

(2014) 06 KL CK 0109
In the High Court Of Kerala
Case No : OT. Rev. No. 127 of 2013

Trichur Auto Spares

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 10-06-2014

Acts Referred:

Kerala Value Added Tax Act, 2003 — Section 16, 16(3), 16(8), 16(9), 19

Citation : (2014) 202 ECR 416 : (2014) 3 ILR 173 : (2014) 3 KLJ 239 : (2014) 3 KLT 10 : (2015) 79 VST 89

Hon'ble Judges : K.M. Joseph, J;A.K. Jayasankaran Nambiar, J

Bench : Division Bench

Advocate : Harisankar V. Menon and Meera V. Menon, Advocate for the Appellant; Sudheesh Kumar, Sr. Government Pleader, Advocate for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.—This OT Revision is filed challenging the order dated 26.03.2013 of the Kerala Value Added Tax Appellate Tribunal. The brief facts necessary for the disposal of the Revision petition are as follows;

The petitioner is an assessee for the purposes of the Kerala Value Added Tax Act (hereinafter referred to as the "Act") and is engaged in the trading of automobile spare parts. The places of business of the petitioner were inspected by the Intelligence Wing of the Commercial Taxes department on 26.11.2009 and, on the basis of details gathered during the said inspection, penalty proceedings were proposed to be initiated against the petitioner for contravention of Section 40 of the Act read with Section 71 thereof dealing with failure to keep true and complete accounts. The proceedings initiated were in respect of the following offences that were alleged to have been committed by the petitioner viz.

- (i) non-declaration by the petitioner of two godowns maintained by it;
- (ii) variation in stock valued at Rs. 8294/- with a tax effect of Rs. 1037/-; and
- (iii) unaccounted sales worth Rs. 32,823/- with a tax effect of Rs. 4103/-.

2. The petitioner chose to have the offences compounded in terms of Section 74 of the Act and accordingly preferred Annexure-A application before the Intelligence officer who proceeded to accept the application and determine the tax payable as Rs. 1,52,000/- and the compounding fee payable as Rs. 1,52,000/-. The order of the Intelligence Officer is produced as Annexure-B.

3. On receipt of Annexure-B order, the petitioner preferred an appeal against the said order before the appellate authority who, vide Annexure-C order, considered the matter on merits and rejected the appeal. Aggrieved by the order of the first appellate authority, the petitioner preferred a further appeal before the Appellate Tribunal which rejected the appeal on the finding that, insofar as the petitioner had compounded the offence u/s 74 of the Act, it could not have challenged the order permitting the compounding of the offence by invoking Section 55 of the Act. The Tribunal also placed reliance on the decision of this court in *Sreesastha Trading Company v State of Kerala and Others - 1992 (1) KTR 74*. It is the said order of the Appellate Tribunal that is impugned in these proceedings before us.

4. We have heard Adv. Sri. Harisankar Menon, learned counsel appearing on behalf of the petitioner as also Sri. Sudheesh Kumar, learned Government Pleader appearing on behalf of the State Government. Learned counsel for the petitioner would contend that the Appellate Tribunal erred in not considering the appeal preferred by it on merits. He would point out that the provisions of Section 55 of the Act clearly provide for an appeal to the first appellate authority against any order issued or proceedings recorded under the Act other than those that are expressly excluded under that provision. Since it is not in dispute that an order passed u/s 74 of the Act is not expressly excluded by Section 55, the first appellate authority was legally justified in entertaining the appeal and passing orders on merits. It is his contention that insofar as the assessee was agitating the issue regarding correctness of the quantification of compounding fee by the Intelligence Officer, it was not a case where the assessee was turning around and reneging from its offer to compound the offence and hence the decision in the *Sreesastha Trading Company* case (*Supra*), relied upon by the Appellate Tribunal, did not apply on the facts of the instant case. It is his further contention that the Appellate Tribunal ought to have considered the issue on merits and found that the quantification of compounding fee done by the Intelligence Officer was incorrect. This was because, the specific case of the assessee was that it had accounted the entire turnover, relating to the goods stored in the undeclared godowns, in its books of account and this fact could be easily verified on a comparison with the books that were seized by the commercial tax authorities. Per contra, the learned Government Pleader would point out that the petitioner having resorted to a compounding of the offences u/s 74 of the Act, it could not challenge the order accepting its compounding application by filing an appeal u/s 55 of the Act. He supports the order of the Appellate Tribunal by contending that the findings of the Tribunal are in accordance with the settled law on the subject.

5. We have considered the submissions made on behalf of the petitioner

assessee as well as the State Government. The Appellate Tribunal has dismissed the appeal preferred by the petitioner on the ground that the order of the first appellate authority, that was impugned by the petitioner before it, was itself one that could not have been passed by the said authority. The Tribunal finds that an order of compounding passed u/s 74 of the Act is not an appealable order for the purposes of Section 55 of the Act and hence the first appellate authority exercised an appellate jurisdiction that he did not have under the Act. This being the case, the Tribunal did not see any reason to entertain the further appeal preferred by the petitioner against the order of the first appellate authority.

6. In order to appreciate the stand taken by the Appellate Tribunal, it is necessary to examine the provisions of Section 55 of the Act together with Section 74 thereof. Section 55 of the Act that deals with appeals before the first appellate authority reads as follows:

[55. Appeals to the Deputy Commissioner (Appeals) and Assistant Commissioner (Appeals):-] (1) Any person aggrieved by any order issued or proceedings recorded other than those under sub-section (3), sub-section (8) or sub-section (9) of section 16, sub-section (8) of section 19 passed by an authority empowered to do so under this Act not being an authority above the rank of an Assistant Commissioner may, within a period of thirty days from the date on which the order was served on him, appeal against such order,

(i) to the Deputy Commissioner (Appeals), if the order was passed by an authority of the rank of an Assistant Commissioner; and

(ii) to the Assistant Commissioner (Appeals), if the order was passed by an authority of the rank of a Commercial Tax Officer;

Provided that orders passed under sections 48, 49, 67, 69, 70, 70A and 72 shall be appealable only to the Deputy Commissioner (Appeals):

Provided further that the Deputy Commissioner (Appeals) and Assistant Commissioner (Appeals) may admit an appeal presented after the expiration of the said period if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the said period.

Provided also that no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax or other amounts admitted by the appellant to be due or such instalment thereof as might have become payable, as the case may be, where the appeal is against an assessment completed under sub-section (6) of section 23, or u/s 24 or section 25.

(2) Where an appeal lies against any order under sub-section (1), any order issued u/s 66 to rectify any error in such order shall also be appealable under the said sub-section.

(3) The appeal shall be in such form and shall be verified in such manner as may be prescribed, and shall be accompanied by a fee of five hundred rupees.

(4) Notwithstanding that an appeal has been preferred under sub-section (1), the tax or other amounts shall be paid in accordance with the order against which the appeal has been preferred:

Provided that the Deputy Commissioner (Appeals) and Assistant Commissioner (Appeals) may, at his discretion, give such directions as he thinks fit in regard to the payment of the tax before the disposal of the appeal, if the appellant furnishes sufficient security to his satisfaction in such form and in such manner as may be prescribed.

(5) In disposing of an appeal, the Deputy Commissioner (Appeals) and Assistant Commissioner (Appeals) may, after giving the appellant a reasonable opportunity of being heard,-

(a) in the case of an order of assessment or penalty, either confirm, reduce, enhance or annul the assessment or the penalty or both;

(b) set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed;

(c) or pass such other orders as he may think fit; or

(d) in the case of any other order, confirm, cancel or vary such order:

Provided that at the hearing of any appeal against an order of the assessing authority, the assessing authority or the officer empowered by the Commissioner in this behalf shall be heard.

(6) The order of the Deputy Commissioner (Appeals) and Assistant Commissioner (Appeals) disposing of an appeal before it shall state the point for determination, the decision thereon and the reason for arriving at such decision.

(7) Where as a result of the appeal any change becomes necessary in the order appealed against, the Deputy Commissioner (Appeals) and the Assistant Commissioner (Appeals) may, direct the assessing authority to amend such order accordingly and on such amendment being made, any amount paid in excess by the appellant shall be refunded to him or as the case may be the further amount of tax, if any, due from him shall be collected in accordance with the provisions of this Act, as the case may be.]

If a dealer is aggrieved by the order of an assessing authority, his first appeal for the redressal of his grievance shall be to the Deputy Commissioner (Appeals). However, the following orders are specified in this Section as non-appealable:

a) An order disposing off the application for registration as per Section 16(3);

b) An order of registering authority on the application of a dealer for cancellation of registration made u/s 16(8);

c) An order cancelling the registration of a dealer made by the Authority u/s 16(9);

d) An order cancelling the permit of a dealer made u/s 19(8);

Although the above orders are non-appealable, the dealer has the remedy of applying for a revision of such order or proceedings. For this purpose, an application in Form No. 29 may be filed before the Deputy Commissioner. Procedure for filing appeal

The appeal shall be made within 30 days from the date of service of the order appealed against. The period of 30 days may be extended by the Deputy Commissioner (Appeals) if the appellant provides sufficient cause for the delay. The appeal shall be in Form No. 29 (Rule 72) accompanied by a fee of five hundred rupees.

Payment of tax

Sub-section (4) requires that the amount of tax demand as per the order appealed against shall be paid as per the order. However, on furnishing sufficient security in Form No. 7, the Deputy Commissioner (Appeals) may give directions as he thinks fit in respect of payment of tax before disposal of the appeal.

In the case of best judgment assessment made u/s 23(6) on account of failure to prove the correctness of various statements, or audit assessment u/s 24 or turnover escaping assessment u/s 25, the appeal shall be accepted only after providing proof of payment of undisputed tax and other amounts which have become due and payable.

Disposal of appeal

Sub-section (5) provides for the manner of disposing off the appeal. Before disposing off the appeal, the assessing authority whose order is appealed against or such officer empowered by the commissioner shall be heard.

The order shall state the point of determination, the decisions and the reasons for such decision. The order appealed against may be amended as per the decision of the Deputy Commissioner (Appeals).

7. It is clear from a reading of Section 55 that an appeal lies to the first appellate authority against any order issued or proceedings recorded under the Act other than those that are expressly excluded under that provision. An order passed u/s 74 of the Act is not expressly excluded by Section 55. The question to be examined, however, is whether an order passed u/s 74 is, on account of its very nature, one that can be appealed against. It must be noted that by invoking the said provision, an assessee virtually admits to the commission of the offence alleged against it and opts for a composition of the offence in lieu of going through a process of statutory adjudication to determine his liability for penalty or prosecution. In this sense, therefore, the assessee contracts with the State department to settle the matter for a fee in lieu of an adjudication process. Section 74 of the Act that deals with Composition of Offences reads as follows:

74. Composition of offences:-(1) The assessing authority or other officer or

authority authorized by the Government in this behalf may accept from any person who has committed or is reasonably suspected of having committed an offence against this Act, [other than those specified under clause (e) of sub-section (1) or clauses (b), (c) or (d) of sub-section (2) of section 71] by way of compounding of such offence-

(a) where the offence consists of the evasion of any tax payable under this Act, in addition to the tax so payable a sum of money equal to the amount of tax so payable subject to a minimum of rupees five hundred and maximum of rupees [eight lakh]; and: [Provided that the maximum compounding fee collectable against a single offence spread over several return periods in a financial year shall be two lakh rupees.]

(b) in other cases, a sum of money not exceeding ten thousand rupees: Provided that the Commissioner may by order authorize any officer to compound the offence under this section on payment of a reduced amount.

(2) On payment of such amount under sub-section

(1), no further [penal or prosecution] proceedings shall be taken against such person, in respect of that offence.

8. It is clear from a reading of Section 74 that an assessee who opts for the benefit of the said provision, accepts the commission of the offence alleged to have been committed by it. Once it does that, the competent authority proceeds to determine the compounding fee payable by the assessee in accordance with clause (a) or (b) of sub-section (1) of the said Section. We feel that in such a situation, it will not be open to an assessee who opts for compounding under the said Section, and thereby avoids adjudication proceedings for penalty and prosecution under the Act, to turn around and contest the order of the competent authority accepting its application for compounding the offence. We are of the view that the scheme of composition of offences under Act does not permit an assessee to approbate and reprobate. No doubt it may be open, in cases of patent mistakes in the quantification of the compounding fee payable, for an assessee to contest the order of the competent authority in an appeal u/s 55 of the Act but that recourse can be had only in cases where the mistake is one that is relatable solely to the quantification of the compounding fee and does not militate against the admission by the assessee of its having committed the offence alleged against it. The legal justification for such an appeal would be the contention that while the assessee has admittedly compounded the offence, the department has no right to demand or collect any amount towards compounding fee, as is in excess of what is authorised by the statutory provision.

9. The contention of the petitioner, in the instant case, is that it is aggrieved by the order of the competent authority only to the extent it wrongly quantifies the compounding fee payable by it u/s 74 of the Act. According to the petitioner, it had already accounted the turnover, relatable to the stock of goods found in the undeclared godowns, in its books of accounts, well before the date of inspection

by the commercial taxes department. It is therefore contended that since there was no evasion of tax, the compounding fee payable in respect of the said offence should have been determined in accordance with clause (b) of sub-section (1) of Section 74 and not in accordance with clause (a) thereof.

10. We are not impressed with the said argument. It must be noted that the offence alleged to have been committed by the petitioner, in respect of the undeclared godowns, was the failure to keep true and complete accounts. The requirement for maintaining true and correct accounts by dealers is one that is mandated by Section 40 of the Act and the penal provision that is attracted in cases of default is Section 71 of the Act. The books of accounts required to be kept by a dealer, such as the petitioner, are enumerated in Rule 58 of the KVAT Rules. The requirement of maintaining accounts for each godown, if there is more than one godown for keeping his stock, is also mandated by the said Rule. In the light of the said provisions, the petitioner's composition of the offence of "failure to keep true and correct accounts" virtually amounted to an admission by it of the fact that it had not kept true and correct accounts in respect of the stock in its undeclared godowns. This admission by it was the basis for the composition u/s 74 and it cannot renege from this stand by contending that it had, in fact, accounted the stock in its books of account. In other words, the contention put forth by the petitioner before the first appellate authority was not one that pertained to the quantification of the compounding fee but went to the very root of its admission before the competent authority for the purposes of Section 74. As already noted above, we are of the view that the petitioner cannot be permitted to go back on the admission that formed the basis of the acceptance by the State of his application for compounding u/s 74 of the Act. Accordingly, we find that the petitioner could not have availed the appellate remedy u/s 55 of the Act against Annexure-B order of the Intelligence officer and the finding of the Appellate Tribunal that holds so is legally unassailable. Resultantly, we see no reason to interfere with Annexure-D order of the Appellate Tribunal and dismiss the OT Revision, but without any order as to costs.