
(2010) 07 KL CK 0009

In the High Court Of Kerala

Case No : O.T. Rev. No. 42 of 2009 and W.P. (C) No. 35553 of 2009

M.G. Abdul Sathar

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 19-07-2010

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 6(1A), 63, 67(2), 72

Citation : (2011) 43 VST 65

Hon'ble Judges : P.S. Gopinathan, J; C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : N. Muraleedharan Nair and Smt K. Hymavathy, for the Appellant;
Mohammed Rafiq, Government Pleader, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—The connected revision case and the W. P. (C) are filed by a dealer engaged in the business of stationery and confectionery goods. After taking registration under the Kerala Value Added Tax Act, 2003 (hereinafter called, "the Act"), the petitioner started collecting and remitting tax during the year 2005-06. After completion of assessment, the assessing officer noticed that the petitioner has not taken permission u/s 6(1A)(a) of the Act prior to collection of tax, which according to the officer, is the requirement of the said section in terms of rule 10A of the Kerala Value Added Tax Rules (hereinafter called, "the Rules") as the turnover was below Rs. 10 lakhs. For collecting and remitting tax by the petitioner who had turnover below Rs. 10 lakhs without permission u/s 6(1A)(a) read with rule 10A of the Rules, the assessing officer forfeited the tax collection and levied penalty u/s 67(2) of the Act for the alleged violation. In first appeal, the appellate authority, though cancelled penalty levied u/s 67(2), left freedom to the officer to consider penalty u/s 72 of the Act, against which the Department filed an appeal and the assessee filed a cross objection which were disposed of by the Tribunal by the order impugned in the O. T. Revision filed by the assessee u/s 63 of the Act. The connected W. P. is filed by the assessee for a declaration that form IF prescribed is ultra vires and beyond the powers of the respondents under rule 10A of the Rules and is applicable only for the purpose of

section 6(1A)(b) of the Act. We have heard counsel appearing for the petitioner and the Government Pleader Sri Mohammed Rafiq appearing for the respondent.

2. The main question to be considered is whether the petitioner which is a registered dealer with turnover below Rs.10 lakhs is entitled to collect tax without obtaining a prior permission in terms of rule 10A of the Rules. According to the petitioner, rule 10A and form IF prescribed thereunder apply to only dealers who are covered by section 6(1A)(b) of the Act and not a dealer registered under the Act with turnover less than Rs. 10 lakhs otherwise not liable to pay tax. For easy reference, we extract hereunder the relevant provisions of the Act and the Rules :

S. 6. Levy of tax on sale or purchase of goods.--(1) Every dealer whose total turnover for a year is not less than ten lakhs rupees and every importer or casual trader or agent of a non-resident dealer, or dealer in jewellery of gold, silver and platinum group metals or silver articles or contractor or any State Government, Central Government or Government of any Union Territory or any Department thereof or any local authority or any autonomous body whatever be his total turnover for the year, shall be liable to pay tax on his sales or purchases of goods as provided in this Act. The liability to pay tax shall be on the taxable turnover-

(1A) Notwithstanding anything contained in sub-section (1),--

(a) where a dealer whose total turnover for a year is below the limit specified in sub-section (1) collects tax u/s 30 on his sales, he shall, whatever be his total turnover for the year, be liable to pay tax under sub-section (1) on the taxable turnover for the year.

(b) where the sale of any goods is exempted at the point of sale by any dealer, such dealer may, at his option, pay tax in respect of the sale of such goods and thereupon he shall, whatever be his total turnover, be liable to pay tax on the taxable turnover for the year.

S. 30. Collection of tax by dealers.--(1) A registered dealer may, subject to the provisions of sub-sections (2) and (3), collect tax at the rates specified u/s 6, on the sale of any goods, from the person to whom he sells the goods and pay it over to Government in such manner as may be prescribed.

(3) No registered dealer shall collect any sum purporting to be by way of tax,--

Provided further that where the sale of any goods is exempted only at the point of sale by any dealer, such dealer may, notwithstanding anything contained in sub-section (1), at his option, collect tax in respect of the sale of such goods and thereupon he shall be liable to pay tax in respect of such goods.

Rule 10A. Filing of option for collection and payment of tax.--Every dealer opting to pay tax in accordance with the provisions of sub-section (1A) of section 6 shall file application in form IF before the assessing authority. The option shall be deemed to have been accepted by the assessing authority as and when the

assessing authority acknowledges the receipt of such application.

3. The only question is whether form IF prescribed under rule 10A and rule 10A as such are applicable to a registered dealer for collection and payment of tax, if the turnover of such dealer is below the non-taxable limit of Rs.10 lakhs. While the contention of the petitioner is that dealers like petitioner who have registration are entitled to collect tax and remit the same without any prior permission under rule 10A, the contention of the Government Pleader is that both dealers with turnover below the nontaxable limit of Rs.10 lakhs falling under sub-clause (a) and dealers in whose hands sale of any goods are exempted, covered by sub-clause (b) of section 6(1A), should obtain advance permission from the officer under rule 10A by filing form IF prescribed under the said rule.

4. It is an undisputed position that a dealer whose annual turnover is below the limit prescribed, namely, Rs. 10 lakhs, has no liability to take registration under the Act or to collect or remit tax. However, practically dealers are confronted with a situation where turnover estimated by them for an year may exceed the non-taxable limit of Rs. 10 lakhs later and if they have not taken registration, they will not be able to collect tax for the turnover. Further, if the turnover declared by a dealer at below Rs. 10 lakhs is rejected and the actual turnover is estimated by the assessing officer at above Rs. 10 lakhs, he will be called upon to pay tax with penal consequence, though he would not have taken registration or collected tax. Even though proviso to section 6(1A) provides for levy and collection of tax only on the turnover in excess over Rs. 10 lakhs in the first year of business, so far as later years are concerned, all penal consequences will follow for nonpayment of tax, if the turnover exceeds the non-taxable limit of Rs. 10 lakhs covered by section 6(1A) of the Act. As a matter of practice, it is commonly seen that several dealers who are doing business marginally above the non-taxable limit do not undertake any risk but take registration, start collecting tax and remitting the same. We find that this is recognised in the statutory provisions above stated wherein without conferring any specific power to registered dealers to collect tax if the turnover is below the nontaxable limit, section 6(1A)(a) states the consequence of a dealer, whose turnover is below the limit prescribed in sub-section (1) of section 6, collecting tax u/s 30 on his sales and remitting the same. The only consequence stated therein is that such dealer will be liable to pay tax on the entire taxable turnover irrespective of whether the turnover is below the non-taxable limit. Further, section 30(4) reiterates that if a registered dealer has collected tax under sub-section (1), he shall be liable to tax on the taxable turnover, no matter his turnover is below the limit prescribed u/s 6(1) of the Act. Levy of tax obviously applies only to taxable commodities and the situation contemplated by the above provisions is that a dealer need not risk any tax liability in business, if he takes registration, collects tax and remits the same irrespective of whether his turnover exceeds the limit that attracts liability or not. This, in our view, is a safety measure available to dealers to avoid running the risk of a liability on assessment if they take registration, collect and remit tax irrespective of whether the turnover exceeds the non-taxable limit or not.

Therefore, we hold that there was nothing illegal or wrong in the petitioner taking registration, collecting and remitting tax for the year in question when the petitioner did not have minimum turnover that attracts liability.

5. The next question to be considered is whether the petitioner was bound to take prior permission for collection and remittance of tax under rule 10A by filing application in form IF. The contention of the petitioner is that rule 10A has no application for dealers like petitioner and it applies only to dealers covered by section 6(1A)(b) of the Act. However, the Government Pleader submitted that rule 10A applies to both the categories of dealers covered by clauses (a) and (b) of section 6(1A) and the form makes it clear that it applies only to dealers with turnover below Rs. 10 lakhs. The Counsel for the petitioner has relied on circular No. 5/2006 wherein illustrations are given pertaining to the scheme of collection of tax by dealers who are not liable to pay tax and according to him, the circular makes it clear that only dealers covered by sub-clause (b) of section 6(1A) are covered by rule 10A. Admittedly, the petitioner is covered by clause (a) of section 6(1A). We notice that clause (a) does not refer to any option, but only declares the consequence that a registered dealer collecting tax under sub-section (1) of section 30 has to remit tax on the entire taxable turnover even if he is not liable to pay tax u/s 6(1) of the Act by virtue of the turnover being below the taxable limit. The section does not talk about any option to be exercised, even though registration and collection of tax as pointed out by the Government Pleader itself is an option exercised by the dealer against the entitlement of immunity from payment of tax available to him u/s 6(1A) of the Act by virtue of the turnover being below the taxable limit. However, the situation covered by clause (b) is something quite different because the goods referred to therein are not taxable at the hands of the dealer referred to there. It is pertinent to note that the circular gives an illustration in respect of certain commodities produced by the Khadi and Village Industries at whose hands those goods are not taxable. What is made clear u/s 6(1A) is that a dealer who is granted exemption is entitled to exercise an option for collection and remittance of tax. In this context it is pertinent to note that rule 10A provides for exercising an option to be intimated to the officer and such option is deemed to have been granted, if a proper acknowledgement is issued by the officer. We are of the view that the cases covered by clause (a) and clause (b) of section 6(1A) are not similar because cases covered by clause (a) are sale of goods which are taxable by dealers whose turnover during the year is below the taxable limit. In other words, for procuring the same commodity from a dealer with turnover above Rs. 10 lakhs, any purchaser is bound to pay tax as the commodity is taxable. However, the case referred to in clause (b) are goods which are not taxable at the hands of the dealer selling it, for, e.g., the Khadi and Village Industries selling goods which are granted exemption at their hands. Granting of exemption to a dealer for the goods produced and sold by them is a matter of policy of the State and when the State gives an option to the dealer to collect tax, it has the authority to decline the option by rejecting the request by the dealer. In other

words, it is up to the State to decline the option requested for by the petitioner and deny permission to collect tax on the commodity, if the State intends to supply the commodity to the customer free of tax. In this context we notice that the proviso to section 30(3) also makes it clear that the dealer enjoying exemption in respect of a commodity has the option to collect tax which necessarily means that the officer based on application filed under rule 10A is entitled to grant it or reject it. Nowhere else in the statute there is a provision requiring a registered dealer to seek independent permission from the officer to collect tax during the year his turnover is below the nontaxable limit of Rs. 10 lakhs. All what section 6(1A) and section 30(4) states is that the dealer who has turnover below non-taxable limit of Rs. 10 lakhs, collecting and remitting tax, will be liable to pay tax on the entire taxable turnover u/s 6(1) of the Act. As rightly pointed out by the counsel for the petitioner, the illustration given to the circular makes it clear that the permission required to be obtained for collection and remittance of tax is only by the class of dealers covered by section 6(1A)(b) of the Act and not by the dealers who are covered by sub-clause (a) of section 6(1A), i.e., dealers collecting tax on their own and remitting tax even if their turnover for the year is below the non-taxable limit. In other words, there is no necessity for a registered dealer to take prior permission from the officer under rule 10A for collection and remittance of tax even if his turnover is below the taxable limit. The form prescribed is obviously without reference to sub-clause (a) and (b) of section 6(1A) of the Act and the circular also makes it clear that form 1F prescribed is not in order inasmuch as it does not specify clause (a) or (b), whereas rule 10A under which the said form is prescribed applies to both clauses of section 6(1A).

6. In view of the above findings, we allow the O. T. Revision case by declaring that the collection and remittance of tax by the petitioner who is a registered dealer without prior permission does not involve violation of any provisions of the Act and Rules and so much so, no penalty is leviable either u/s 67(2) or u/s 72 of the KVAT Act. Consequently the Tribunal's order confirming the orders of the lower authorities is quashed. The penalty levied will stand cancelled and assessment will be modified granting input-tax credit to the petitioner.

7. In view of the findings above, we hold that the form prescribed is not in order and consequently State or the Commissioner as the case may be, is directed to prescribe form in the place of form IF under rule 10A for suiting the provisions of section 6(1A)(b) of the Act. W. P. (C) is allowed to the above extent.