

(2012) 12 KL CK 0120
In the High Court Of Kerala
Case No : O.T.R. No"s. 90 and 94 of 2012

Satheesh Kumar

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 14-12-2012

Acts Referred:

Central Sales Tax Act, 1956 — Section 2(h), 9(2)
Kerala General Sales Tax Act, 1963 — Section 7
Kerala Value Added Tax Act, 2003 — Section 10, 67, 67(c), 71, 8

Citation : (2013) 2 ILR (Ker) 526 : (2013) 2 KLT 331

Hon'ble Judges : K.M. Joseph, J;K. Harilal, J

Bench : Division Bench

Advocate : Aji V. Dev and J. Sushanth, for the Appellant; Bobby John, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Joseph, J.—Revision Petitions are filed by the very same assessee. The petitioner has been visited with penalty and the Tribunal has sustained penalty at the reduced rate. The years in question are 2006-07 and 2007-08. O.T.R. 90/2012 relates to the assessment year 2006-07. The petitioner is a contractor. He agreed to execute work for the Janatha Service Co-Operative Bank, Vallicode, Kottayam for construction of the building. He received a sum of Rs. 7,70,000/- in three instalments in the year 2006-07 and sum of Rs. 4,85,976/- during 2007-08. According to him, actual transfer has been effected on 22/7/2007 and the final bill was received on 17/8/2007. The Intelligence Officer, however, found that the petitioner had suppressed the above turnover and imposed penalty of Rs. 1,44,376/- for the years 2006-07. For the years 2007-08, the Intelligence Officer imposed penalty of Rs. 391,120/-. Appeal filed before the first appellate authority was unsuccessful. The Tribunal however reduced the penalty for the year 2006-07 from Rs. 1,44,376/- to Rs. 50,000/-. For the year 2007-08, penalty was reduced from Rs. 91,120/- to Rs. 30,000/-. It is against that the appellant came before us. Following questions of law are purported to be raised:

(a) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law, taking the view that the mobilization advances received by the revision petitioner is taxable, especially considering the statutory provisions that (i) no advance tax is insisted U/s. 8 of the KVAT Act but it is insisted U/s. 10 only, (ii) the awarder had neither deducted nor paid any tax on advances and (iii) under R. 11(1) contractor can file option (pay tax) within 30 days of the conclusion of the contract.

(b) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in disallowing the claim of liability of tax @ 4%, even though the revision petitioner was under compounding scheme of taxation.

(c) Whether on the facts and in the circumstances of the case, the appellate tribunal is erred in not following the dictum laid down by the Hon"ble Apex Court in E.I.D. Parry (I) Ltd. v. Asst. Commissioner of Commercial Taxes & Anr. (2000) 117 STC 457 (SC).

(d) Is not the order of the tribunal erroneous and perverse on the facts and circumstances of the case?

2. We heard the learned counsel for the petitioner and the learned Government Pleader.

3. Learned counsel for the petitioner would submit that the findings are unsustainable. According to him, this is a case where he has opted for compounding and he has paid the tax. He drew our attention to R. 11 of the Kerala Value Added Tax Rules. Therein he relied on the first clause of second proviso which reads as follows:

(a) in the case of a contractor, the option shall be filed within thirty days from the date on which the contract, in respect of which such option is filed, is concluded. One such option may cover one or more works contract.

It is his contention that he has right to opt within a period of 30 days from the date on which the contract is concluded and it means 30 days from the date when the work is executed. Therefore according to him, option is within time and there is no basis for the penalty. He would contend that under S. 10 of the Act, there is an obligation on the part of the awarder of the work to deduct the tax. Therefore, he would contend that when the amounts were received, he was entitled to take the view that the awarder has deducted the tax and therefore, there is no liability on his part.

4. Per contra, the learned Government Pleader would point out that R. 11 (1) reads as follows:

11. Filing of option by dealers for payment of compounded tax.-- (1)Every application for exercising option for payment of compounded tax u/s 8 shall be in Form No. 1D and shall be filed before the assessing authority on or before the 30th day of April every year.

According to him, the acceptance of the contention of the petitioner would have the anomalous result of allowing the assessee to postpone the payment of tax to the point as he chooses, namely he can fix the date with reference to his understanding of when he completed the work and this is certainly not the interpretation to be placed on rule. According to him, the words when the contract is concluded only means when the contract is entered into.

5. Learned counsel for the petitioner drew our attention of the decision of the Apex Court E.I.D. Parry (1) Ltd. v. Assistant Commissioner of Commercial Taxes & Anr. ((2000) 117 STC 457) and Cement Marketing Co. of India Ltd. v. The Assistant Commissioner of Sales Tax, Indore & Ors. ((1980) 45 STC 197) and according to him, in view of the doubtful position of law, there is no justification in the officer imposing penalty.

6. As far as the duty on the part of the awarder to deduct the tax is concerned, it is submitted by the Government Pleader that being a Co-operative Society, they may not have deducted the tax. At any rate, the said provision cannot absolve from the petitioner of his duty to file return and also show the turnover in the return. In this case penalty has been visited upon the petitioner for not showing the turnover, that is the amounts received during the relevant period and also for not filing the return.

7. The learned Government Pleader would further submit that no reliance can be placed on decisions as facts are distinguishable. In this case the petitioner has been visited with the penalty under S. 67 of the Kerala Value Added Tax Act. (hereinafter referred to as the Act). No doubt the learned counsel for the petitioner would point out the exact sub-section under which the penalty was imposed is not mentioned.

8. But, we take note of S. 67(c) and (d). Admittedly the petitioner was carrying out a works contract for the Co-operative Society. Admittedly, he has received certain sums. The sums are fairly large sums. There is no dispute that in the return filed, he did not include the said sum. There is no disputing the fact that for a quarter, he did not file the return. S. 67 reads inter alia as follows:

67. Imposition of penalty by authorities--Notwithstanding anything contained in Section 71 if any authority empowered under this Act is satisfied that any person,--

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(c) has failed to submit any return as required by the provisions of this Act or the rules made thereunder; or

(d) has submitted an untrue, or, incorrect return.

9. Now we will examine whether there is any merit or bonafides in the contention of the petitioner based on his interpretation of the first proviso to R. 11 of the Rules. The Law contemplates application for compounding being filed every year.

This is clear beyond the point of ambiguity from a perusal of R. 11. It specifically says that the Contractor seeking to exercise option shall either in Form 1D or in 1D(a), file the option on or before 30th of April every year. It is next followed by the first proviso fixing the time within which such option has to be filed. On the one hand, the learned counsel for the petitioner would contend that there is time to file it within a period of 30 days of the conclusion of the work, that is to say 30 days begins to run from the date on which the work is executed. On the other hand, the learned Government Pleader would contend that the words thirty days from the date on which the contract is concluded can bear only one meaning namely 30 days on which the contract is executed. We have absolutely no doubt in our mind that the rule maker intended that option has been exercised within thirty days from the date on which the contract is made. He would also refer sub-r.(1A) of R. 11 which reads as follows:

11. Filing of option by dealers for payment of compounded tax.-- (1)Every application for exercising option for payment of compounded tax u/s 8 shall be in Form No. 1D and shall be filed before the assessing authority on or before the 30th day of April every year:

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(1A) Along with the application the dealer shall furnish the following documents namely:-

(a) in the case of a works contractor other than those covered by item (iii) of clause (a) of section 8 -

(i) a copy each of the agreement executed by the contractor with the awarder and the work schedule; and

(ii) copies of the agreement executed with the sub-contractor and certificates in Form No. 20H obtained from each sub-contractor (applicable in cases where deduction is claimed in respect of sub-contracts);

(b) in the case of a works contractor covered by item (iii) of clause (a) of section 8 -

(i) copies of the permission, if any, granted under sub-section (9) of section 7 of the Kerala General Sales Tax Act 1963 (15 of 1963)

(ii) a certificate from the awarder showing the date of awarding, total amount and payments already made in respect of each contract; and

(iii) a copy each of the agreement executed by the contractor with the awarder and the work schedule;

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XXX XXX XXX

Sub-rule (2) of R. 11 contemplates permission being granted by the assessing

officer on being satisfied that the application filed is in order. We are of the view that there can be no ambiguity regarding the meaning of the words when the contract is concluded. It can only mean the date on which the contract is executed or when the contract is entered into. The provision of sub-r. (1A) of R. 11 also contemplates the copy of the agreement being forwarded. No doubt in clause (ii) of sub-r.(b) of Rule (1A) even the payment, which has been received in respect of each contract is to be indicated. But none of that will detract from the interpretation which we have placed that the law requires the application for compounding to be made within thirty days of the party entering into the contract. This conclusion is further fortified by the requirement that the application is being made every year. Tax is apparently to be collected on the basis of the provisions as contemplated and further it is to be done on the basis of the deductions in accordance with the provision as contemplated.

10. As far as the contention of the petitioner that under S. 10 of the Act the awarder has to deduct the tax or should have deducted the tax and, therefore, penalty should not have been levied, we are not impressed by the said argument. No doubt, an awarder has a legal duty to deduct tax under S. 10, but can the assessee deny power to the officer to impose penalty under S. 67 not filing a return and not including the turnover in question in the return on the basis that the awarder had a duty to deduct the tax. It is true that the Department can proceed against the awarder, but in a case where the awarder has not deducted the tax and the said turnover is completely suppressed and the works contractor also does not show the turnover in the return, the resultant position would be that the revenue will suffer the loss. As far as the petitioner is concerned, we notice that the petitioner took up contention that the amounts were received as advance and therefore he did not show the amount returned. The said argument is not pressed before us. Therefore, the petitioner ought to have returned the said turnover in its return. Admittedly, he has not returned it. He has also not filed one quarterly return. They clearly attract the penal provisions contained in S. 67. We have already found that the contention of the petitioner is not correct and the first proviso of R. 1(a) cannot support the petitioner. The further question which arises is whether the petitioner can lay store by the principles enunciated by the Apex Court in the two decisions. No doubt penalty need not be imposed and even if law provides for the imposition of minimum penalty it need not be imposed and there is always discretion with the authority. As far as the decision in *E.I.D. Parry (I) Ltd. v. Assistant Commissioner of Commercial Taxes & Anr.* ((2000) 117 STC 457) is concerned, the court took the view that there was a bona fide failure on the basis of a doubtful position in law to include the taxable item and therefore, penalty ought not have been levied. We think that the facts of the instant case before us would not attract the principles enunciated therein. In *Cement Marketing Co. of India Ltd. v. The Assistant Commissioner of Sales Tax, Indore & Ors.* ((1980)45 STC 197) the court held as follows:

The assessee effected certain transactions of sale of cement in accordance with

provisions of the Cement Control Order and deducted from the price shown in the invoices sent to the purchasers, the amount of freight, which was included in the "free on rail destination railway station price" and which was paid by the purchasers.: Held, that the amount of freight formed part of the sale price within the meaning of the first part of the definition of that term in S. 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 and S. 2(h) of the Central Sales Tax Act, 1956 and was rightly included in the taxable turnover of the assessee.

Hindustan Sagar Mills Ltd. v. State of Rajasthan (1919) 43 STC 13(SC); 1979(D.S.C.R. 276 followed.

S. 43 of the Madhya Pradesh Act providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty.

A return cannot be said to be "false" within the meaning of S. 43 unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the court may, in a given case infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty.

Where the contention of the assessee throughout was that on a proper construction of the definition of "sale price" in S. 2(o) of the Madhya Pradesh Act and S. 2(h) of the Central Act, the amount of freight did not fall within the definition and was not liable to be included in the taxable turnover, it could not be said that the contention of the assessee was frivolous taken up merely for the purpose of avoiding liability to pay tax. It was a highly arguable contention which required serious consideration by the court. The belief entertained by the assessee that it was not liable to include the amount of freight in the taxable turnover could not be said to be mala fide or unreasonable, but was a bona fide belief and therefore penalty could not be imposed on the assessee under S. 43 of the Madhya Pradesh Act and S. 9(2) of the Central Act.

11. In this case as we have already noted on a plain reading of the proviso of the section and proviso to R. 11 of the Rules, it is difficult to accept the case that the words thirty days from the date on which the contract is concluded would mean thirty days from the date on which the work is executed. It is also difficult to disagree with the finding of the fact finding authority. A large sum cannot be characterised as advance. The society would not part the large sum by way of advance. Equally, there is clear failure to file quarterly return. The law obliges the assessee to file quarterly return. We would think that we may not be justified in accepting the contention based on S. 10 of the Act that the amounts were not shown in the return and the return was not filed for one quarter on the basis of

the belief that the awarder has deducted the tax. Therefore, we would conclude that the principles enunciated by the Apex Court cannot assist the petitioner. Lastly the learned counsel for the petitioner would submit that quantum relief may be given to the petitioner. We have already noticed that for one year the penalty was an amount of Rs. 1,44,376/- which has been reduced to Rs. 50,000/-. For the other year, the Tribunal has granted relief by reducing penalty from Rs. 91,120 to Rs. 30,000/-. We are of the clear view that there is no scope for granting relief. The questions of law answered are against the petitioner.

The O.T.Rs. are dismissed.