(2012) 07 KL CK 0016

In the High Court Of Kerala

Case No : O.T. Rev. No. 22 of 2012

State of Kerala APPELLANT

Vs

M.M. Enterprises RESPONDENT

Date of Decision : 03-07-2012

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 25, 31, 42, 42(2)

Citation : (2013) 63 VST 323

Hon'ble Judges : Thottathil B. Radhakrishnan, J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : Boby John, Government Pleader, for the Appellant;

Judgement

K. Vinod Chandran, J.—The revision petitioner is the State and the respondent is a dealer in Cement and Steel. State challenges the order of the Tribunal which reversed the order of assessment u/s 25 of the Kerala Value Added Tax Act, 2003 (hereinafter referred to as "the Act") modified by the first appellate authority. Though the assessee/respondent was issued notice and was served, there is no appearance and we proceed to dispose of the revision after hearing the Government Pleader. The dealer filed the annual returns in form 10 showing the total sales turnover above Rs. 40,00,000 for the year 2008-09. On verification of the returns and books of accounts, it was found that certain purchases have not passed through the regular books of accounts maintained by the dealer and that certain excess invoices were noticed for the year. It was proposed to reject the claim of Rs. 11,542.78 and Rs. 17,436.22 as input-tax credit respectively for the months of February and March 2009. The proceedings were taken u/s 25 of the Act, which deals with "assessment of escaped turnover". Best judgment assessment was made by adding unaccounted purchases as also 11/2 time of such unaccounted purchase for probable omission and suppression. Gross profit at 25 percent was added to arrive at the total sales turnover. Annexure A order passed u/s 25 of the Act was challenged in first appeal which ended in annexure B, wherein the aspect of duplication of bills raised in assessment was directed to be reconsidered by assessing officer. Rejection of input-tax credit was confirmed and addition was reduced to equal amount of the suppression with similar deduction of gross profit to 10 percent.

2. Assessee not satisfied with the modification approached the Value Added Tax Tribunal by way of second appeal as provided under the statute. The Tribunal by annexure C order remanded the matter, however, making certain observations regarding the action of the assessing officer in resorting to best judgment assessment u/s 25 of the Act.

3. The Tribunal held that the appellant/assessee is entitled to file revised return as contemplated u/s 42(2) of the Act, and having filed the audited statement of accounts and revised return as per audited report along with tax due, interest and settlement fee, the purchases should be held to be accounted for and consequent credit of input tax granted. The Tribunal found that explanation tendered by the assessee being valid, there cannot be any assessment for escaped turnover u/s 25 of the Act and that eligibility to file revised return u/s 42(2) cannot be taken away. Mandate of rule 22(4) of the Value Added Tax Rules, 2005, it was held, could not override the provisions of section 42(2). Rejection of input-tax credit was also remanded to the assessing authority with the observation that the same is allowable on submission of purchase bills subject to the stipulation in the Act and Rules and also on there being evidence to the effect that consignors have reported the sales to the assessing authority and accounted the transaction. The assessee then was held to be entitled to the benefit of input-tax credit. In such circumstances, the issues were remanded for consideration by assessing officer. The question of law raised by the State regarding input-tax credit does not arise from the order of the Tribunal, since it is an open remand. We have already held in M. Mohammed Haji Manachithodi Agencies, Palakkad Vs. State of Kerala, that a dealer who has suppressed purchases is disentitled from claiming input tax despite the suppressed purchases having suffered tax. With respect to the assessment u/s 25 of the Act, the remand is futile in so far as the Tribunals findings on sub-section (2) of section 42 obliges the assessing officer to accept the books of accounts.

4. The only question that would arise for our consideration is as to whether on receipt of notice u/s 25 of the KVAT Act, the dealer would be entitled to file a revised return u/s 42(2). The question of law raised by the State is modified as under:

(1) Whether a dealer can file revised return u/s 42(2) of the Act, after proceedings have been initiated u/s 25 of the KVAT Act and after assessment of escaped turnover?

5. The assessee claims that whatever was notified as escaped turnover has now been returned as tax suffered. According to the Tribunal, this claim would extinguish the power available to the assessing authority to make the assessment for escaped turnover u/s 25 of the KVAT Act resorting to best of

judgment.

6. We are unable to agree with the said proposition. Section 42 as it stood in the year 2008-09 mandates annual audit by a chartered accountant or cost accountant and submission of copy of audited accounts and certificate as prescribed by every dealer whose turnover exceeds Rs. 40,00,000. By sub-section (2) it is also stipulated that where any dealer detects any mistake in the annual returns with reference to the audited figures he shall file a revised annual return along with audited certificate. Section also provides for payment of such tax, interest due thereon and penal interest calculated as per section 31 of the Act. The proviso to the section also stipulates that any dealer against whom penal action is initiated, shall not be granted the said benefit of filing revised returns in respect of such omission or mistake, upon which penal action is initiated. Notice u/s 25 definitely will not amount to penal action. Hence the proviso will not be applicable. However the revised return is only with respect to any omission or mistake in the returns with reference to the audited figures. Hence on audit being completed if the returns already filed contain any mistakes or anything is omitted to be included then returns are permitted to be revised, however by automatic sufferance of liability to interest and penal interest.

7. The moot question is as "to whether in the facts of this case, section 42(2) can be resorted to. Sub-section (2) of section 42 specifically speaks of any omission or mistake with reference to the audited figures. It necessarily postulates a revised return on any omissions or mistakes being noticed in audit. Definitely on such mistakes being noticed by a chartered accountant or cost accountant in the course of audit which is also reflected in the audited figures the dealer would be entitled to file a revised return as provided under sub-section (2). The omission detected in the present case is not one of difference between audited figures and the annual returns filed. On verification of the books of accounts as also annual returns, the assessing authority found definite instances of suppression of purchase. This prompted the assessing officer to initiate action against the assessee u/s 25 for assessment of escaped turnover. The assessee had also received notice and the proceedings had concluded with annexure A. In fact, the specific contention of the assessee before the assessing officer was that "books of accounts are under audit and revised return as contemplated u/s 42(2) of the Act shall be filed along with audit report" ("sic"). Evidently there is no revised return filed before the passing of annexure A. The Tribunal also did not make any effort to find out whether such revised return had been filed before the date in which assessment was concluded u/s 25 of the Act. Going by the findings of the Tribunal it has to be assumed that the revised return u/s 42(2) of the Act was filed by the time the case reached the Tribunal. In any event the date of filing such return will not be relevant since the omission was not one detected with reference to audited figures.

8. Section 25 is an independent provision enabling assessment of escaped turnover wherein the assessing authority initiating action under the above

section has been granted the powers to make best judgment assessment. The second proviso to sub-section (1) of section 25 also provides for filing revised return but only in the event of application of incorrect rate of tax. Section 42(2) cannot be imported to wriggle out of assessment proposed u/s 25. When action is proposed u/s 25, revised return can be filed only in the manner provided therein and in the situation provided thereon. Even going by the facts of the instant case, the revised return u/s 42(2) assumed by Tribunal to have been filed by assessee is not by way of rectifying a mistake or omission in the annual return with reference to the audited figures. Actual suppression of purchase was detected by the assessing officer and proceedings initiated. The findings of the Tribunal with respect to section 25 and section 42(2) of the KVAT Act hence cannot be sustained. The question of law hence is answered in favour of the Revenue and against the assessee.

9. The order of remand with respect to the input-tax credit is sustained but the setting aside of the best judgment assessment by the Tribunal is overruled. The order of the assessing authority as modified by the first appellate authority should normally revive in so far as the additions are concerned. Since the Tribunal has not considered the justification of the estimations as modified by the first appellate authority, the assessing officer shall along with the issue of input-tax credit, consider the estimation afresh but shall in any event confine it to that as modified by the first appellate authority. The other tax revision is allowed remanding the matter to the assessing officer to complete the assessment afresh as directed above, after issuing notice to the assessee and affording an opportunity for hearing.

