(2016) 10 KL CK 0035

High Court Of Kerala

Case No: O.T. Rev. (VAT) No. 164 of 2015.

State of Kerala - Petitioner
@HASH Syed Muhammed

APPELLANT

Vs

RESPONDENT

Date of Decision: Oct. 26, 2016

Citation: (2017) 1 KerLJ 343 : (2016) 4 KLT 462

Hon'ble Judges: Thottathil B. Radhakrishnan and Devan Ramachandran, JJ.

Bench: Division Bench

Advocate: Mohammed Rafiq, Sr. Government Pleader, for the Petitioner; Harisankar V. Menon, Mahesh V. Menon and Meera V. Menon, Advocates, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Devan Ramachandran, J. - State of Kerala has filed the above revision assailing the order of the Kerala Value Added Tax Additional Appellate Tribunal, Palakkad (''the Tribunal'' for short), by which it had set aside the orders of assessment and the order of the first appellate authority affirming the assessment, as prayed for by the respondent herein in their appeal before it.

2. The question of law raised in this revision by the State, inter-alia, is whether the discounts received by the assessee much after purchase from the supplier would have to be deemed as turn over as per Explanation VII to Section 2(ii) of the Kerala Value Added Tax Act (''the Act'' for short) or whether it would have to be treated as either a ''cash discount'' or ''trade discount'' as defined by the Hon''ble Supreme Court in **Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Emakulam v. Advani Oerlikon (P) Limited (45 STC 32 (SC)).**

3. The respondent is a registered dealer under the Act and they are trading in cement. They had filed the annual return for the year 2010-2011 conceding a total sales turn over of Rs. 1,66,33,860/-. It was also conceded by the assessee that it had

obtained an amount of Rs. 3,78,297/- as discount from its suppliers subsequent to the purchase from them. On verification of the accounts, it was noticed by the Assessing Officer that the purchase value declared by the assessee was without reckoning the loading and unloading charges paid by them. It was further noticed that when the said charges were also reckoned, the sale price will fall far below the purchase price, thus attracting Explanation VII to Section 2(ii) of the Act, which would warrant that the subsequent amounts obtained from the suppliers as ''discounts'' be deemed as part of the turnover.

4. Before proceeding further, a reading of the said Explanation would be beneficial in understanding the issues raised in this revision. Explanation VII to Section 2(ii) is as follows:

"Where a dealer sells any goods purchased by him at a price lower than at which it was purchased and subsequently receives any amount from any person towards reimbursement of the balance of the price, the amount so received shall be deemed to be turnover in respect of such goods."

5. Since the assessing authority found that the assessee had sold the goods at a lower price than it purchased from the suppliers, the Assessing Officer proposed to reckon the amounts that have been received by the respondent from their suppliers as ''discounts'' into its total turn over. The assessing authority thus issued an order dated 25.09.2013 assessing the turn over by including the ''discounts'' received by the respondent and completed the assessment. The respondent filed an appeal before the Assistant Commissioner (Appeals), Palakkad, which was dismissed confirming the order of the assessing authority. The respondent, thereafter, filed a further appeal, which was numbered as TA (VAT) No.226/2014 before the Tribunal. The said appeal was allowed in their favour as per order dated 28.01.2015, which is annexed as Annexure-C and impugned by the State in this revision.

6. From the order of the Tribunal, it is obvious that it had in fact confirmed the findings of the assessing authority and the first appellate authority that if the "discounts" are not accounted and the incidental charges like the loading and unloading charges incurred by the dealer are also to be added, then it would become obvious from the accounts that the dealer had sold the goods at a lower price than the price at which they were purchased. This would have been automatically attracted the rigour of explanation VII to Section 2(ii) of the Act.

7. The Tribunal, however, then went on to consider the explanation given to the word ''purchase price'' or ''sale price'' as defined by the section and came to a conclusion that the purchase price of the petitioner should be equal to the price of the suppliers added with expenses and incidentals for the purchase. On such reasoning, the Tribunal entered into a finding that "the discounts allowed according to the prevailing market price has to be lessened from the value consideration received or receivable to arrive at the sale price" (sic). For entering into this

conclusion, the Tribunal relied on certain decisions, namely, Advani Oerlikon (P) Limited (supra), **Deputy Commissioner of Sales Tax, Ernakulam v. Kerala Rubber & Allied Products (1993 (2) KLT 207 (SC) : 90 STC 170 (SC))** and **I.F.B. Industries v. State of Kerala (2012 (1) KLT SN 121 (C.No.130) SC : 20 KTR 187 (SC))**, the vires of which the Tribunal interpreted to be that the discounts allowed after conclusion of the sale is also an allowable deduction.

8. We are afraid that the Tribunal has misdirected itself in both interpreting the precedents cited above as well as in understanding the true import of the nature of the "discounts" that have been obtained by the assessee. It is without doubt that the Hon''ble Supreme Court in Advani Oerlikon (P) Limited (supra) has distinguished clearly between a ''trade discount'' and a ''cash discount''. It has defined cash discount as a discount granted in consideration of the expeditious payments and a trade discount to be a deduction from the catalogue price of goods allowed by wholesalers to retailers engaged in the trade.

9. Both these discounts, though distinct, are however, one that are obtained to the retailer at the time of purchase. It may be that discounts are paid later, but they are reckoned at the time of purchase. In other words, the discount that is available to the parties, be that a cash discount or trade discount, is clearly shown to be such at the time of purchase either as an incentive for expeditious payment or as a margin of profit to the retailer. In contra distinction, are the amounts that the retailer is paid by the suppliers, which are not reckoned at the time of purchase, but much later, in order to get over the loss sustained by him on account of market dictated hostile conditions.

10. In the case at hand, even though the respondent claims that the amounts that it had received from the suppliers were in the nature of a ''trade discount'', in the un-controverted and virtually admitted position that without receiving such ''discounts'', the business of the respondent would have been in loss, would clearly indicate that the ''discounts'' that the assessee had received are in the nature of reimbursements of the loss that it had suffered on account of it having had to sell the goods at a price lower than the purchase price. No evidence to the contrary was found attempted to be led by the assessee before any of the authorities except to make a claim that the discounts received by it are incentives in the usual course of business.

11. We say that the Tribunal has misdirected itself because there is a clear distinction in the Act between a cash discount that is obtained by a dealer at the time of purchase and the amounts that were obtained by them much after the purchase and subsequent to the sale by the dealer. The mandate of the Act, as is discernible from Section 2 (lii), (ii), is that any discount on the price allowed in respect of any sale where such discount is shown separately in the tax invoice and the buyer pays only the amount reduced by such discount; or any amount refunded in respect of the goods returned by the customers shall not be included in the

turnover. However, this is in contra position to the amount that is received by the dealer towards reimbursement for the balance of the price as is shown in Explanation VII to the said section.

12. If all amounts received by the dealer from the suppliers are treated as ''discounts'' entitled to deduction, then, as is obvious from the provisions referred to above, the ineluctable distinction between a cash or trade discount at the time of purchase, which is then shown separately in the tax invoice and that of the amounts that the dealer, who has suffered loss, receives or obtains much after the purchase is over, either in the end of the month or in the end of the year depending upon the method of accounting, but called conveniently as ''discounts'', would be obliterated. The Tribunal has, therefore, erred in applying the ratio in Advani Oerlikon (P) Limited (supra), even to the amounts received by the assessee from its suppliers as reimbursement for the loss suffered, which are not ''cash discounts'' or ''trade discounts'', as defined in the judgment. In the absence of any material or evidence to the contrary, but merely on the assertion of the assessee, the Tribunal could not have entered into the factual finding that the amounts received by the respondent are cash or trade discounts, entitled to be excluded from its purchase turnover.

13. When the Statute directs that a thing be deemed or presumed on certain conditions being present or satisfied and when such conditions become available, then there is no option but to deem or presume it. Here, the assessee has suffered loss and they have received certain amounts from their suppliers, without which the assessee would not have been able to recoup the loss suffered by it. The conditions that are to be present for applying the mandate of Explanation VII to Section 2(ii) thus being obvious from the accounts of the assessee, any explanation to the nature of the amounts received by it, in the absence of specific and'' clinching evidence/documents to prove such nature, would be of no avail. We, therefore, confirm the findings of the Assessing Authority and the first Appellate Authority that the amounts received by the assessee, which they call ''discounts'' are, in fact, the amounts that would fall within the ambit of Explanation VII to Section 2(ii) and hence liable to be added to the turnover.

14. The legal position that the amounts that are obtained by an assessee, who has suffered loss in its trading by having had to sell the goods at a price lower than the purchase price, will require to be accounted for in the turnover, has already been approved by this Court in **Cement House v. State of Kerala ((2010) 18 KTR 329 (Ker)).** The relevant portion of the judgment that states the law is as under:

"xxx xxx xxx

It is obvious from the above that the purpose of the Explanation is to levy tax on the actual sale price irrespective of whether it is received by the dealer at the time of sale of goods or from the purchaser itself. In other words, any amount received by a dealer by way of consideration for sale of goods whether it is received from the

purchaser or not is assessable as turnover in respect of the goods sold. The question whether sale is at below the purchase price is a matter to be decided not based on purchase price accounted by the dealer or the amount shown in the invoice, but the actual purchase price which certainly involves freight and handling charges paid by the dealer for the foods purchased. In this case, the clear finding of the lower authorities including the Tribunal is that in some cases sale price is below the purchase price seen in the purchase invoice. So far as other sale, in respect of which there is margin profit of 0.6 per cent the finding of the lower authorities is that petitioner has not accounted freight charges and loading and unloading charges towards purchase cost and when the same is reckoned the sale price is less than the purchase price. In view of this finding, we have to hold that the main part of the condition in the Explanation that the sale is at below the purchase price stands established and therefore, the contention of the petitioner is rejected. For attracting the above provision, a dealer should subsequent to the sale receive any amount from any person towards reimbursement of the balance of the price. Even though senior counsel appearing for the petitioner contended that the amount received by the petitioner in the form of credit notes is not balance of the price for the goods sold by the petitioner, the authorities below gave a clear finding that the credit notes received is for the goods sold by the petitioner which were purchased from the same manufacturer who issued the credit notes.
xxx xxx xxx."

15. The finding of the authorities that the assessee would suffer loss if the discounts are not taken into account remains un-controverted and is virtually admitted and we see no reason to disturb any such finding of facts, especially in a revision of this nature. This fact having been established beyond doubt, the Assessing Officer and the first appellate authority were justified and right in applying the provisions of Explanation VII to Section 2(ii) of the Act and in holding that the amounts received by the assessee, though called ''discounts'', are also to be reckoned as part of the turnover. We find no infirmity in the same.

16. In view of the above, the revision is allowed setting aside the impugned order and confirming the assessment made by the Assessing Officer.

17. In the nature of the circumstances, we do not think that this is a fit case to order costs on either of the parties and therefore, direct the parties to suffer their respective costs.