
(2010) 02 KL CK 0024

In the High Court Of Kerala

Case No : Writ Petition (C) No. 32866 of 2009

Sasi

APPELLANT

Vs

The Commercial Tax Officer

RESPONDENT

Date of Decision : 05-02-2010

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 43, 7
Kerala Value Added Tax Act, 2003 — Section 66(3), 8
Kerala Value Added Tax Rules, 2005 — Rule 11(2)

Citation : (2010) 1 KLT 661 : (2011) 6 RCR(Civil) 1139 : (2010) 32 VST 463

Hon'ble Judges : C.K. Abdul Rehim, J

Bench : Single Bench

Advocate : P.N. Damodaram Namboothiri, for the Appellant; C.K. Govindan, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Abdul Rehim, J.—Challenge in this Writ Petition is against Ext.P6 notice issued u/s 66(3) of the Kerala Value Added Tax Act, 2003 (KVAT Act). Through the said notice, the 1st respondent had intimated the petitioner about proposal to revise Ext.P5 permission already granted u/s 8(b) read with Rule 11(2)(i) of the KVAT Act and Rules. The petitioner is running a Granite crushing industrial unit and he is a registered dealer under the provisions of the KVAT Act. The petitioner opted for compounding u/s 8(b) of the Act and application submitted in this regard in Form- 1D evidenced from Ext.P1 was allowed as per Ext.P5 proceedings issued in Form-4DA, fixing compounded tax payable for the year 2009-10 as Rs. 25,250/- which includes tax amount of Rs. 25,000/- and cess of Rs. 250/-. The said amount was permitted to be remitted in quarterly installments of Rs. 6,313/- each. In Ext.P6 notice it is mentioned that on a subsequent verification of records and on enquiry conducted by the 1st respondent, it is noticed that there was mistake in fixing compounding rate and the same ought to have been fixed at Rs. 1,50,000/-, in view of the provisions contained in the Finance Act, 2009. Being a mistake apparent on the face of

record it was ought to be rectified. Through Ext.P6, the petitioner was called upon to submit objections if any against the proposal.

2. For a better appreciation of the dispute involved, it will be beneficial to examine the relevant provisions. Section 8(b) of the KVAT Act as it stood till the year 2008-2009 is extracted below,

(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. 50,000 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 : 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. 7,50,000 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 m-sand produced by them.

Explanation: For the purposes of this clause, primary, crusher shall also be reckoned for the purpose of computation of the quantum of compounded tax, and the rate applicable primary crusher shall be fifty per cent of the rates mentioned in items (i), (ii) and (iii) above. Through Finance Bill, 2009, copy of which is produced as Ext.P7, the State Government proposed amendments to Section 8(b) reducing the rate of tax for compounding. As per the said proposal, Section 8(b) was sought to be amended as follows:

(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 each crushing machine of size exceeding 30.48 cm x 22.86 cm but not exceeding 40.64 cm x 25.40 cm : Rs. 1,50,000 per annum.

(iii) for each crushing machine of size exceeding .40.64 cm x 25.40 cm : Rs. 3,00,000 per annum.

(iv) for each cone crusher Rs. 10,00,000 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 m-sand

produced by them:

Provided further that dealers with a single crusher other than cone crusher shall pay rupees twenty five 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.

It is evident from the second proviso proposed to be added to Section 8(b) that, those dealers who are having single crushing machine other than cone crusher will be permitted to pay tax at the rate of Rs. 25,000/- per annum. It is pointed out that on the basis of the Finance Bill the Commissioner of Commercial Taxes (2nd respondent) had issued Ext.P4 a circular which contained operational instructions for implementation of the provisions of Finance Bill 2009-10. In Ext.P4 circular it is mentioned that compounded rate for single crusher irrespective of Jaw size (other than cone crusher) will be Rs. 25,000/- per annum. Ext.P4 circular was issued on 23.3.2009.

3. There is no dispute with respect to the fact that the size of machinery which is being used by the petitioner is falling within the category mentioned as item(ii) of Section 8(b), i.e., machine having size; exceeding 30.48 cm. x 22.86 cm., but not exceeding 40.46 cm, x 25.40 cm. It is also an admitted case that during the previous year the rate of compounding with respect to the machinery in question was Rs. 1,60,000/-. The fact that the petitioner had opted for compounding during the previous year and had paid tax @ Rs. 1,60,000/- is also not in dispute. It is evident that Ext.P5 order permitting compounding at Rs. 25,000/- was issued only on Ext.P4 circular which in turn was issued based on Ext.P7 Finance Bill. But when Finance Act 2009 dated 28.7.2009 was introduced, the 2nd proviso to Section 8(b) is incorporated only as follows:

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 c.m. shall pay rupees twenty five thousand only per annum as tax under this clause

On the basis of the provisions introduced through Finance Act 2009, Section 8(b) of the KVAT Act stood amended with effect from 28.7.2009 as above. Therefore the authorities noticed that the provisions contained in the Finance Bill was never incorporated into the statute and hence the compounding permitted through Ext.P5 was a mistake. Therefore it was sought to be rectified.

4. Under the above premise the question need to be considered is as to whether the petitioner is entitled to pay tax at the compounded rate as ordered in Ext.P5, which is issued based on the provisions of the Finance Bill 2009 and Ext.P4 circular of the 2nd respondent. According to the petitioner the permission granted on the above basis is not liable to be rectified, for any reason that such benefit was not available under the Finance Act. It is contended that the Finance

Act was enforced during midway of the year and therefore imposition of a different tariff in the middle of the year is not permissible. Learned Counsel for the petitioner Sri. P.N.D. Namboothiri had placed reliance on the dictum laid down by the Hon'ble Supreme Court in Varkisons Engineers Vs. State of Kerala and Another, . In that case, the view taken by the Kerala High Court, holding that the amendment made to Clause (b) of Sub-section (i) of Section 7 of the Kerala General Sales Tax Act, 1963 eventhough came into effect only on July 23rd, is applicable for the whole year of 2001-2002, was set aside and the matter was remanded for "de novo" consideration to examine the question as to whether imposition of a different tariff in the middle of the year could be given effect in the absence of proper machinery for computing tax liability, and also expressing doubt as to whether Section 43 of the K.G.S.T. Act could be invoked by the department in cases where an alternate mode of taxation u/s 7 for paying compounded tax is followed.

5. In the case at hand it is an admitted position that during the previous year, as per provisions of the statute then in force, the petitioner was liable to pay compounded rate of tax at Rs. 1,60,000/-. It is, also admitted by virtue of Finance Act, 2009 the rate of compounding fixed with respect to the particular machinery size is Rs. 1,50,000/-. Contentions of the petitioner that Ext.P5 could not be rectified, need be examined based on the above facts. The reduced rate for payment @ Rs. 25,000/- per annum was permitted under Ext.P5, only based on the 2nd proviso to Section 8(b) which was sought to be introduced through Finance Bill 2009, and also based on Ext.P4 circular issued containing instructions for implementation of provisions of Finance Bill. In this regard facts of the case at hand clearly distinguished from the decision of the Hon'ble Supreme Court in Arkison's case (cited supra). The proposal contained in the Finance Bill was never transmitted into the statute. The statute which stood as on the date of commencement of the financial year 2009-2010, i.e., as on 1.4.2009, the rate of compounding stipulated was Rs. 1,60,000/-. Therefore it cannot be said that in variance of the prevailing rate of tax any enhancement was brought during mid way of the financial year by enforcement of the Finance Act, 2009. On the other hand it is clear and evident that what is sought to be rectified through Ext.P6 is only a mistake that crept in fixing the compounding rate, which happened to be refixed based on the proposals contained in the Finance Bill and,. based on clarifications issued through the circular. But the proposal contained in the Finance Bill was never incorporated into the statute. Hence the provisions contained in the Finance Act, through which amendment was brought in to Section 8(b), there is absolutely no enhancement effected with respect to the rate of tax, in prejudice to the interest of the petitioner.

6. Under the above circumstances, the further question mooted for consideration is as to whether the rate fixed and permitted through an order of compounding can be rectified, enhancing such rate, during midway of the financial year. It is to be noticed that the rate permitted through Ext.P5 order was not the rate contained in the statute at any point of time. Hence it is purely a mistake which

is liable for rectification.

7. Learned Counsel for the petitioner raised yet another argument that Ext.P4 circular issued by the 2nd respondent is having legal enforceability and a decision taken on the basis of such circular cannot be revised subsequently in prejudice to the interest of the assessee. In support of the above contention the petitioner had placed reliance on the decisions of the Hon'ble Supreme Court in Commissioner of Sales Tax (U.P.) v. Indra Industries 122 (2001) STC 100 and State of Kerala and Ors. v. Kurian Abraham (P) Ltd. and Anr. 2008 (4) KLT 85 (C. No. 75) SC : 2008 (16) KTR 184 (SC) and a few other decisions. Going by the dictum laid down in those decisions it is clear and evident that the circulars interpreting or clarifying any provisions contained in fiscal statute, which if issued by the competent authority empowered for issuing such circulars under the provisions of the respective statutes, is binding on all assessing authorities concerned. But in the case at hand Ext.P4 cannot be termed as a circular issued under the provisions of the statute interpreting or clarifying any of the provisions contained in statute. On the other hand Ext.P4 contained only operational instructions for implementation of proposals contained in the Kerala Finance Bill, 2009. If such proposals have not been transmitted into statute books at any point of time, it cannot be said that those proposals were having any statutory force. Hence Ext.P4 cannot be termed as circular issued in interpretation or in clarification of any of the provisions contained in the relevant statute. In the case at hand it is evident that, the decision taken based on the proposals contained in the Finance Bill which was instructed to be implemented through Ext.P4 circular, stands in contradiction to the statute which stood prior to the amendment and after the amendment. Therefore it is evident that the petitioner could not, as a matter of right, claim benefit of the proposals contained in the Finance Bill nor the benefit of Ext.P4 circular issued providing operational instructions of implementation of such proposals.

8. In the above perspective of the issue, the question as to whether Ext.P5 order is liable to be rectified u/s 66(3) of the KVAT Act; can only be answered on the affirmative. It is evident that the rate fixed in Ext.P5 is not the rate contemplated under the statute which was in force, at any point of time. Therefore it can safely be held that fixation of rate was due to a mistake apparent on the face of the record. Hence the same is liable to be rectified u/s 66(3) of the KVAT Act.

9. Under the above circumstances, I find no reason to interfere with the proposal contained in Ext.P6 notice. Hence the Writ Petition deserves no merit and the same is accordingly dismissed.