(2009) 10 KL CK 0033

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 29206 of 2009

Shanthi Poultry Farm Pvt. Ltd.	APPELLANT
Vs	
Commercial Tax Inspector	RESPONDENT

Date of Decision : 27-10-2009

Acts Referred:

Central Sales Tax Act, 1956 — Section 7(4)
Kerala Value Added Tax Act, 2003 — Section 16(10), 16(11), 16(9), 17(1), 31(5)
Kerala Value Added Tax Rules, 2005 — Rule 17(18), 28

Citation : (2009) 4 KLT 884

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

Bench : Single Bench

Advocate : K. Ramakumar, S. Anil Kumar Trivandrum, K.S. Hariharan Nair, M. Ramesh Chander, K.A. Sanjeetha and Aneesh Joseph, for the Appellant; K. Vinod Chandran, Spl. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

C.K. Abdul Rehim, J.—W.P.(C) 29206/2009 was originally filed seeking direction for permitting inter-state consignment of dressed chicken, poultry feeds, etc., which are supported by documents prescribed u/s 46 of the Kerala Value Added Tax Act, 2003 (K.V.A.T. Act), on payment of Advance Tax in accordance with the directions contained in Circular No. 50/06. After filing the Writ Petition the petitioner was issued with Ext.P10 notice u/s 16(10) of the K.V.A.T. Act read with Rule 17(18)(vii) of the K.V.A.T. Rules 2005. By the said notice the petitioner was required to submit reply if any against proposal for cancellation of the registrations under the K.V.A.T. Act and the Central Sales Tax Act (C.S.T. Act), within 24 hours. Further the petitioner was also required to furnish additional security u/s 17(1) of the K.V.A.T. Act to the tune of Rs. 89,33,177/-. On receipt of Ext.P10 notice, the petitioner submitted Ext.P 11 reply contending that the time of 24 hours granted is unreasonable and insufficient. Further it is pointed out that the Writ Petition is posted for consideration on 20.10.2009. Inspite of the request to keep the proceedings in abeyance, Ext.P12 is issued by the 3rd respondent cancelling registration of the petitioner granted under the K.V.A.T. Act and C.S.T. Act. Through amendments brought in to the Writ Petition, Ext.P12 proceedings is now under challenge.

2. The petitioner in W.P.(C) No. 29600/09 had approached this Court challenging Ext.P9 notice issued proposing cancellation of registration. But after filing the Writ Petition the registration is cancelled as evidenced by Ext.P10 and by amendment brought in to the Writ Petition the cancellation of registration is under challenge. W.P. (C) No. 29900/09 is filed challenging Ext.P9 order wherein registration of the petitioner is cancelled. Since the cancellation of registration in all the three cases are based on the same set of facts and allegations, they were considered together and disposed of by a common judgment.

3. The petitioner in W.P.(C) No. 29206/09, which is a private limited company, is a registered dealer having its place of business in West Yakkara, Palakkad and is dealing with live chicken, hatching chicks, equipments, poultry feeds and poultry medicines, etc. The allegations in Ext.P12 order cancelling registration is that, the Deputy Commissioner of Commercial Taxes, Palakkad in his report submitted to the Commissioner of Commercial Taxes, Thiruvananthapuram had informed that the Bank instruments furnished by the dealer towards Advance tax, between the period from 3.8.2000 to 3.9.2000, worth Rs. 50,000/- have been dishonoured for insufficiency of funds in the bank account and that the Commissioner of Commercial Taxes had instructed to invoke provisions of the K.V.A.T. Act to cancel registration of the dealer. It is further alleged that tendering of invalid bank instrument and dishonouring of the same when presented for encashment is a "good and sufficient reason" provided u/s 16(10) of the K.V.A.T. Act. The proceedings further says that the instruments tendered by the dealer was accepted by the officials of the Check Post, on the presumption that it is ''Pay Order'' issued by Axis Bank, Palakkad and the description of the signature in the instrument was printed in order to mislead the Check Post authorities that those are ''Pay Orders''. But, in fact those instruments were cheques issued by "Peroorkkadavu Farmers Development Society" in favour of Commercial Tax Inspector, Naduppuni. Therefore the nature of offence committed by the dealer is grave and is liable to be dealt with under the provisions of Section 16(10) read with Rule 17(18) (vii) of the K.V.A.T. Act and Section 7(4)(b) of the C.S.T. Act. The proceedings further says that the dealer had failed in filing reply and only sought 7 days time on the ground of pendency of the Writ Petition. But since the matter relates to proposal for cancellation of registration in a case of fraud perpetrated on the State revenue and forgery committed, the request cannot be acceded to, because sustaining the registration alive is against interest of revenue. Therefore the objection is over-ruled and the registration is cancelled.

4. Similarly, in W.P.(C) No. 29600/09 the allegation is that the report of the Deputy Commissioner, Palakkad is to the effect that the petitioner had presented the cheques issued by the Axis Bank, Palakkad to the Check Post at Naduppuni

making to believe the instrument as ''Demand Drafts'' and 5 cheques thus issued were dishonoured. Therefore there was a deliberate attempt of evasion of tax by cheating and misleading Government authorities and the petitioner have conspired with unscrupulous persons for submitting the cheques issued by ''Peroorkadavu Farmers Development Society, Palakkad''. In this case the petitioner has submitted detailed reply wherein it is stated that the chicken are generally transported during night hours in order to avoid hot sunlight and the vehicles may be arriving the Check Post after 5 O''clock in the evening. Since it is not practical to obtain Demand Drafts during that time the petitioner was compelled to avail service of certain persons at Palakkad to obtain and submit pay orders. Huge amounts of Advance Tax was paid with respect to all other consignments effected during the period from April 2009 to July 2009, which were properly credited to the Government account and the Pay Orders which are said to be bogus are submitted only by the agents namely Manoj and Geevarghese, who were entrusted by the dealer to remit Advance Tax. Infact those agents were cheating the petitioner by submitting bogus pay orders and therefore the petitioner had requested to permit remittance of tax due with interest and penalty. Further the petitioner had submitted that he is ready and willing to furnish additional security if needed and hence requested to refrain from cancelling the registration. But the Assessing Authority found that since there is an admission from the part of the dealer that the cheques submitted were bogus, it became convinced that they are conniving in defrauding the Government along with some other persons and therefore the petitioner had violated Section 47(16A) of the K.V.A.T. Act. Therefore the registration is cancelled.

5. In the case of W.P.(C) No. 29900/09 the allegation is that the petitioner had produced various cheques amounting to Rs. 1,17,000/- which are found to be fake and unrealisable and thereby he had cheated the Government. In this case also the petitioner had filed reply to the notice wherein identical contention as in the above case was taken, that the cheques are issued only by the agents and the petitioner was not in the knowledge that those instruments are bogus. The mistake was apologised and the petitioner had offered to pay the whole amount. It is submitted in the objection that the petitioner is not a practitioner of any malpractice mentioned and he was made a victim by some culprits for their wrong doings and in the history of transactions he never defaulted any payments due to the Government. But the Assessing Authority after considering the objections held that there is a duty cast upon the dealer to see that the tax due to the State exchequer is settled then and there and the Advance tax payments reaches the Government timely without fail. Since the petitioner received illegal gains and thereby cheated the Government exchequer, and since the investigation is in progress, continuance of registration is prejudicial to the Revenue.

6. It is noticed that in W.P.(C) No. 29600/09 the petitioner had produced Demand Drafts for an amount of Rs. 2,05,100/- being the amount covered by

dishonoured cheques with interest u/s 31(5) and penalty, as evidenced by Ext.P8 series. In that case the 1st respondent had issued notice u/s 67 of the K.V.A.T. Act demanding penalty of Rs. 4 lakhs plus Rs. 2 lakhs as tax. The notice proposing to impose penalty is produced as Ext.P9. So also in the case of W.P.(C) No. 29900/09 the petitioner was imposed with penalty to the tune of Rs. 4 lakhs and the petitioner had remitted the said amount by way of Demand Draft as evidenced by Ext.P8.

7. One of the main grounds of challenge against the impugned orders is that, there is absolutely no ingredients brought out to establish any valid reason coming within the purview of Section 16(10) of the K.V.A.T. Act. Section 16(10) reads as follows:

Section 16(10): Notwithstanding anything contained in Sub-section (9), the registering authority shall have power, for good and sufficient reasons, to cancel, modify or amend any registration certificate issued by it.

What amount to "good and sufficient reasons" for the purpose of Section 16(10) is enumerated in Rule 17(18) of the K.V.A.T. Rules, which reads as follows:

Rule 17(18): No registration shall be cancelled under Sub-section (9) or Sub-section (10) of Section 16 without giving an opportunity to the dealer of being heard. For the purposes of Sub-section (10) of Section 16), the following shall constitute good and sufficient reasons, namely:

(i) Where the registration has been obtained in the name of a fictitious persons or where the place of business shown in the application is non-existent or the owner of such places has not given his consent in writing to the applicant for running the business; or

(ii) Where the applicant has obtained the registration by the exercise of fraud or misrepresentation of facts; or

(iii) Where the dealer is found to have claimed input tax credit or refund of input tax on the strength of any forged or bogus document; or

(iv) Where the dealer has not been paying the tax collected by him to Government as required by the Act or these rules consecutively for a period of three returns periods and/or has failed to furnish any security or additional security demanded by the registering authority; or

(v) Where the deafer is found to have obstructed the officers conducting audit visit or inspection or search at his business place or residence in accordance with the provisions of the Act or these rules; or

(vi) Where the registration is continued without any business being transacted for a continuous period of two years, or

(vii) Where there is any other act or omission of a like nature on the part of the dealer.

Contention of the petitioners is that dishonour of cheque cannot be considered as "any other act or omission of a like nature" mentioned in Clause (vii) of Sub-rule (18) of Rule 17. In support it is contended that procedure to be followed in case of dishonour of cheque is enumerated in Rule 28 of the K.V.A.T. Rules, which reads as follows:

Rule 28: Procedure where a cheque is dishonoured: If a cheque presented by a dealer towards payment of tax or other amount due under the Act is dishonoured the assessing authority shall issue a notice to the dealer in Form No. 10H. On receipt of the notice, the dealer shall make the payment of the amount within the time specified therein, but not later than ten days from the date of receipt of the notice, along with interest under Sub-section (5) of Section 31. The dealer shall not be permitted to make payment by means of cheque for a period of six months as specified in the notice, which may be extended by the assessing authority, with due notice to the dealer, for good and sufficient reasons to be recorded in writing. However, if the dealer pays the amount covered by the cheque and makes prompt payment of tax or other amount due under the Act for a period of six months, the assessing authority shall restore the facility of payment by means of cheque.

In the cases at hand the authority had not followed the procedure prescribed under Rule 28. But at the very first moment when it is intimated that the cheques were dishonoured, the petitioners have paid or tendered the full amount covered under such dishonoured cheques. Therefore it is contended that the dishonour of cheque by itself could have been dealt with by imposition of the consequences as provided in Rule 28, and it is not a ''good and sufficient reason'' for cancellation of registration.

8. Another foremost contention against the impugned action is that, it is specifically mentioned that the Commissioner of Commercial Taxes had issued instructions to invoke provisions of K.V.A.T. Act to cancel registration of the dealers. Hence it is clear that the authority who issued the impugned proceedings has not acted on the basis of any materials brought on to his satisfaction or after he became convinced that there is circumstances warranting such cancellation. It is contended that there was no independent application of mind by the authority who exercised the jurisdiction and the order is passed without any advertence to the facts and circumstances of the case, in order to arrive at any conclusion that the registrations are liable to be cancelled.

9. The petitioner in W.P.(C) No. 29206/09 contended that there is denial of opportunity to the petitioner for objecting the proposal, and thereby violation of principles of natural justice writ at large on the face of the order impugned. It is contended that no reasonable opportunity as mandated in Section 16(11) was afforded. There was no exigency warranting cancellation of registration within 24 hours, because there existed no imminent prejudice to the interest of the State, is the contention. It is pointed out that the authority had already issued demand for payment of additional security as contemplated u/s 17(1) of K.V.A.T. Act and

also initiated action for imposing penalty as per Section 67 of K.V.A.T. Act, and therefore the imminent cancellation of registration was not at all warranted. In W.P. (C) Nos. 29600/09 and 2990G/09, contentions are raised to the effect that there is clear failure on the part of the authority concerned to advert to the explanations/objections submitted to the proposal. Inspite of specific denial of any role in the perpetration of the alleged forgery or fraud, and inspite of the specific contention that presentation of the cheques was made without any involvement or connivance of the dealers, such contentions were not at all adverted to by the authority nor any conclusion was arrived on the merits of such contentions. Therefore the impugned orders are not sustainable, is the submissions.

10. The respondents have filed statements in W.P.(C) Nos. 29206709 and 29600/09. It is stated therein that, investigations conducted subsequent to dishonour of cheques revealed massive fraud being committed in payment of Advance Tax causing huge loss to the State coming to crores of rupees. It is further stated that suspecting connivance of officers, 7 Commercial Tax Inspectors at the Check Post and Deputy Commissioner, Palakkad and Inspecting Assistant Commissioner, Chittoor, were already placed under suspension. The acceptance of cheque was against specific directions contained in Circular No. 25/2007 dt. 3.7.2007 and the petitioner had played an active role in the commission of the fraud. It is further submitted that investigation is going on, based on a crime registered by the police. It is also contended that impugned orders are appealable under K.V.A.T. Act, and hence the Writ Petition is not maintainable.

11. Heard, M/s. K. Ramakumar, Senior Counsel, S. Anil Kumar and M. Ramesh Chander appearing on behalf of petitioners and Shri, K. Vinod Chandran, Special Government Pleader (Taxes) on behalf of respondents. Arguments were advanced on behalf of the petitioners based on the above narrated grounds for interference with the orders impugned. On the other hand the learned Special Government Pleader vehemently opposed such contentions on more than one ground.

12. At the outset, maintainability of the Writ Petitions are questioned on the basis of effective alternate remedy of appeal available under the statute. Learned Counsel for the petitioners pointed out that there is no appeal provided against an order issued u/s 16(9) of the K.V.A.T. Act, as per Section 55(1) of the said Act. But it is specific that the impugned orders are not issued under Sub-section (9) of Section 16. The learned Spl. Government Pleader pointed out that even if in a case where appeal is not maintainable, there is effective remedy of Revision provided u/s 57 of the Act. But the learned Senior Counsel pointed out that the alternate remedy provided in the statute is not a bar in these cases for various reasons. It is contended that since there is lack of proper ingredients to invoke Section 16(10) or Rule 17(18)(vii), the question to be decided is purely legal in nature concerned with jurisdiction of the authority, and hence there is no

impropriety in entertaining the Writ Petition. It is further contended that on cancellation of registration, the petitioners are put to imminent prejudices of irreparable nature, because the goods dealt with by them are perishable. Therefore inordinate delay which may be caused in resorting to the appellate remedy will defeat the purpose. Further it is contended that since it is clear and evident that the cancellation of registration is based on instructions issued by the Commissioner of Commercial Taxes, any appeal, to an authority subordinate to him, will not be dealt with independently. On an evaluation of the rival contentions on this point, I am of the opinion that considering the special circumstances of the case and nature of the grounds raised, there is no impediment for this Court to examine sustainability of the impugned orders, notwithstanding availability of the alternate remedy. Hence I am proceeding to deal with the contentions with respect to sustainability of the orders in the eye of law.

13. The prime question to be considered in these cases is as to whether the ingredients of Section 16(10) read with R, 17(18)(vii) was established, justifying cancellation of registration. The crux of the allegation is about dishonour of the cheques issued towards payment of Advance Tax. But dishonour of cheques as such cannot be considered as "good and sufficient reason" contemplated u/s 16(10) or as an "act or omission of a like nature" enumerated in Rule 17(18)(vii). This is especially because of the specific procedure provided with respect to dishonour of cheques in Rule 28 of K.V.A.T. Rules. When consequential actions are specified in the said Rule, mere dishonour of cheque cannot be taken as reason u/s 16(10)or as an ''act or omission'' coming under Rule 17(18)(vii), and such a reason alone will not constitute the ingredients necessary to invoke action for cancellation of registration.

14. Learned Special Government Pleader raised a contention that the procedure in Rule 28 is contemplated only with respect to dishonour of "a cheque" and when there is repeated dishonours it will amount to evasion of tax committed on more than one occasion, which is coming within the purview of Section 16(9) of K.V.A.T. Act, and which will warrant cancellation of registration. But the contention is liable to be repelled, since no action as enumerated in Rule 28 was resorted to in any of these cases on the dishonour of any one of the cheques, on any earlier occasion, and also because of the fact that the action is initiated specifically on the basis of reasons contemplated u/s 16(10), and not u/s 16(9).

15. The next question arising for consideration is as to whether there exists any other ''good and sufficient'' reason warranting cancellation of registration, apart from the mere dishonour of the cheques. It is brought out on record that the cheques in question were presented as if it were pay orders. From Circular No. 25/2007 it is evident that the Check Post authorities are restrained from accepting Advance Tax other than by way of demand drafts. Whether the Advance Tax can be accepted through pay orders or as to whether there was any misrepresentation made to the effect that the cheques produced were pay orders

etc. need examination. In the impugned order in W.P.(C) No. 29206/09 there is an observation, "Beyond all since the matter involved is a case of forgery and fraud sustaining registration alive is against the interest of revenue". Of course, if forgery or fraud is committed and if there is involvement of the petitioners in committing such forger or fraud, it may be a ''good and sufficient reason'' coming within the purview of Section 16(10) or may be an "act or omission" contemplated under Rule 17(18)(vii). But before taking an action on the basis of such an allegation, principles of natural justice demand that, the dealers should be put on with specific notices raising such allegations and they should be given adequate opportunity to defend such allegations. Eventhough the statement filed on behalf of the respondents enumerate unearthing of a large scale fraud committed and a massive action initiated against the authorities who were suspected to have connived, the proposal notices issued in these cases does not reveal any such instances or it does not contain any such narrations. The question as to whether there is any direct involvement of the dealers in perpetrating such a fraud is yet to be enquired and no such specific allegation is raised. On the other hand inspite of specific contention raised by two of the petitioners that they are innocent and the malpractices were committed by some third person without their knowledge or connivance, no advertence to such contentions is seen made, nor any conclusion was seen arrived repelling such contentions.

16. Considering the haste at which the matter was dealt with and considering the contents of the proposals issued as well as contents of the orders impugned, I am of the opinion that there was no independent application of mind rendered by the competent authority while issuing the proposals and while finalizing the proceedings. It is evident that the entire proceedings were pursued in an attempt to give effect to the instructions issued by the Commissioner of Commercial Taxes. The cryptic nature of the conclusions narrated in the impugned orders, itself reveals non-application of mind and non-advertence to the objections. Therefore I am of the opinion that the impugned orders cannot be sustained while tested on the touch stone of the mandatory requirements of a quasi-judicial proceedings, and therefore those orders are liable to be quashed.

17. But it is made clear that quashing of the impugned proceedings will not in any way prevent the competent authority in initiating fresh proceedings for cancellation of registration on issuing fresh notices, enumerating valid grounds either u/s 16(9) or u/s 16(10) of the K.V.A.T. Act read with Rule 17(18) of the K.V.A.T. Rules, and in finalizing such proceedings after affording reasonable opportunity to the petitioners to object such proposal, and after affording opportunity of personal hearing. It is also made clear that quashing of the impugned proceedings is without prejudice to any other proceedings already initiated or which may be initiated against the petitioners for imposition of penalty, demand for additional security deposit, demand for payment of tax amounts due with interest, and such other proceedings.

18. In the result the Writ Petitions are allowed quashing the impugned orders in all the three cases, wherein registration of the petitioners under K.V.A.T. Act and C.S.T. Act are cancelled. But it is made clear that the quashing of the impugned orders is without prejudice to any fresh proceedings which, may be initiated against the petitioners u/s 16(9) or/and Section 16(10) of the K.V.A.T. Act, read with Rule 17(18) of the K.V.A.T. Rules, based on the same cause of incidents, facts and circumstances and the authority concerned shall take note of the observations made hereinabove, before taking any fresh proceedings.

