
(2009) 02 KL CK 0019
In the High Court Of Kerala
Case No : S.T. Rev. No. 79 of 2008

State of Kerala

APPELLANT

Vs

T.S. Kalyanaraman

RESPONDENT

Date of Decision : 13-02-2009

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 23(3), 23(3A), 39(7), 7(1)
Kerala General Sales Tax Rules, 1963 — Rule 30(1)

Citation : (2009) 26 VST 661

Hon'ble Judges : K. Surendra Mohan, J; C.N. Ramachandran Nair, J

Bench : Division Bench

Advocate : Mohammed Raffiq, Government Pleader, for the Appellant; S.K. Devi and Santhosh P. Abraham, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—This is a revision filed by the State against the order of the Tribunal rejecting an application for review filed by the Revenue u/s 39(7) of the Kerala General Sales Tax Act, 1963 to review an order in appeal issued by the Tribunal. The respondent-assessee, a dealer in gold jewellery, filed an application for payment of tax at compounded rate as provided u/s 7(1)(a) of the KGST Act read with Rule 30(1) of the Kerala General Sales Tax Rules, 1963 for the assessment year 2000-01. Even though application for payment of tax at compounded rate was furnished in form 21 on due date, the assessing officer did not pass any orders or issue form 21A or demand in form 22 as required under the provisions of the Act and Rules. However, the respondent-assessee started remitting tax along with monthly returns in terms of the compounding application filed by him. The assessing officer did not raise any objection in the monthly returns filed by the respondent-assessee for the whole year whereunder tax payment was strictly in terms of the compounding application and the monthly tax paid for the 12 months was at a uniform rate of Rs. 61,344 which was the tax payable at compounded rate as conceded in the form 21 application filed by the respondent-assessee. However, when the assessment was taken up, the assessing officer noticed that there was deficiency in payment of tax at

compounded rate in as much as the tax determined by the respondent-assessee for the year 1998-99 which also constituted the basis of payment of tax at compounded rate for 2000-01 was incorrect. At this stage, the assessee raised objection to the pre-assessment notice issued contending that he does not want an assessment at the compounded rate u/s 7(1)(a) and the assessment should be completed on the taxable turnover returned or to be determined by the officer. The assessing officer, however, completed the assessment in terms of the compounding application u/s 7(1)(a) and issued assessment and demand notice demanding differential tax at compounded rate with interest thereon. The first appeal filed against the assessment was dismissed by the Deputy Commissioner (Appeal) and in second appeal, the Tribunal allowed the claim. However, the State filed a review petition stating that the Tribunal has not considered relevant facts, particularly the follow-up action taken by the respondent-assessee by remittance of tax at compounded rate. Even though the Tribunal issued a detailed order disclosing therein the additional new facts furnished by the Department which clearly establish that the respondent-assessee acted upon the compounding application filed by him by remitting the tax strictly in terms of it, the Tribunal dismissed the review application stating that the same is not tenable. It is against this, the State has filed the revision case. We have heard Government Pleader appearing for the petitioner and counsel appearing for the assessee.

2. During hearing of this revision, counsel for the respondent-assessee pointed out that the State has not filed separate revision against original order of the Tribunal and so much so, merits of the case cannot be considered by this court. However, Government Pleader pointed out that the challenge against order in review application is sufficient to redress the grievance of the State inasmuch as if this Court finds that review application was wrongly dismissed by the Tribunal, then State will be entitled to relief against original order in appeal. We are inclined to accept this contention because on going through the impugned orders of the Tribunal disposing of the review application, we find that new facts furnished by the Department are narrated by the Tribunal in the said order, whereas in the original order-in-appeal they have not considered these facts which are crucial for deciding the issue. In fact, neither in the original order nor in the order in the review application, the Tribunal has considered the effect of pendency of an application for compounding filed by the respondent-assessee u/s 7(1)(a) read with Rule 30(1) of the KGST Rules and the consequence of the assessee acting upon the compounding application that was pending by remitting tax along with monthly returns strictly in terms of the pending application so filed and whether the officer is entitled to pass orders accepting compounding along with the assessment. These issues should have been considered by the Tribunal because neither the Act nor the Rules prescribe the time-limit for the officer to pass order on compounding application filed by the assessee. It is also seen that the proviso to Rule 30(1) entitles an assessee to make a belated application in form 21 for payment of tax at compounded rate. We find that even

after the Department brought out new facts before the Tribunal, it still did not choose to consider the relevance of the same nor did it consider the effect of pendency of an application filed in form 21 which was not withdrawn by the respondent-assessee at any point of time, but continuously acted upon the same by remitting tax for all the year along with 12 monthly returns filed strictly in terms of the compounding application originally filed by him. It is a fact that the compounding application filed by the assessee remained in force and the assessee acted upon the same by remitting tax along with monthly returns strictly in terms of the compounding application. At no point of time the assessing officer rejected the compounding application and when assessment was taken up, he accepted the compounding application but made correction with regard to the tax payable for the preceding year, i.e., 1998-99, which also constitutes the basis for payment of tax at compounded rate for 2000-01. We notice that but for the correction that the assessing officer made for the tax payable for the year 1998-99, which led to an increase in the tax payable at compounded rate from the amount shown by the assessee, the assessee would not have raised this objection. Even though there is no time-limit prescribed for passing orders on compounding application filed in form 21, the right procedure for the assessing officer was to pass an order and inform the assessee of his orders before the due date for filing the first monthly return due for the year. In other words, before May 10, of the relevant year, the assessee is entitled to an order on the compounding application filed in form 21. However, so long as the application is not rejected, nothing bars the assessee from proceeding to file monthly returns and remit tax at the rate shown in the compounding application filed by him. It is seen from the order of the Tribunal in the review application that even though the assessee's liability for payment of tax based on the taxable turnover returned every month was much below the tax payable based on the compounding application, the assessee continued to remit tax for all the 12 months at the uniform rate of Rs. 61,344, which is the tax payable, along with monthly returns in terms of the application for compounding furnished by the assessee in form 21. The conduct of the assessee obviously shows that the assessee insisted that the assessing officer accept the compounding application and the assessing officer at no point of time acted against this request of the assessee. It is clear from the order that application for compounding was considered by the assessing officer while considering assessment and after correcting the mistake with regard to tax payable for 1998-99, the assessing officer, in fact, accepted the compounding application and allowed the claim of the assessee. It is seen that the assessee has not withdrawn the application for compounding at any time and on the other hand, the assessee acted upon the said application and remitted the tax for the whole year along with monthly returns strictly in terms of the said application. We, therefore, hold that the assessee is not entitled to back-track and request the assessing officer to complete the assessment based on the turnover returned by the assessee. It is to be noted that the offer to pay tax at compounded rate gives an immunity to the assessee from inspection and other interference by the Department in the

course of his business. Regular assesseees who are not covered by the scheme of payment of tax at compounded tax can be subject to inspection at any time during the year and in cases where tax is accepted based on application filed for compounding, the Department has no right to inspect or harass the assesseees. After availing of immunity in these forms, the assessee cannot after the closure of the year go back from the offer he made for payment of tax at compounded rate. Therefore, we are of the view that the Tribunal thoroughly went wrong in holding that the assessee is entitled to back out from his offer to pay tax at compounded rate, which stands accepted by the officer while passing the assessment order. Even though the normal procedure for accepting offer of the assessee to pay tax at compounded rate is to issue an order in form 21A along with notice of demand in form No. 22, such procedure is an empty formality after the closure of the assessment year when assessee has filed all the monthly returns and even the final return. In cases where the application for compounding is pending and monthly returns are accepted based on the same, the assessing officer can consider acceptance of application for compounding filed in form 21 in the course of assessment itself. We, therefore, find nothing irregular in the officer accepting the scheme of payment of tax at compounded rate offered by the assessee in the course of regular assessment. Therefore, the scope for appeal is only limited to the assessee's challenge against modification of the tax payable for earlier year namely, 1998-99. We also make it clear that since the modification in the tax payable at compounded rate is made by the officer only in the course of assessment, no interest could be demanded from the assessee u/s 23(3) or Section 23(3A) of the KGST Act for any period until default arises. In other words, interest should be payable on the differential amount for the default period, i.e., for the period after service of notice along with assessment order.

3. Even though in the normal course we should restore the matter to the Tribunal after vacating the order in review, we do not think there is any need for the same because in the course of considering the revision against the order in review, we have considered the matter on merits and decided all the issues arising from the order in appeal as well which were also raised in the revision case filed by the State. Further, when the review application was considered by the Tribunal on merits, though rejected, there is merger of the appellate order in the order in review and so much so, we allow the revision by vacating the orders of the Tribunal both in the appeal as well as in the review application by holding that the assessment at compounded rate is perfectly justified. However, we direct the assessing officer to reconsider the tax for the year 1998-99 which is one of the basis for determination of tax payable at compounded rate for 2000-01 and then rework interest by excluding liability for the differential amount for the period noted above and issue a revised order to the assessee. Fresh order should be passed after issuing a proposal to the respondent-assessee, calling for their objection and only after hearing the objections. If any issue survives with regard to determination of tax for 1998-99 for the purpose of payment of tax at

compounded rate for 2000-01, the assessee is free to file appeal.