

(2015) 03 KL CK 0165

In the High Court Of Kerala

Case No : Writ Petition (C) No. 19574 of 2014

Mar Basil Granites and Metals

APPELLANT

Vs

Commercial Tax Officer

RESPONDENT

Date of Decision : 06-03-2015

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 6, 8(b)

Citation : (2015) 2 KLT 58

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

Bench : Single Bench

Advocate : Raju Joseph, Senior Advocate, Harisankar V. Menon, Meera V. Menon, N. James Koshy, Mayankutty Mather, Abdul Jawad and R. Leela, for the Appellant; George Mecheril, Spl. Government Pleader, Advocates for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.

1. As these Writ Petitions involve a common issue, they are taken up together for consideration and disposed by this common judgment. The petitioners are dealers in granite metal who have opted to pay tax at the compounded rate in accordance with S. 8(b) of the Kerala Value Added Tax Act (hereinafter referred to as the "K.V.A.T. Act") during various assessment years from 2008-09 to 2013-14. S. 8(b) of the K.V.A.T. Act reads as follows:

"8. Payment of tax at compounded rates:--

Notwithstanding anything contained in Section 6,--

(a).....

(b) Any dealer producing granite metals with the aid of mechanized crushing machine may, at his option, instead of paying tax in accordance with the provisions of the said sections, pay tax at the following rates, namely:--

(i) for each crushing machine of size not exceeding 30.48 cm x 22.86 cm = Rs.

40,000 per annum;]

(ii) for the each crushing machine of size exceeding 30.48 cm x 22.86 cm but not exceeding 40.64 cm and 25.40 cm = [Rs. 1,60,000 per annum]

(iii) for the each crushing machine of size exceeding 40.64 cm x 25.40 cm = [Rs. 3,20,000 per annum]

(iv) for each cone crusher [Rs. 18,00,000 per annum];

Provided that in the case of dealers, who opted to pay compounded tax under this clause, no separate assessment shall be made in respect of [Manufactured sand] produced by them.]

[Provided further that notwithstanding anything contained in this clause, dealers with a single crushing machine of size not exceeding 30.48 cm x 22.86 cm shall pay rupees [thirty thousand] only per annum and those with a single crushing machine of size above 30.48 cm x 22.86 cm but not exceeding 40.64 cm x 25.40 cm shall pay rupees [one lakh twenty thousand] only per annum, as tax under this clause.]

[Explanation:-For the purpose of this clause, primary crushers shall also be reckoned for the purpose of computation of compounded tax, and the rate applicable to primary crushers shall be at fifty per cent of the aggregate of the tax payable on secondary crushers]"

2. The provisions of S. 8(b) have remained substantially the same during the years under consideration in these Writ Petitions, and the only amendments introduced in the Section over the years is with regard to the rate at which tax had to be paid on individual crushing machines. For deciding the issue in the present Writ Petitions, the said amendments are not relevant.

3. The petitioners had applied for permission to pay tax in accordance with S. 8(b) during the various years under consideration in the Writ Petitions, and paid tax at the appropriate rates during the said years. In accordance with the said provision, therefore, they also became entitled to claim an exemption, from separate assessment, of the Manufactured sand or M-sand that was produced during the course of production of granite metal. The petitioners were, therefore, not paying tax separately on the M-sand that was produced and sold by them. The revenue authorities, however, took objection to the said course of action of the petitioners, for it was found that the petitioners had also installed, in their premises, separate machines such as Vertical Shaft Impactors, for shaping the granite metal coming out of the secondary crushers. It was found that there was considerable amount of M-sand that was produced through the operation of the said machines. The revenue authorities, therefore, proceeded to demand differential tax from the petitioners, in respect of the M-sand that was generated through the operation of those machines on which tax had not been paid under S. 8(b) of the Act. The notices issued to the petitioners demanding differential tax, and in one case the order passed confirming the demand of differential tax,

are impugned in the Writ Petitions.

4. The contentions of the petitioners, briefly stated, are as follows:

"* As per the scheme of S. 8(b) of the KVAT Act, any dealer producing granite metal with the aid of mechanized crushing machines could opt to pay tax at the compounded rate envisaged under the said provision. Accordingly, so long as the dealers had discharged their tax burden by paying tax in respect of the crushing machines specified in the provision, the M-sand produced during the course of manufacture of the granite metal could not be separately assessed. The mere fact that the petitioners had installed another machine in their unit, the operation of which also resulted in production of M-sand, was of no significance because the obligation to pay tax, as per the scheme of S. 8(b), was only in respect of the specified machines and not all machines used in the unit.

* An identical issue had arisen in connection with the payment of tax at compounded rates under the erstwhile provision under the KGST Act. A division bench of this Court had then found that so long as the dealers had discharged their tax liability on the specified machines, there could not be any separate assessment in respect of a bi-product that was produced in the unit that was engaged in the manufacture of granite metal. (See: State of Kerala v. Poabs Granites Pvt. Ltd. (2011 (4) KHC 876) . The said decision was followed subsequently, while deciding a similar issue under the K.V.A.T. Act (See: Judgment dated 29.7.2011 in O.T. Rev. No. 24/2009 - M/s. Poabs Granite Products Pvt. Ltd. v. State of Kerala).

* The Authority for clarification, constituted under the K.V.A.T. Act, had clarified that no separate assessment could be done in respect of the M-sand that was produced through the operation of the V.S.I. machine, so long as the dealer had discharged his tax liability in respect of the crushing machines specified in the Section. The said clarification by the competent authority under the Act, was binding on the revenue authorities.

* The provisions of S. 8(b) of the K.V.A.T. Act were amended through the Kerala Finance Act, 2014 whereby separate rates were fixed for Vertical Shaft Impact machines, depending on their production capacity, as part of the compounding scheme for granite metal. While the amendment is prospective in its operation, it also suggests that for the prior period, there could not have been a demand for differential tax based on the operation of the said machines."

5. Per contra, the contentions of the respondent State, briefly stated are as follows:

"* The petitioners had installed Vertical Shaft Impact machines, in their units where they were producing granite metals. In as much as the said machines were not crusher machines, and the benefit of compounding was extended only to dealers producing granite metal with the aid of mechanized crushing machines, the M-sand produced through the use of V.S.I. machines would not

qualify for the exemption contemplated in the proviso to S. 8(b).

* The M-sand that is produced through the use of the VSI machine cannot be treated as a bi-product that is obtained during the manufacture of granite metal, but is rather a main product, that is obtained only through the use of the VSI machine, and hence separately taxable under the K.V.A.T. Act. It is only the M-sand that is obtained in the process of producing granite metal with the aid of mechanized crushing machines, which qualifies for the exemption.

* The statutory provisions have since been amended with effect from 1.4.2014 and, as per the amended provisions, M-sand produced using VSI/HSI machines is also separately taxable, with the option of paying tax at compounded rates being made available to the dealer. The amendment indicates that it was never the intention of the legislature to grant an exemption in respect of M-sand that was produced using VSI/HSI machines."

6. I have heard the learned Senior Counsel Sri. Raju Joseph, Sri. N. James Koshy, Sri. Mayankutty Mather, Sri. Abdul Jawad and Smt. R. Leela and Sri. Harishankar Menon on behalf of the petitioners, and the learned Special Government Pleader Sri. George Mecheril on behalf of the respondents, in all these cases.

7. The sole issue that arises for consideration in these Writ Petitions is whether, the petitioners, who are admittedly dealers engaged in the production of granite metal with the aid of mechanized crushing machines, are entitled to claim exemption from separate assessment, in respect of the M-sand produced by them using VSI/HSI machines, that have not been reckoned for the purposes of compounding under S. 8(b) of the K.V.A.T. Act?

8. The provisions of S. 8(b) of the K.V.A.T., as they stood during the relevant period, envisaged a payment of tax at compounded rates, as an alternative to the regular payment of tax under S. 6 of the Act, for dealers producing granite metal using the aid of mechanized crushing machines. The scheme of the compounding provision suggests that dealers could opt to pay a tax, that was computed as the sum total of the amounts chargeable on specified machines that were used by the dealer in the production of granite metal. For this purpose, the legislature, in its wisdom, had identified only certain machines, out of the various machines that could be used by a dealer in the production of granite metal, as relevant for the purposes of quantifying the tax payable under the provision. It was envisaged that once the dealer paid tax in accordance with the scheme, by paying a tax computed on the basis of the number of specified machines used by him, he would be entitled to an exemption from separate assessment in respect of the M-sand that was produced in the course of production of granite metal.

9. There is some lack of clarity in what M-sand or Manufactured Sand actually refers to. The petitioners would maintain that it is a bi-product obtained during the manufacture of granite metal, in that it is obtained as a result of shaping the granite metal that comes out of the secondary crushers. It is stated to refer to

granite metal of 3mm size and below. In the statement filed on behalf of the respondents, however, the production process of crushed aggregates (granite metal), crusher sand and Manufactured sand is described as follows:

"6. The Production processes of crushed aggregates (granite metal), crusher sand and Manufactured sand are as follows:

a) Primary Crushing:

The primary jaw crusher converts the blasted rubbles (800 mm to 250 mm) from the quarry to smaller size (75 mm to 200 mm) suitable feed material for the secondary crusher to produce aggregates of different size that could be used for construction. The primary crushing is usually a single jaw crusher. Larger size jaw crushers are used in primary crushing to reduce the secondary blasting in quarry operation to minimize the problems caused due to fly rocks.

(b) Secondary Crushing:

The primary function of the secondary crushing machine is to produce aggregates of the different size 50 mm, 20 mm, 12 mm, 6 mm, 4.75 mm (crusher sand) that could be used for different construction purpose. The capacity of the crushing plant is primarily depend on

c) The type of machines used in the secondary crushing stage: There are usually two types of machines. They are 1) jaw crusher 2) Cone Crusher. The capacity of the Cone crusher is higher than the Jaw crushers. However, the complexity of operation, cost of operation and breakdown factors are less in jaw crushers.

d) The number of secondary machines used along with primary machines to process the rubbles: Larger the number of the machines used, larger the output of finished products. Higher number of secondary is required to produce larger quantity of smaller size aggregates like 6mm and minus 4.75 mm.

7. It is further submitted that any crushed metal below 5 mm produced from secondary crusher can be called as crusher sand. It has high elongation and flakiness. The fine dust below 150 micron is over 25%. Due to this reason it is not safe to use in concrete. Crusher sand can be used for masonry works and hollow/solid bricks. The crushing of the stones where concluded in the secondary or cone machines and the by-products is not saleable as granite metal. These are called the crusher sand. These crushed sand (unsuitable granite metal) of below 6 mm produced in the secondary crusher will undergo a process of washing to avoid little grits. By washing away the little grits of less than the size of below 150 microns is the fine product which is sold as M. sand (crusher sand).

Vertical Shaft Impactor (VSI) or Horizontal Shaft Impactor (HSI) for exclusive production of manufactured sand. The granite aggregates of size of 6 mm (1/2 inch) to 40mm (1 1/2 inch) collected from the crusher unit and quarries are unloading to the raw material storage tank. At the bottom of the storage tank a vibratory feeder is fixed. This vibratory feeder discharged granite aggregates to

the belt conveyor and it feed granite aggregate from storage tank to the VSI machine. A metal detector and collector are fitted above the raw-material feed belt conveyor for removing any metal particles. In order to avoid spreading of dust particles, water spray system is provided. The output from the VSI are supplied to vibrating screen through another belt conveyor. A series of water jets are provided over this vibrating screen and the entire fine particles are washed by this water spray and wash water is collected in the classified fitted below vibrating screen. The output from the VSI/HSI are separated into M. Sand and over size aggregates. This M. Sand is supplied to classifier fitted below the screener and the over sized aggregates are again fed to VSI for regrinding. The classifier is fitted with a screw elevator and the M. Sand discharged to the classifier tank filled with water is supplied to the M. Sand conveyor by this screw conveyor and finally M. Sand is collected in the yard and loaded to trucks. The wash water from the vibrating screens and over flow from the classifier is supplied to a series of settling tanks, where the M. Sand particles in the wash water is settled in respective tanks and over flow water free from M. Sand particles are again pumped for reuse in granite aggregates wetting and M. Sand washing. The settled M. Sand particles are collected periodically and sold as second quality M. sand."

10. It is apparent therefore, that the difference of opinion between the petitioners and the respondents is only with regard to what constitutes M-sand or Manufactured sand. It is not in dispute, however, that all the products namely, granite metal, crusher sand and manufactured sand, are obtained during the process of production of granite metal using mechanized crushing machines. If that be so, then, as already noted above, so long as the M-sand or Manufactured sand is a product that is obtained in the process of production of granite metal using mechanized crushing machines, the mere fact that the dealer in question had installed, and used, another machine for the purposes of shaping the granite metal obtained from the secondary crushers, or for obtaining finer sized granite metal or sand, was of no consequence. In my view, the legislative scheme envisaged the payment of compounded tax by reckoning only certain specified machines, from among the various machines that were used in the production of granite metal, and the VSI/HSI machine was not one of them. Resultantly, the demands made on the petitioners, in connection with a separate assessment of the M-sand or Manufactured sand obtained through the use of VSI/HSI machines, cannot be legally sustained. The notices and orders, impugned in these Writ Petitions, are consequently quashed. There is yet another aspect of the matter. S. 8(b) of the KVAT has been amended by the Finance Act, 2014 and, specific provisions, providing for payment of compounded tax on VSI/HSI machines of various sizes, have been introduced. The newly introduced amendments are substantive in nature and hence, in the absence of any express indication to the contrary, necessarily prospective in their operation. The said amendment, introduced with prospective effect, also suggests that, for the prior period, the legislature never intended to include VSI/HSI machines in the

reckoning of compounded tax under S. 8(b) of the KVAT Act.

Thus, these Writ Petitions are allowed, by declaring the impugned notices and orders issued/passed by the respondents as illegal and legally unsustainable, and by quashing the same. There will, however, be no order as to costs.