

(2024) 10 KL CK 0105
In the High Court Of Kerala
Case No : Other Tax Revision No.14 Of 2023

M/s.N K Trading Company

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 22-10-2024

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 25(1), 25B
Kerala Value Added Tax Rules, 2005 — Rule 59

Citation : (2024) 10 KL CK 0105

Hon'ble Judges : Dr. A.K. Jayasankaran Nambiar, J; Syam Kumar V.M, J

Bench : Division Bench

Advocate : M.K.Hajara, Izzudin K.M, Mohammed Rafiq

Final Decision : Allowed

Judgement

Dr. A.K. Jayasankaran Nambiar, J.

1. This Revision Petition pertains to the assessment year 2011-12 under the Kerala Value Added Tax Act [hereinafter referred to as the "KVAT Act"], and the petitioner is aggrieved by the order dated 28.11.2022 of the Kerala Value Added Tax Appellate Tribunal in T.A. (VAT).No.73 of 2020 that decided issues including the issue of limitation against the petitioner. In the Revision Petition before us, the following questions of law are raised:

(i) Whether the Appellate Tribunal is justified in law on the finding that the plea of rejection of limitation on the assessment proceedings which was made for the year 2011-12 on 09.07.2018 is in order.

(ii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is erred in not appreciating the fact that the claim of sales return in the case of end customers is supported by statements as prescribed under rule 59 of the KVAT Rules 2005 which are produced before the assessing authority.

(iii) Whether on the facts and in the circumstances of the case, the Appellate

Tribunal went wrong in interpreting section 25AA with respect to the suppression of sales turnover and allowing corresponding claim of input tax claim from the purchase of registered dealers.

(iv) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is erred in not considering the duplication of assessment of sales return while calculating the turnover as well as in the computation of tax due.

During the course of the proceedings, it was accepted by the learned counsel that questions of law nos.(ii), (iii) and (iv) would have to be answered against the petitioner/assessee and in favour of the Revenue. However, the answer to question (i) above would determine whether or not the petitioner would be liable to pay any amount to the Department for the assessment year 2011-12. This is because if we find in favour of the petitioner/assessee on the question of limitation, then the entire demand for the said assessment year, which include the demands relating to the issues covered by questions (ii), (iii) and (iv), would have to be set aside.

2. The self assessment by the petitioner/assessee for the assessment year 2011-12 was sought to be re-opened by the Assessing Authority in terms of Section 25(1) of the KVAT Act by a notice dated 24.01.2018. As per the provisions of Section 25(1) of the KVAT Act as it stood then, the Assessing Authority had time only upto 31.03.2017 to issue the notice for assessment of escaped turnover, and in this case, the notice was issued only on 24.01.2018. The Assessing Authority however proceeded to complete the assessment in relation to the petitioner for the said assessment year by passing an order dated 09.07.2018.

3. In appeal proceedings pursued by the petitioner/assessee, initially before the First Appellate Authority and thereafter before the Appellate Tribunal, although the petitioner raised a contention regarding limitation, the same was rejected by the authorities. It is therefore that the petitioner is before us in this O.T. Revision impugning the order of the Appellate Tribunal inter alia on the issue of limitation.

4. Inasmuch as we are concerned with the provisions of Section 25(1) of the KVAT Act, as it stood with effect from 01.04.2017, we deem it appropriate to extract the provisions of Section 25(1) of the KVAT Act as it stood immediately prior to its amendment with effect from 01.04.2017:

"25. Assessment of escaped turnover:- (1) Where for any reason the whole or any part of the turnover of business of a dealer has escaped assessment to tax in any year or return period or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable or any deduction has been wrongly made therefrom, or where any input tax or special rebate credit has been wrongly availed of, the assessing authority may, at any time within five years from the last date of the year to which the return relates, proceed to determine, to the best of its judgment, the turnover which has escaped assessment to tax or has been underassessed or has been assessed at a rate

lower than the rate at which it is assessable or the deduction in respect of which has been wrongly made or input tax or special rebate credit that has been wrongly availed of and assess the tax payable on such turn over or disallow the input tax or special rebate credit wrongly availed of, after issuing a notice on the dealer and after making such enquiry as it may consider necessary:

Provided that before making an assessment under this subsection the dealer shall be given a reasonable opportunity of being heard.

Provided further that where the escapement is due to the application of incorrect rate of tax, no assessment under this sub-section shall be made where the dealer files revised return and pays the tax which has escaped assessment along with interest under sub-section (5) of section 31 and thrice the interest as settlement fee.

Provided also that the period for the completion of assessments including those subjected to extension under section 25B which expired on 31st March, 2015, shall be extended up to 31st March, 2016.

5. The provision was amended through the Kerala Finance Act, 2017 with effect from 01.04.2017 when the period of limitation under Section 25(1) for proceeding to determine the escaped turnover was changed from "five years" to "six years from the end of the year to which the assessment relates" and the third proviso thereto was amended to read as follows:

"Provided also that the period for proceeding to determine any assessment including those subjected to extension under section 25B which expires on 31st March, 2017, shall be extended up to 31st March, 2018."

6. It is now well settled through a line of decisions of this Court as affirmed by the Supreme Court that inasmuch as the amendment to Section 25(1) was expressly made effective only from 01.04.2017, the period for re-opening assessments under Section 25(1) of the KVAT Act have to be seen as enlarged from five years to six years only with effect from that date, and accordingly, the provisions of Section 25(1), save the 3rd proviso thereto, have to be construed as having only a prospective operation [Commercial Tax Officer, Anchal and Others v. S. Najeem and Another - [2018 (3) KLT 877 (DB)]].

7. As regards the effect of the amendment brought about to the 3rd proviso to Section 25(1) of the KVAT Act, which too was amended with effect from 01.04.2017, one among us [Dr. Justice A.K.Jayasankaran Nambiar] had, in the decision in Baiju v. State Tax Officer - [2020 (1) KLT 233], that followed earlier Division Bench judgments of this Court in Binu Gopinath v. State of Kerala - [2018 (2) KLT 991] and Paul Varghese v. State of Kerala - [(2005) 13 KTR 29 (Kerala)] found that the purpose of the amendment to the 3rd proviso to Section 25(1) of the KVAT Act was only to extend the time for re-opening those assessments where the period of limitation for re-opening under the unamended provisions was to expire by 31.03.2017. The object of the amendment was to

permit a re-opening of such cases till 31.03.2018. The amendment had to be viewed in the backdrop of the introduction of the new regime of GST in the State with effect from 22.06.2017, on which date the KVAT Act was repealed by the State legislature. It was opined that the circumstances under which the amendment was carried out clearly brought out the intention of the legislature to permit a re-opening of past assessments under the KVAT Act up to 31.03.2018 and it was this intention that had to be read into the third proviso to Section 25(1), as amended with effect from 01.04.2017, so as to give it full effect. The argument of counsel, placing reliance on the principles of statutory interpretation was separately dealt with as follows:

"16. Before parting with the issues, I must also address the arguments of learned counsel for the petitioners that, going by the well-settled principles of statutory interpretation, a proviso cannot enlarge the scope of the main provision to which it is appended. The contention is essentially that, inasmuch as the provisions of Section 25(1) of the KVAT Act enlarged the period for re-opening assessments from five years to six years only with effect from 01.04.2017, the third proviso could not be seen as permitting a re-opening of past assessments beyond the five-year period of limitation prescribed under the unamended Act. The legal position with regard to the principles that must guide an interpretation of a proviso have been pithily stated in the decision of the Supreme Court in *S.Sundaram Pillai & Ors. v. V.R.Pattabiraman & Ors.*– [(1985) 1 SCC 591] as follows:

"A proviso may serve four different purposes:

1. Qualifying or excepting certain provisions from the main enactment;
2. It may entirely change the very concept of the intendment of the main enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
3. It may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
4. It may be used merely to act as an optional addendum to the enactment with the sole object of explaining the real intendment of the statutory provision."

17. In the instant cases, as already noticed above, while the main part of Section 25(1) clearly indicates that the extended period of six years for re-opening assessments is to operate prospectively with effect from 01.04.2017, the third proviso seeks to carve out those assessments, where the period of re-opening would have expired by 31.03.2017, for a differential treatment, by stating that in such cases, the re-opening could be carried out before 31.03.2018. To treat the said proviso as having only prospective effect would render meaningless the words used by the legislature in the said proviso and accord to it the same meaning as the main provision. Going by the tests enumerated in *Sundaram*

Pillai (Supra), the third proviso to Section 25(1), as amended with effect from 01.04.2017, has to be seen as qualifying the ambit of the main enactment with the object of explaining the real intendment of the statutory exercise.”

8. The decision in Baiju (supra) was subsequently affirmed by the Division Bench in appeal and it is our understanding that the matter was not carried further by the State. While so, we have now been shown a judgment of the Supreme Court in Assistant Commissioner (Assessment) v. M/s. Cholayil Pvt. Ltd. - [2023 KHC Online 7078], where, while considering an argument by the State Government that the amended provisions of Section 25(1) and the 3rd proviso thereto would have the effect of enabling the State to assess the escaped turnover in relation to those years for which the period of limitation prescribed under the erstwhile provisions of Section 25(1) had already expired, the court considered the amendments that were introduced to Section 25(1) and to the 3rd proviso thereto with effect from 01.04.2017 and held as follows at paragraphs 15, 17 and 18:

“15. In this context, what has to be interpreted is the expression “proceed to determine” as it occurs in sub-Section (1) of Section 25 as well as the third proviso to the said sub-Section as amended in Finance Act, 2017. No doubt, in both the provisions, the expression used is “proceed to determine.” The said expression must be considered in light of the words that occur prior to and subsequent to the said expression. Under sub-Section (1) of S.25, the intention of the use of the expression “proceed to determine” is in the context of initiation of proceedings at any time within five years (now six years after the 2018 amendment) from the last date of the year to which the return relates. The object and purpose is that there cannot be a belated initiation of proceedings and at the whims and fancies of the Department so as to re-open stale returns, which had already been concluded under the provisions of the said Act. However, the object of the proviso which also uses the words “proceed to determine” must be in the context of completion of the Assessment which had already been initiated in accordance with sub-Section (1) to S.25 within the time-frame as prescribed therein.

17. However, it is now contended on behalf of the appellants by learned Senior Counsel, Shri Dwivedi, that the object of the proviso was in fact to extend the time period of one year to “initiate” the proceedings and hence, the expression ‘proceed to determine’ in sub-section (1) of S.25 of KVAT Act as well as the subsequent third proviso of the said section must be given the same meaning which would according to learned Senior Counsel mean that the proviso also extends the period of limitation by one year at a time by way of substitution of the earlier period being made at every Financial Year under the respective Finance Acts for the initiation of proceedings of reassessment under S.25 of the Act. We do not think that such a meaning could be given to the expression ‘proceed to determine’ as submitted by learned senior counsel insofar as the third proviso to sub-section (1) of S.25 is concerned. Firstly, the said expression

is only w.e.f. the Finance Act, 2017 and not for the earlier period as the words used in the third proviso for the earlier period is "completion of assessments" Thus, the period for completion of assessments cannot mean 'initiation of proceedings.' Although the Legislature may use the very same expression in different parts of a section or different parts of an Act it is ultimately to be seen whether the interpretation so placed on the very same expression would lead to a logical understanding in line with the object and the intention of the Legislature or lead to an absurdity or anomaly. If the same expression used in different parts of a Section or an Act if given the same meaning leads to an anomaly or absurdity then the only option the Court would have is to give a contextual meaning to the said expression.

18. Applying the aforesaid principle to the present case, when the expression "proceed to determine" is given a contextual meaning in the instant case it would mean that under sub-section (1) of S.25 of the Act, the couching of the said expression in the context of the limitation period would only indicate that it is for 'initiation' of the proceeding for reassessment by issuance of a notice. But the expression 'proceed to determine' in the third proviso to sub-section (1) of S.25 by amendment made to the Finance Act is to 'complete' the proceedings initiated under sub-Section (1) of S.25 within the time-frame indicated in the said proviso which, as already noted, must be within one year at a time and the entire third proviso being substituted every successive year under the respective Finance Acts is with a view to mandate the Department to complete the re-opened assessment in a timely manner and within the period stipulated under the said proviso to sub-Section (1) of the S.25 of the KVAT Act. Therefore, the department is not right in contending that the expression 'proceed to determine' in the third proviso gives a lease of life or an extension of the period of limitation by one year at a time for 'initiation' of the reassessment proceeding under sub-section (1) of S.25 of the Act. Such an interpretation would lead to absurdity as a proviso cannot militate against the intention of the main provision in sub-section (1) of S.25 and thus a proviso cannot extend the limitation period which is fixed under the main provision. The normal function of a proviso is to exempt something out of the provision or to qualify something enacted therein which, but for the proviso, would be within the purview of the provision. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. In other words, a proviso qualifies the generality of the main enactment by providing an exception and taking out, as it were, from the main enactment, a portion which, but for the proviso, would fall within the main provision. Further, a proviso cannot be construed as nullifying the provision or as taking away completely a right conferred by the enactment."

9. In the light of the above findings of the Supreme Court, we are essentially called upon to decide whether the view taken in Baiju (supra), which was affirmed by the Division Bench of this Court, has to be seen as impliedly overruled by the judgment of the Supreme Court referred above. It is significant

that in the case that was decided by the Supreme Court, the interpretation of the amended provisions of Section 25(1) of the KVAT Act and the 3rd proviso thereto arose as an incidental issue, since the facts in that case reveal that the dispute therein arose in the context of the statutory provisions as they stood prior to the amendment of 2017.

10. We have heard Smt.Hajara M.K., the learned counsel for the petitioner as also Sri.Mohammed Rafiq, the learned special Government Pleader (Taxes) for the respondent/State. We have also gone through the argument note submitted by the learned special Government Pleader (Taxes).

11. The learned counsel for the petitioner would contend that in the light of the clear finding of the Supreme Court as regards the interpretation to be placed on the 3rd proviso to the amended Section 25(1), the proceedings initiated by the Revenue for assessing turnover that pertained to the assessment year 2011-12, on 24.01.2018, had to be seen as clearly barred by time. Per contra, it is the stand of Sri.Mohammed Rafiq, the learned special Government Pleader (Taxes) that the decision in Chodayil (supra) did not consider the challenge to the amended provisions of the Statute and therefore cannot be seen as attributing a different view to the clear words used in the Statute. He relies on the following decisions to fortify his contentions regarding the interpretation to be placed on the provisions of the 3rd proviso to Section 25(1) of the KVAT Act as amended in 2017: Ghanshyamdas v. Regional Assistant Commissioner of Sales Tax, Nagpur and others – [AIR 1964 SC 766]; State of Punjab and Others v. Tara Chand Lajpat Rai – [(1967) 19 STC 493 (SC)]; Sales Tax Officer and another v. Messers Sudarsanam Iyengar and Sons – [(1962) 2 SCC 396]; Tirur Medical Stores v. State of Kerala – [(1978) 42 STC 118 (Ker)]; Chodayil Private Limited v. Assistant Commissioner (Assessment) – [2015 (4) KLT 516 (FB)]; Binu Gopinath v. State of Kerala – [2018 (2) KLT 991] and Binu Gopinath v. State of Kerala – [2018:KER:21549].

12. We have considered the rival submissions and have once again examined the amended provisions of Section 25(1) of the KVAT Act and the 3rd proviso thereto. Reading the said provisions, in the light of the judgment of the Supreme Court in Chodayil (supra) above, we find that there is an aspect that was overlooked earlier when Baiju (supra) was decided. This is with regard to the different phraseology that is used in Section 25(1) of the KVAT Act and the 3rd proviso thereto. In particular, while the phraseology used in Section 25(1) of the KVAT Act is "at any time within six years from the last date of the year to which the return relates, proceed to determine, to the best of its judgment the turnover which has escaped assessment to tax and assess the tax payable on such turnover after issuing a notice on the dealer and after making such enquiry as it may considered necessary". The phraseology used in the 3rd proviso to Section 25(1) reads "Provided also that the period for proceeding to determine any assessment including those subjected to extension under Section 25B which expires on 31st March, 2017, shall be extended up to 31st March, 2018".

13. It will be seen therefore that while the main provision of Section 25(1) speaks of proceeding to determine the turnover which has escaped assessment and then to assess the tax payable on such turnover, the 3rd proviso speaks of proceeding to determine the assessment itself. We believe that it is taking note of the differential phraseology used in the main provision of Section 25(1) and the 3rd proviso thereto that the Supreme Court in Chodayil (supra) found that the phraseology 'proceed to determine' has a different meaning when used in the main provision of Section 25(1) and in the 3rd proviso thereto. As observed by the Court in Chodayil (supra), 'proceed to determine' in the main provision of Section 25(1) has the meaning of 'initiation of proceedings for assessment' whereas the phrase 'proceed to determine and assessment' occurring in the 3rd proviso thereto has the meaning of 'completing such assessment'. As a matter of fact, the 3rd proviso to Section 25(1), as it stood prior to the amendment in 2017, also spoke of completion of assessment and it is our understanding that the intention of the Legislature remained unchanged while carrying out the amendment to the 3rd proviso to Section 25(1) of the KVAT Act. We may also notice that the extension of time upto 31.03.2018 in the 3rd proviso to Section 25(1) is also granted to assessments subjected to extension under Section 25B which would otherwise expire on 31.03.2017. Section 25B is itself a provision that contemplates the grant of extension of the period of limitation for completing assessments in certain cases, and enabled the Deputy Commissioner for good and sufficient reasons to extend the period of completion of assessments beyond the period specified in Sections 24 and 25 of the KVAT Act. In our view, when the provisions of Section 25B, which are expressly mentioned in the 3rd proviso to Section 25(1), deal with cases for completion of assessment, then the reference to the first part of the 3rd proviso must also be in relation to completion of assessment. We are of the view that the extension contemplated under the 3rd proviso in either event is only for completion of assessments that have already been initiated in accordance with the main provision of Section 25(1) of the KVAT Act.

14. We are therefore of the view that on the facts of the instant case, the notice issued to the petitioner on 24.01.2018 to re-open the assessments pertaining to the assessment year 2011-12, which had crossed the erstwhile five year limitation period on 31.03.2017, could not have been saved by invoking the provisions of the 3rd proviso to Section 25(1) as amended with effect from 01.04.2017. The assessments completed against the petitioner/assessee by the order dated 09.07.2018 has therefore to be seen as bad in law and barred by limitation. We therefore answer question no.(i) in favour of the assessee and against the Revenue.

The O.T. Revision is thus allowed by setting aside the impugned order of the Tribunal and answering the question of limitation in favour of the assessee and against the Revenue.