(2013) 02 KL CK 0110

In the High Court Of Kerala

Case No : O.T. Rev. No. 10 of 2013

Suresh Lal — APPELLANT

Vs

State of Kerala — RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Citation : (2014) 68 VST 139

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

Bench : Division Bench

Advocate : S. Santhosh Kumar and Smt. P. Lissy Jose, for the Appellant; Bobby John Pulikkaparabil, Government Pleader, for the Respondent

Judgement

K.M. Joseph, J.—The petitioner has filed this revision feeling aggrieved by the order passed by the Kerala Value Added Tax Appellate Tribunal, Ernakulam, under the Kerala Value Added Tax Act, 2003 (hereinafter referred to as "the Tribunal" and "the Act", respectively). The assessment order in question is 2009-10. The petitioner is conducting a metal crusher unit. Crushed metal was originally taxable under entry 97 of the Third Schedule to the Act at four per cent. With effect from April 1, 2007, granite metal was deleted from the purview of the entry, if it is produced with the aid of crushing machines and from April 1, 2007 it became assessable at 12.5 per cent. For the year 2009-10, the petitioner alleges that electronic filing of the return was introduced for the first time. It is his further case that with the help of the staff of the Department, in the monthly return, the entry generated was "industrial inputs coming under the Third Schedule" instead of "crushed metal". Resultantly, the petitioner would say that he showed the rate of tax at four per cent. On realising the mistake, the petitioner filed revised return on August 7, 2010. He paid the differential tax with interest and settlement fee under the second proviso to section 25(1) of the Act. The petitioner, in the meantime, had been issued with a notice by the Intelligence Officer proposing penalty u/s 67 of the Act for filing incorrect monthly returns. By annexure A order, overruling the objection of the petitioner, penalty was imposed at Rs. 4,05,420 being double the amount of tax sought to be evaded. Appeal was unsuccessful. Annexure D is the order passed by the Tribunal upholding the decision to impose penalty, but reducing the penalty to the amount of tax sought to be evaded, that is, the penalty was reduced to Rs. 2,02,710.

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

3. The learned counsel for the petitioner would submit that this is only on account of the facts as aforesaid, that is, e-filing was introduced for the first time on April 1, 2009 and it was done with the help of the Departmental staff that the computer generated software showed the entry as "industrial inputs coming under the Third Schedule". It was accordingly that tax at four per cent was paid. Learned counsel for the petitioner also drew our attention to rule 24D(4) which reads as follows:

24D. Electronic filing of returns.--(1) to (3) . . .

(4) The assessing authority shall approve the entries made by the dealer after which the return will be registered in KVATIS.

4. He further sought support from rule 35. According to him, rule 35 provides that if in any case the return is rejected, reasons must be furnished to the assessee, not later than the due date for filing of the return for the subsequent period, inter alia. He would, therefore, submit that the petitioner cannot be faulted, particularly bearing in mind that the proceedings are penal in nature. The petitioner acted bona fide. He would further emphasise that this is a case where the Government had extended the date to file the annual return to August 31, 2010 and that return was filed within that period. He would submit that the return was not rejected and, therefore, the reliance which has been placed by all the authorities including the Tribunal on section 79B and section 22(9) is without basis. Learned counsel for the petitioner would submit that it cannot be that it is a case of filing incorrect return and it only relates to the rate of tax.

5. Per contra, learned Government Pleader would point out that no case has been established for interference in the revision. He would lay store by sections 22(9) and 79B. He would submit that revised return was filed by the petitioner after penalty proceedings were initiated and, therefore, there is a clear bar under the Act against their acceptance. As far as the case of the petitioner that the petitioner has paid settlement fee referred to in section 22(5), he would submit that it cannot bar the authority from proceeding u/s 67 of the Act. He would point out that in this case the intelligence officer has proceeded u/s 67(1)(d) and (j), that is, for filing incorrect return and for contravening the provisions of the Act and the Rules. Learned Government Pleader relies on the judgment of this court in Jainulavudheen Vs. State of Kerala,

6. Admittedly, the petitioner has filed return for the year 2009-10 disclosing Rs.

23,61,075 as sales turnover. Penalty proceedings were initiated on July 12, 2010. We notice that when the said notice was received, the petitioner filed a request on July 26, 2010 for ten days time for furnishing reply to the notice and producing books of accounts. The request was considered and the case was adjourned to August 4, 2010. On August 4, 2010, the petitioner again requested for ten days time more. The officer issued summons to the petitioner to appear on August 18, 2010. On August 17, 2010 the petitioner reported that due to bonus discussion and labour problems, he could not appear on August 18, 2010 and he requested for a date after Onam and also sought permission to file revised return for the year 2009-10. He filed a reply with a revised return for the year 2009-10 on September 7, 2010 (it is common case that it was filed on August 9, 2010). We notice further from the penalty order that the contention taken by the petitioner was that the amendment did not come to its notice and so the rate adopted from the commencement of the Act was continued. He contended further that there was proper reason to believe that even the assessing officer was unaware of the amendment, as the return filed was never rejected, nor the adoption of wrong rate of tax brought to his notice.

7. The petitioner has filed a return wherein he has shown the rate of tax at four per cent in respect of granites produced by him which clearly attracts tax at 12.5 per cent from April 1, 2007. The year in question is 2009-10. Quite clearly the return filed by the petitioner showing the rate of tax at four per cent in place of 12.5 per cent can be said to be an incorrect return. There is misclassification of the rate. It is pertinent to note that the authority has found that for the previous year the petitioner has been classifying the very same goods as "granite". But, for the year 2009-10, the petitioner has shown it as "industrial inputs coming under the Third Schedule". The argument which is projected before us is that e-filing was introduced for the first time from April 1, 2009 and therefore it was on the basis of the understanding of the officers also that the rate was shown as four per cent. We notice that such an argument was not raised before the Intelligence Officer. Therefore, the attempt made by the petitioner to set up such a case before us cannot be countenanced. In other words, the only case set up before the authority was that the petitioner was not aware of the amendment, and that even the officers were not aware of the amendment. Even if neither the petitioner nor the officers were aware of the amendment, there is no case before the Intelligence Officer justifying describing "granite" in the return for the year 2009-10 as "industrial inputs coming under the Third Schedule" when for the previous years after the amendment came into force with effect from April 1, 2007, the petitioner had been showing the very same materials as "granite".

8. Therefore, we cannot say that the decision of the officer to impose penalty is illegal or without any basis. Having regard to the provisions contained in section 22(9) and section 79B of the Act, there is a clear bar to the acceptance of revised return, once penal action was initiated. Undoubtedly, penal action was initiated prior to the petitioner filing the revised return. Therefore, the petitioner cannot lay store by the extension granted for filing the annual return for the year

2009-10 till August 31, 2010. This is a case where the petitioner had filed a return and, therefore, the subsequent return can only be treated as a revised return. Therefore, in view of the supervening event, namely, issuance of the notice proposing penalty, the law sets a bar to the petitioner to filing revised return.

9. As far as the provisions contained in section 22(5) is concerned, it may be true that the petitioner has paid the settlement fee and that was accepted also. But as pointed out by the learned Government Pleader, it cannot be a bar for imposition of penalty u/s 67. No express bar against imposing a penalty is also brought to our notice.

10. As far as rules 35 and 24D(4) which we have referred to are concerned, it may be true that the officers ought to have been more diligent and should have rejected the return. Under the KVAT Act and the scheme, the law provides for self-assessment. But, at the same time, rule 35 sets a time-limit for rejecting the return and conveying the reasons. Also, provisions relating to e-filing contained in section 24D(4) contemplated an active role for the officer, the whole purpose being the interest of the Revenue is safe-guarded and money pours into the public coffers as it should promptly. But, this by itself will not obviate the duty of the assessee to file the return correctly. Obviously, ignorance of the law is no excuse. The amendment enhancing the rate of tax came into force by a public document. The petitioner has shown the rate of tax incorrectly, rendering the return an incorrect return. Therefore, we do not think that in the facts of this case we should interfere with the decision of the authority as confirmed by the two appellate authorities to impose penalty on the petitioner. But, we also feel that having regard to all circumstances, in particular, the provisions contained in rules 24D(4) and 35 and also the admitted fact that the petitioner has paid the entire amount of tax with interest and settlement fee, the amount of penalty should be further reduced. In the circumstances, we modify the order passed by the Tribunal by directing that the petitioner will be liable to pay penalty at Rs. 1,50,000 in place of what is ordered by the Tribunal. Subject to the same, the revision petition will stand dismissed.

