basis of the rate of tax provided in the Kerala Finance Bill, 2009, and the said rate of tax was enhanced by the Kerala Finance Act, 2009 which was enacted subsequently, it could not be said that there was an enhancement of tax prejudicial to the interest of the assessee, since the permitted rate of compounded tax had not existed in the Statute at any point of time. In the said decision it was held that the payment of the tax by the assessee on the basis of the provisions of the Kerala Finance Bill, 2009, could only be viewed as one effected under a mistake of law and hence the enhanced tax consequent to the enactment of the Finance Act could be validly collected from the assessee. The said decision cited by the learned Special Government Pleader is also clearly distinguishable as it did not have to deal with a validation clause such as the one contained in the Kerala Finance Act, 2011, that validated any action that was taken in terms of the provisions of the Kerala Finance Bill, 2011 (Bill No. 426 of the 12th Kerala Legislative Assembly).

14. Thus, in any view of the matter, the actions of the respondents in demanding differential tax amounts from the petitioners after having accepted the payment of tax by the petitioners in accordance with the applications submitted by them for the assessment year 2011 - 2012, cannot be legally sustained. Resultantly, I quash the impugned orders/demand notices in the various writ petitions to the extent they demand differential tax from the petitioners, as illegal and legally unsustainable.

15. In W.P.(C) Nos. 128 and 14691 of 2013, the orders impugned are orders imposing a penalty on the petitioners for non payment of tax at the higher rate applicable under Section 8(f) of the KVAT Act, consequent to its amendment by Kerala Finance Act, 2011. In view of my findings with regard to the non sustainability of the levy of differential tax above, the impugned orders in these writ petitions will also stand quashed. The writ petitions are hence allowed as above.

16. It is made clear that, if as a consequence of this judgment, the petitioners become entitled to any amounts by way of refund of excess tax paid to the Government, then, the respondents shall take steps to either refund the amounts to the petitioners or adjust the same towards the future tax liability of the petitioners. The same shall be done within a period of three months from the date of receipt of a copy of this judgment.