

(2016) 11 KL CK 0069

In the High Court Of Kerala

Case No : Writ Petition (C) No. 38920 of 2015 (L)

N. Prakasan

APPELLANT

Vs

Commercial Tax Officer

RESPONDENT

Date of Decision : 24-11-2016

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 25C, Section 6(5)

Citation : (2016) 4 KerLJ 852

Hon'ble Judges : Mr. A.M. Shaffique, J.

Bench : Single Bench

Advocate : Sri. V. Devananda Narasimham, Sri. P.H. Riyas, Advocates, for the Petitioner; Sri. V.K. Shamsudheen, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Mr. A.M. Shaffique, J. - Since common questions arise for consideration in these writ petitions, these are heard and decided together.

2. In W.P.(C) No.38920/2015, the petitioner challenges Exts.P5 to P7 assessment orders passed under Section 25(1) of the Kerala Value Added Tax Act, 2003 (hereinafter referred to as the "KVAT Act" for short) and Exts.P12 to P14 penalty orders passed under Section 22(7) of the KVAT Act for the years 2009-10 to 2011-12, respectively. The short facts involved in the above writ petition would disclose that the petitioner is a registered dealer with presumptive identification number. He conceded and filed returns for the years 2009-10, 2010-11 and 2011-12 and remitted tax under Section 6(5) of the KVAT Act. It is contended that after 5 years, i.e., on 03.08.2015, the monthly returns were verified for the aforesaid years and pre-assessment notices were issued under Section 25(1) of the KVAT Act alleging that the petitioner suppressed purchase turnover with an intention to evade payment of tax. Though the petitioner filed reply, the assessments have been completed, which are produced as Exts.P5 to P7. The 1st respondent also issued Ext.P8 penalty notice proposing to impose penalty under Section 22(7) of the KVAT Act. Petitioner filed objection inter alia contending that

when assessments have been completed as per Exts.P5 to P7 applying tax under Section 6(1) of the KVAT Act 2003, there is no basis for initiating penalty proceedings. However, the 1st respondent issued penalty orders, which are impugned as Exts.P12 to P14.

3. Main contention urged by the petitioner is that, being a presumptive dealer under Section 6(5) of the KVAT Act, once returns have been accepted and finalised, there was no reason for re-opening the assessment under Section 25(1) of the KVAT Act. Even otherwise, under the 6th proviso to Section 6(5) of the KVAT Act, petitioner is eligible for input tax credit on the turnover in excess of Rs. 60 lakhs. Ext.P5 assessment order for the year 2009- 10 have been completed fixing sales turnover of Rs. 82,26,091/-, Ext.P6 assessment order for the year 2010-11 by fixing the turnover of Rs. 58,11,410/- and Ext.P7 assessment order for the year 2011-12 by fixing sales turnover of Rs. 68,81,398/-. Once the assessment proceedings were terminated, there was no reason for initiating penalty proceedings. Petitioner submits that the statutory remedy available under Section 55 of the KVAT Act is not effective and therefore this writ petition is filed.

4. Counter affidavit has been filed on behalf of the 1st respondent, inter alia stating that the proceedings had been taken in accordance with law. There is clear suppression of purchase turnover. In the pre-assessment notice, dealer was given full details of purchases detected from KVATIS. Since the purchases during each year is around 1000 numbers, it is not possible to summon each supplier and cross verify the data and therefore they justified the stand taken in the matter.

5. In W.P(C) No. 11849/2016, petitioner challenges Exts.P3 and P3(a) assessment orders. Petitioner is a presumptive dealer under Section 6(5) of the KVAT Act. The petitioner reported sales turnover below Rs. 60 lakhs for the year 2012-13 and paid tax at presumptive rate. While so, she was served with notices under Sections 25(1) and 22(7) of the KVAT Act for which replies were given. In the reply, petitioner specifically sought for benefits under Section 25C. However, ex parte orders were passed as Exts. P3, P3(a) and P3(b). The main contention urged by the petitioner is that when the allegation is that there are unaccounted purchases from registered dealers within the State of Kerala, if the benefit under Section 6(5) of the Act cannot be extended, then the petitioner should be given the benefit of input tax under Section 11 of the KVAT Act. In the Finance Act, 2014, the legislature introduced Section 25C giving it retrospective effect from 01.04.2005. Therefore, indicating that if a dealer is denied the eligibility to pay presumptive tax for violation of conditions enumerated under Section 6(5) of the Act, such dealer shall be granted input tax credit or special rebate, as the case may be. It is submitted that such a benefit had not been extended to the petitioner. Hence, the petitioner seeks to quash Exts. P3, P3(a) and P3(b) orders. Ext. P3 is the assessment order under Section 25(1), Ext.P3(a) is the penalty order under Section 22(7) and Ext.P3(b) is an order under Section 66.

6. Counter affidavit has been filed by the respondent inter alia contending that the purchase turnover of the petitioner as per the list uploaded by respective suppliers would come to Rs. 1,36,69,386/-, the net unaccounted purchase unearthed was to the tune of Rs. 70,02,502/-. It is contended that the order of penalty under Section 22(7) cannot be challenged as it is a specific penalty provision of presumptive dealers violating provisions of Section 6(5). It is further contended that the petitioner is not entitled for the benefits under Section 25C as amended by Finance Act 2014. The said provision is not applicable to the dealer as the assessment was on account of suppression of purchase made by the dealer, which is not one among the conditions prescribed in the said provision.

7. In W.P.(C) No.13920/2016, the impugned orders are Exts.P3 to P3(e) passed by the 1st respondent under Section 22(7) for the assessment years 2009-10 to 2014-15 of the KVAT Act. The main contention urged by the petitioner is that while passing the impugned orders, the assessing authority did not extend the benefit of Section 25C of the Finance Act 2014 to the petitioner. Counter affidavit has been filed on behalf of the 1st respondent raising similar contentions and supporting the stand of the Government inter alia contending that there was clear suppression of the purchase turnover for the relevant period. It is submitted that notice dated 19.11.2015 was issued under Section 22(3) of the Act and since the dealer has not produced any books of account during the prescribed time limit, the assessments were completed. Thereafter, the assessment orders were passed under Section 25(1) of the Act.

8. In W.P.(C) No.17808/2016, petitioner challenges Exts.P3 to P3(b) orders passed under Section 25(1) of the KVAT Act. Petitioner, being a presumptive dealer under Section 6(5), seeks the benefit of input tax credit as provided under Section 25C. The contentions raised are similar to other cases.

9. In W.P.(C) No.17809/2016, petitioner challenges Exts.P3, P3(a) and P3(b) assessment orders and penalty order wherein also petitioner claims the benefit of input tax credit under Section 25C. Ext.P3 is the order passed under Section 24 of the KVAT Act for the assessment year 2013-14, Ext.P3(a) for the assessment year 2014-15 and Ext.P3(b) is the penalty order issued under Section 67(1)(b) (d) of the KVAT Act in respect of assessment year 2013- 14.

10. In W.P.(C) No.24236/2016, petitioner challenges Ext.P1 order of assessment made under Section 25(1) of the KVAT Act for the assessment year 2014-15 inter alia contending that the petitioner is not given the benefit of Section 25C of the Act.

11. In W.P.(C) No.13851/2016, petitioner challenges assessment order Ext.P1 under Section 25(1) of the KVAT Act for the assessment year 2013-14 claiming benefit of input tax credit under Section 25C.

12. In W.P.(C) No.3840/2016, petitioner challenges Exts.P1 to P3 assessment orders under Section 25(1) of the Act and Exts.P4 to P6 penalty orders under Section 22(7) of the Act for the assessment years 2009-10 to 2011-12. In this

case also, petitioner contends that even assuming that there is a suppression of purchase turnover, petitioner is entitled to get input tax credit since the petitioner is a presumptive tax dealer.

13. Though some of the petitioners in these writ petitions contend that there is no suppression of purchases, at the time of hearing, none of the petitioners had raised such a contention and confined their argument to the benefit available under Section 25C of the KVAT Act.

14. Heard the learned counsel for the petitioners and the learned Government Pleader appearing on behalf of the State and its authorities. The learned counsel for the parties relied upon the following judgments:-

(i) Judgment dated 23.01.2015 in O.T.Revision No. 178/2014 in M/s.Keltron Employees Co-operative Society v. State of Kerala. In this judgment, the Division Bench of this Court considered the scope of 6th proviso to sub-section 5 of Section 6 inserted by the Finance Act 2011 with effect from 01.04.2005 by which dealers were entitled to claim benefit of input tax credit on the turnover in excess of Rs. 60 lakhs. The contention urged was that the said benefit would be available even if an application is not filed as per the Rules. It was held that the assessee will be entitled for input tax credit only if an application is filed before the assessing authority as provided under the Rules. The Division Bench also considered the scope and effect of Section 25C brought into effect by the Finance Act 2014 and held that it only enables such dealers to claim input tax credit on the turnover in excess of Rs. 60 lakhs. The Division Bench held that Section 25C will not in any manner absolve any dealer paying presumptive tax against whom any assessment or other proceedings are initiated by the assessing authority denying the eligibility to pay presumptive tax for the violation of conditions enumerated in sub section (5) of Section 6 from being assessed for payment of tax as a normal dealer or from imposing any penalty under Sub Section (7) of Section 22.

(ii) In judgment dated 12.08.2012 in O.T.Revision No.69/2012 (Reji Jose v. State of Kerala), another Division Bench had occasion to consider the scope and effect of Section 6 (5). Referring to the proviso introduced in the Kerala Finance Act 2011, it was held that, once it is found that the assessee exceeded the turnover limit as prescribed under Section 6(5) especially by detection of an offence, even for the turnover which falls within the limit, the assessee cannot be permitted to pay tax at the rate of 0.5%. Even though it is true that the assessee would not have had the option to collect tax when he continued under the presumptive net, such option was always available by way of maintaining proper books of accounts disclosing the actual turnover and seeking conversion to the mode of payment under Section 6(1) in the event of crossing the limit. Then the liability under Section 6(1) would have arisen only for exceeded turnover. The Division Bench of this Court held that the proviso introduced by the Finance Act 2011 was intended to give the said benefit to assesseees who had exceeded the turnover limit during the course of an year. It was further held:

"As noticed above, the claim of input tax credit is destructive to the claim of the assessee for being retained as a presumptive dealer. In any event, as found by the Tribunal, in the teeth of the suppressions having been detected, the assessee cannot claim any input tax credit as held by this Court in *Venus Marketing v. State of Kerala* (2011) 19 KTR 575 (Ker) and *Mohammed Haji v. State of Kerala*, 2012 (3) KLT SN 17 (Case No.19)."

It is contended that by introducing Section 25C of the Finance Act 2014, the rigour of the above judgment has been taken away.

(iii) In O.T.Revision No.39/2013 decided on 31.08.2015, *Shoe Club v. State of Kerala*, the Division Bench of this Court while considering the retrospective amendment made by introduction of Section 25C held that the said provision was intended to enable the dealer to get input tax credit of special rebate even if the dealer had violated conditions enumerated in Sub Section (5) of Section 6.

(iv) Reference is also made to the judgment in *Mooken Devassy and Co v. Commercial Tax Officer* reported in ((2016) 24 KTR 516 (Ker)). In that case, question was; with reference to presumptive dealer under Section 6(5), if the assessing officer had completed assessment taking into account unaccounted purchases and if the turnover does not exceed Rs. 60 lakhs, whether the dealer will be entitled to benefit of Section 6(5) of the Act. It is held that "In such a case, even in spite of the turnover suppressed, since the turnover of the assessee is still below 60 lakhs of rupees, according to us, the assessee ought to have been given the benefit of Section 6(5) of the Act."

15. As already indicated, the petitioners contend that they are all entitled to the benefit of input tax credit as provided under Section 25C which is incorporated as per Finance Act, 2014, since its application has been made retrospective w.e.f. 01.04.2005.

16. On the other hand, learned Government Pleader submits that the above provision will not apply in an instance where suppression is detected by the assessing officer.

17. The benefit of Section 6(5) becomes available to a presumptive dealer, who had agreed to pay tax at the rate of 0.5% of turnover of taxable goods as presumptive tax, instead of paying tax under sub section (1). But, as per Section 6(5), the said dealer shall not be an importer, or a dealer making any sale in the course of industrial trade or commerce, or an exporter, or a dealer registered under the Central Sales Tax Act 1956 or a dealer affecting first taxable sale of goods within the State or a dealer covered by sub section 1(a) of Section 6 or a contractor. Apparently, the 6th proviso to Section 6(5) reads as under:-

"Provided also that notwithstanding anything contained in the Act or Rules made thereunder, if the turnover of the dealer, who opted for payment of tax under this Sub Section, has exceeded the turnover limit during the course of an year, he shall be eligible for input tax credit on the turnover in excess of Rs.60 lakhs."

This provision may not have application to the facts in an issue especially in the light of the judgment in *Keltron Employees Co-operative Society v. State of Kerala* (supra).

18. Section 25C reads as under:-

"25C. Special provision regarding assessment of dealer paying presumptive tax.- Notwithstanding anything contained in sub-section (4) of section 11 or sub-section (2) of section 12, if any assessment or other proceeding is initiated by the assessing authority denying the eligibility of a dealer to pay presumptive tax for the violation of conditions enumerated in sub-section (5) of section 6, such dealer shall be granted input tax credit or special rebate, as the case may be."

The provision starts with a non obstante clause thereby indicating that if in an assessment or other proceeding initiated by the assessing authority, the eligibility of a dealer to pay presumptive tax is denied on account of violation of a condition enumerated under Sub-section (5) of Section 6 of the KVAT Act, such a dealer can be granted input tax credit.

19. First argument of the petitioner is that the non-disclosure or suppression of turnover comes within the conditions specified under Section 6(5) of the Act. The conditions specified under Section 6(5) are enumerated under clauses (a) to (f), which read as under:-

"(a) an importer; or

(b) a dealer making any sale in the course of interstate trade or commerce or export; or

(c) a dealer registered under the Central Sales Tax Act, 1956 (Central Act 74 of 1956); or

(d) a dealer effecting first taxable sale of goods within the State; or

(e) a dealer covered by sub-section (1A); or

(f) a contractor"

A bare reading of the conditions enumerated above does not instill confidence to arrive at a conclusion that suppression of purchase turnover comes within any of the conditions enumerated under Section 6(5).

20. Therefore, primarily Section 25C of the Act will not apply in an instance where the presumptive dealer suppresses his turnover. The learned counsel for the petitioners however submits that even in an instance where there is suppression of turnover by a presumptive dealer, a Division Bench of this Court in *Mookan Devassy and Co.*, (supra) observed that if the turnover assessed does not exceed Rs. 60 lakhs, the dealer is entitled for the benefit of payment of presumptive tax. If such a rationale is adopted, the petitioners in the present cases are also entitled for benefit of input tax credit. Section 25C applies only if the assessing authority had denied the eligibility of the dealer to pay

presumptive tax for the violation of conditions enumerated in sub section (5) of Section 6. Unless such a finding is made by the assessing authority in the assessment order that the petitioners have violated any of the conditions enumerated in Section 6(5), none of the petitioners are entitled for the benefit of Section 25C. In other words, a finding by the assessing authority that the dealer has violated the conditions in Section 6(5) is a precondition for claiming input tax credit under Section 25C.

21. In some of these cases, petitioners also challenge the penalty proceedings taken under Section 22(7) of the Act. As already held by the Division Bench in Keltron Employees Co-operative Society (*supra*), it is an independent provision in respect of dealers paying tax under Section 6(5) and if it is found that amount of tax if any paid is less than the amount of tax which he is liable to pay, then the assessing authority has jurisdiction to direct the dealer to pay difference of tax between the amount of tax already paid and that fixed in such proceedings together with thrice the amount of such difference as penalty. Having regard to the aforesaid discussion, I do not think that the petitioners are entitled to get any relief in the above writ petitions.

22. In W.P.(C) No.38920/2015, Ext.P6 relates to the assessment year 2010-11 where the total taxable turnover fixed is Rs. 58,11,410/-, which, being below 60 lakh rupees, is covered by the judgment in Mookan Devassy's case (*supra*). The corresponding penalty order is Ext.P13.

In the said circumstances, these writ petitions are disposed as under:-

(i) W.P.(C) No.38920/2015 is partly allowed setting aside Exts.P6 and P13. The assessing Officer is directed to make a fresh assessment giving the benefit of payment of tax at presumptive rate. The challenge to Exts.P5, P7, P12 and P14 are rejected.

(ii) WP(C) Nos. 3840, 11849, 13851, 13920, 17808, 17809 and 24236 of 2016 are dismissed.