**(2012) 06 KL CK 0213**

**High Court Of Kerala**

**Case No:** O.T. Rev. No. 37 of 2012

M. Mohammed Haji
Manachithodi Agencies,
Palakkad — APPELLANT

Vs

State of Kerala — RESPONDENT

**Date of Decision:** June 4, 2012

**Acts Referred:**

- Kerala Value Added Tax Act, 2003 - Section 11, 11(12), 20, 21, 22

**Citation:** (2012) 4 ILR (Ker) 87 : (2012) 3 KLT 17 SN : (2013) 63 VST 317

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

**Bench:** Division Bench

**Advocate:** N. Muraleedharan Nair and Sri. V.K. Shamusudheen, for the Appellant; Boby John, Government Pleader, for the Respondent

**Judgement**

@JUDGMENTTAG-ORDER

K. Vinod Chandran, J

1. Revision petitioner is an assessee engaged in the business of Cement dealership and having registration under the Kerala Value Added Tax Act(hereinafter referred to as the Act). For the year 2007-08 the dealer had filed returns and on finding that certain purchases of Cement from the Malabar Cements has not been reflected in the returns; the books of accounts were called for and examined. On scrutiny of the books of accounts it was revealed that cement purchases from April to August 2007 totaling about Rs. 3,39,015/- was suppressed from the books of accounts. In the circumstances, notice was issued contemplating best judgment assessment and after considering the objections of the dealer the proposals in the notice were confirmed. Assessment was completed making an addition of unaccounted purchase with Gross Profit estimate at the rate of 2% and a further addition of 10% of the total turnover, including that returned and unaccounted for probable

omissions and suppressions. The dealer filed appeal against Annexure-A order which was disposed of by Annexure B. Though the rejection of Books of accounts as also additions were confirmed, the first appellate authority thought it fit to direct the Assessing Officer to grant input tax credit with respect to the suppressed purchases since they were from a registered dealer namely M/s. Malabar Cements India Limited; a Government of Kerala undertaking. The State aggrieved by the grant of input tax credit was before the Tribunal and the Tribunal by AnnexureC order reversed the order of the first appellate authority and restored the order of the assessing officer dis-entitling the revision petitioner to claim and avail of input tax credit on the suppressed turn over. The above decision was anchored on the ratio of two decisions of this Court as also the provisions of the Kerala Value Added Tax Act.

2. The revision petitioner is before this court raising the following questions of law:-

1. Whether on the facts and circumstances of the case the Appellate Tribunal was correct in law in reversing the 1st Appellate Order and confirming the denial of input tax credit made in Annexure A order on the purchases, particularly considering the fact that the entire purchases are made only from M/s. Malabar Cements India Limited, after payment of tax and the purchases are supported with tax suffered invoices issued by the supplier?

2. Whether on the facts and circumstances of the case the Annexure A and C orders of the Authorities below to the extent it demands levy of tax on the estimated turnover without giving input tax credit on the purchases supported with proper invoice is arbitrary and illegal?

3. The revision petitioner does not dispute the actual suppression. The plea of the revision petitioner is to the effect that the omission to account the said transaction was due to a wrong advice that, if the delivery is made directly to the ultimate consumer; no further tax has to be paid by the dealer and hence there was no reason why the same should be accounted. The said contention would go against the very concept of Value Added Tax and is only to be rejected. Further while considering the contention put forward by the dealer, the Assessing Officer has categorically found that the very same defect occurred in the previous year and was pointed out by the audit officer and the assessment was completed in the said year also resorting to best judgment. The further contention is to the effect that since the purchases were made from a Government Company, tax was suffered and this entitles the revision petitioner to claim input tax credit. The Act does not provide for any credit of input tax automatically on the purchases being proved to be made from a Government Company.

4. Tribunal has relied on a judgment of a Division Bench of this Court in OT Rev.76 of 2010 dated 6.7.2011 in M/s. Venus Marketing v. State of Kerala. The Division bench, regarding the claim of input tax credit observed as follows:

We are further of the view that benefits like input tax credit should be made available to dealers conforming to statutory provisions in regard to maintenance of accounts, filing of returns and remittance of tax and eligibility for input tax credit is not a matter to be considered when suppression is detected. The department should be slow to grant concessions and benefits like input tax credit for dealers who are involved in tax evasion and benefit should be given strictly in accordance with the provisions of the Act and Rules.

We are in respectful agreement with the above Division Bench judgment.

5. Value Added Tax structure sought to ameliorate the grievances against the multiplicity of taxes and the cascading tax-burden and has the ultimate goal of augmenting revenue growth by making the procedure simple and more transparent. The scheme of the Act postulates self assessment u/s 21 by filing of returns as per Section 20. The system of self assessment postulates the trust reposed on the assessee promoting and ensuring compliance rather than avoidance and evasion. It provides for best judgment assessment in the context of non filing of returns or filing defective returns (Section 22) or on audit in the contingencies provided u/s 24 or while assessment of escaped turnover is made u/s 25. The input tax credit, provided by Section 11 of the Act is available in respect of a return period against the output tax payable by the dealer for such period as per Sub Section 3. The 4th proviso to Sub Section 3 also provides that the dealer claiming input tax credit while charging taxes u/s 11 on his turnover of goods should grant deduction in respect of the tax paid under the Act, failing which the input tax credit would be disallowed. We also notice the further provision in Sub Section (5)(n) that in the absence of tax invoice in the prescribed form evidencing the sufferance of tax no input tax credit shall be allowed. It would also be relevant to take note of Sub Section (12) of Section 11 which reads thus:-
S.11(12): A registered dealer who intends to claim input tax credit under this section shall, for the purpose of determining the amount of input tax credit, maintain the accounts and such other records as may be prescribed, in respect of purchases, supplies and sales effected by him in the State.

Maintenance of accounts and records for the purpose of determining quantum of input tax credit does not contemplate mere procedural maintenance. The quantum or amount of input tax should be determinable from the books of accounts. A dealer who has failed to account the purchases has suppressed the same from the books of accounts and consequently is dis- entitled from claiming any such credit despite the suppressed purchases having suffered tax.

6. A Constitution Bench of the Supreme Court in Commissioner of Central Excise, New Delhi Vs. Hari Chand Shri Gopal and Others, etc. etc., had considered whether a manufacturer was eligible to get the benefit of exemption on specified intermediate goods on the ground that the records kept by it would indicate the "intended use"

and "substantial compliance" with the procedures set out under Chapter X of Central Excise Rules, 1944. The matter was referred to a Constitution Bench doubting two other judgments of the Supreme Court on the well established principle that exemption notifications call for strict interpretation so far as the eligibility is concerned. Brief facts are that clandestine manufacture of goods without applying/obtaining certificate of registration as required under the Excise Rules was detected on inspection by the preventive wing of the Excise Department and show cause notices were issued. The assessee therein filed detailed objection disputing their liability as also claiming exemption under a notification. The objections having been rejected by the Commissioner at the first instance and also on remand the assessee was before the Tribunal again; which took the view that the benefit of exemption notification should not be denied if intended use of the goods was established, though there was non compliance of the procedural conditions of Chapter X. Reiterating the well settled position that an exemption, concession or exception has to be construed strictly, the Constitution Bench explained the doctrine of substantial compliance in paragraph 32 and 33 and held:-

34. The test for determining the applicability of the substantial compliance doctrine has been the subject of a myriad of cases and quite often, the critical question to be examined is whether the requirements relate to the "substance"or "essence" of the statute, if so, strict adherence to those requirements is a precondition to give effect to that doctrine. On the other hand, if the requirements are procedural or directory in that they are not of the "essence" of the thing to be done but are given with a view to the orderly conduct of business, they may be fulfilled by substantial, if not strict compliance. In other words, a mere attempted compliance may not be sufficient, but actual compliance with those factors which are considered as essential.

7. The principle of strict construction would equally be applicable in the case of input tax credit and the procedural mandate in the provisions of Section 11 has to be necessarily satisfied. The tax sufferance proved by invoice, the quantum determinable from the books of accounts etc., are the essence of the claim for the benefit conferred by the Section in availing input tax credit. Input tax credit is in the nature of set-off of tax suffered thus ensuring the liability of the subsequent dealers only on the quantum of value addition. No dealer has a right to claim input tax credit independent of the provisions of Section 11. The set off so provided is in the nature of a concession. It is a benefit conferred on the assessee quite in harmony with the scheme of multi point levy of tax but confined to the value addition at each stage. The determination of the quantum of such credit from the books of accounts postulates proof of tax-sufferance in the purchase, the levy and collection of tax on the value addition at the subsequent sale and ensures such levy and collection at the point of any subsequent sale too. It constitutes a chain and any break would result in chaos. Hence the stipulations that the claim should be made with reference to the return period and the quantum should be determinable from the books of

accounts should be strictly complied with.

8. The dealer has claimed in the revision that the purchases are supported by tax suffered invoices issued by the supplier as evidenced by the first question of law raised. Be that as it may, we are not in this revision expected to examine the invoices and ought to confine ourselves to the questions of law raised. Admittedly, purchases were suppressed in the books of accounts as also the returns and the explanation offered has been rejected both by the original authority as well as the first appellate authority. Dealer/revision petitioner has not thought it fit to challenge the said findings. It was the State who was before the Tribunal challenging the grant of input tax credit by the first appellate authority. The scheme of the Act as noticed above would require the input tax credit to be claimed along with the return, supported by tax suffered invoices and the quantum of eligible credit being determinable as reflected from the books of accounts. The assessee has admittedly not disclosed the transaction in his books of accounts or his return nor has he filed any revised return. The fact that the purchases were made from the Government Company, as noticed earlier does not automatically entitle a dealer to claim input tax credit. And if the purchases are tax suffered; input tax credit will have to be claimed and availed of as per the provisions of the Act. On the finding that there is no such attempt made by the dealer and on the further ground that the dealer has suppressed his turnover both the questions of law are answered against the assessee/revision petitioner and in favour of the Revenue.
OT Revision is hence rejected however with no costs.