(2007) 11 KL CK 0043

In the High Court Of Kerala

Case No : S.T. Rev. No. 297 of 2007

M.P. Raju APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 19-11-2007

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 23(3), 41, 5(1), 7(7)
Kerala General Sales Tax Rules, 1963 — Rule 30, 30A, 30A(1), 30A(2), 30A(4)

Citation : (2007) 11 KL CK 0043

Hon'ble Judges : H.L. Dattu, C.J;K.M. Joseph, J

Bench : Division Bench

Advocate : Bobby John, for the Appellant; No Appearance, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Dattu, C.J.—The question of law raised before the court is, whether the assessee is eligible and entitled to pay tax at the compounded rate as envisaged under Sub-section (7) of Section 7 of the Kerala General Sales Tax Act (''KGST Act'' for short).

2. The factual matrix in brief is as under:

Petitioner is a civil contractor. For the first time he approached the sales tax authorities for issuance of the certificate of registration during the assessment year 2001-2002. The request made in the application was granted by the Sales Tax Officer/registering authority by his order dated 13.8.2002. The effect of the registration certificate was given from 29.11.2001.

3. In this proceeding, we are concerned with the assessment year 2001-2002.

4. The petitioner had filed an application before the assessing authority with a request to permit him to pay tax under the Act at the compounded rate. In the application itself, it was made known to the assessing authority that the assessee had received certain amounts towards the contract work done by him prior to the

date of filing of the application seeking permission to pay the tax at the compounded rate. The request of the petitioner is rejected by the assessing authority. After such rejection, the assessing authority has proceeded to complete the assessment for the assessment year 2001-2002 u/s 5(1) of the KGST Act. Aggrieved by the said order passed by the assessing authority, the petitioner/assessee had carried the matter in appeal before the Deputy Commissioner (Appeals), Kozhikode. The appellate authority by his order dated 25.8.2005 has allowed the assessee''s appeal and has further directed the assessing authority to accept the payment made by the assessee as per Section 7(7) of the KGST Act and issue a revised demand notice.

5. The revenue, aggrieved by the said order passed by the First Appellate Authority, had carried the matter by way of second appeal before the Sales Tax Appellate Tribunal, Additional Bench, Kozhikode in T.A.332 of 2005 and C.O.12 of 2005. The Tribunal by its order dated 23rd November, 2006 has allowed the appeal and thereby has reversed the findings and conclusions reached by the First Appellate Authority.

6. Disturbed by the orders so passed by the Tribunal, the assessee is before us in this Tax Revision Case filed u/s 41 of the KGST Act.

7. The assessee has raised the following questions of law for our consideration and decision. They are as under:

i) Whether the assessee can be denied the benefit of Section 7(7) of the KGST Act, 1963 for the period prior to registration particularly when the registration has been taken in the same financial years?

ii) Whether the benefit of Section 7(7) of the KGST Act is available only to the registered dealers under the said Act.?

iii) Whether the tribunal is justified in cancelling the first appellate order when there is no valid reason to deviate from the findings of the first appellate authority?

iv) Whether the Assessing Authority is justified in the facts and circumstances of the case in completing the assessment without affording adequate opportunity to the assessee to file a reply and to substantiate his contentions?.

8. Learned Counsel Sri. Bobby John, appearing for the assessee would submit that the findings and conclusions reached by the assessing authority and the Tribunal are contrary to the provisions of the Act. The learned Counsel relying on the orders passed by the First Appellate Authority would contend that the First Appellate Authority was fully justified in allowing the assessee''s appeal filed against the orders of assessment passed for the assessment year 2001- 2002. Therefore he submits that the Tribunal was not justified in modifying the orders passed by the First Appellate Authority.

9. Sri. Vinod Chandran, learned Counsel for the State would submit that in view

of Sub-rule (2) of Rule 30A of the Kerala General Sales Tax Rules (''the Rule'' for short), the assessee ought to have filed an application, if for any reason he was interested in paying tax at the compounded rate as envisaged under Sub-section(7) of Section 7 of the Act before the assessing authority before the receipt of the contract amount or instalment thereof. In the present case the assessee had filed an application for permission to pay the tax at the compounded rate after receipt of the contract amount and, therefore, the assessing authority was justified in rejecting the request made by the assessee for payment of tax at the compounded rate. In support of that contention, learned Counsel has invited our attention to Sub-section (7) of Section 7 of the Act read with Rule 30 A of the Rules.

10. In order to appreciate the stand of both the learned Counsel appearing for the parties to the lis, provisions of Sub-section (7) of Section 7 read with Rule 30A of the Rules requires to be noticed.

11. Sub-section (7) of Section 7 of the Act authorises that every contractor in civil works may opt for payment of tax at the rate of two percent on the whole amount of contract.

12. Rule 30A of the Rules, 1963 provides the procedure for making an application by a civil contractor, who intends to pay the tax at the compounded rate. The said rule is as under:

30A(1) Notwithstanding anything contained in Rule 30, every contractor engaged in civil works of construction of building, bridge, road or dam may opt to pay tax in accordance with Sub-section (7) of Section 7 in respect of each such contract. Explanation.- A composite and indivisible contract for construction of building shall be construed as a civil work of construction of building even if it involved works relating to electrical, sanitary, painting, flooring and the like.

(2) The application for permission to pay tax under Sub-section (7) of the Section 7 shall be in Form No. 21B and shall be filed before the assessing authority in duplicate before the receipt of the contract amount or any instalment thereof: Provided that the contracts for which amounts were received either in full or in part before the coming into force of these rules, such application shall be filed within three months from the date of coming into force of these rules.

(3) In respect of contract for which an express provision in the agreement with the awarder is made for payment of tax in accordance with the provisions of Sub-section (7) of Section 7, instead of application in accordance with Sub-rule (2) above, a copy of such agreement shall be filed before the assessing authority along with the return prescribed in accordance with the rules.

(4) The tax due on the amount of contract amount received in full or in part before the coming into force of these rules shall be paid in full along with the application in Form No. 21B and return in Form No. 9 within the time specified in the proviso to Sub-rule (2) above after deducting the payment already made

unless payment is permitted in instalments as provided in these rules.

(5) Interest provided in Sub-section (3) of Section 23 shall be payable when default is made in the payment of tax in accordance with Sub-rule (4) above.

(6) In respect of contract on which tax under this Act was already deducted by the awarder, such amount shall be allowed to be deducted as tax already paid provided a certificate obtained from the awarder is produced showing the amount and nature of contract, the amount deducted and the mode of remittance to Government.

(7) When the tax payable under Sub-section (7) of Section 7, for the contract amount received before the coming into force of these rules exceeds for a period of more than one year, the arrears of tax which exceeds that due for a year may be permitted to be paid in instalments within a period of one year as permitted by the Deputy Commissioner on application by the contractor.

13. Sub-rule (1) of Rule 30A of the Rules authorises the contractor engaged in civil works of construction to opt to pay tax in accordance with Sub-section (7) of Section 7 of the Act in respect of each contract. Sub-rule (2) of Rule 30A of the Rules makes it obligatory on the part of the contractor to make an application for permission to pay tax at the compounded rate in Form No. 21B and it shall be filed before the assessing authority in duplicate before the receipt of the contract amount. The expression ''shall'' is used in Sub-rule (2) of Rule 30A of the Rules. The word ''shall'' in the context it is used requires to be treated as not merely a directory but a mandatory.

14. Payment of tax at the compounded rate is a bilateral agreement between a contractor and the assessing authority. The assessee is required to make an application for permission to pay tax at the compounded rate as provided under Rule 30A of the Rules. After making such an application, it is for the assessing authority to consider that application and grant permission to the assessee to pay tax at the compounded rate.

15. The assessee for the first time had gone before the Sales Tax Officer for grant of registration certificate on 29.11.2001. The assessing authority by his order dated 13.8.2002 granted the registration certificate as required under the Act by passing an order on 13.8.2002. The said registration certificate would come into effect from 29.11.2001. After such registration, he had approached the assessing authority to grant permission to pay the tax at the compounded rate and the application in this regard was after receipt of the contract amount from the awarder of the contract. The said application, in our opinion, is rightly rejected by the assessing authority, may be on a different ground. We do not accept the reason so assigned by the assessing officer for rejecting the application filed by the petitioner for grant of composition benefit under Sub-section (7) of Section 7 of the Act.

16. Even otherwise also, in our opinion, the assessee is not eligible and entitled

to pay tax at the compounded rate in view of Sub-rule (2) of Rule 30A of the Rules. If for any reason the petitioner intends to avail the benefit of payment of tax at the compounded rate, he ought to have filed an application before the assessing authority/Sales Tax Officer prior to the receipt of the contract amount. In the instant case, such a thing has not been done by the assessee. Therefore, in the facts and circumstances of the case, we are of the opinion that the assessee is not entitled for payment of tax at the compounded rate as provided under Sub-section (7) of Section 7 of the Act.

17. In that view of the matter, we affirm the orders passed by the assessing authority and that of the Tribunal on a different count altogether. Therefore, the Tax Revision Case fails and accordingly it is rejected.

18. Consequently I.A. 2550 of 2007 is dismissed.

Ordered accordingly.

