IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

TUESDAY, THE 20TH DAY OF OCTOBER 2015/28TH ASWINA, 1937

OT.Rev.No. 35 of 2013 ()

AGAINST THE ORDER/JUDGMENT IN T.A VAT NO.535/2011 of KERALA VAT APPELLATE TRIBUNAL, ERNAKULAM DATED 26.11.2012.

PETITIONER(S)/RESPONDENT/ASSESSEE:

SHRI. K.V.RAMACHANDRAN,
CONTRACTOR, AYODHYA, RAMANTHALI.

BY ADVS.SRI.T.M.SREEDHARAN (SR.)
SRI.V.P.NARAYANAN
SMT.BOBY M.SEKHAR
SMT.DIVYA RAVINDRAN

RESPONDENT/APPELLANT/REVENUE:

STATE OF KERALA,
REPRESENTED BY THE CHIEF SECRETARY TO GOVERNMENT,
SECRETARIAT, THIRUVANANTHAPURAM.

R BY SMT.SOBHA ANNAMMA EAPEN, GOVERNMENT PLEADER

THIS OTHER TAX REVISION (VAT) HAVING BEEN FINALLY HEARD ON 20-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

DG

OT.Rev.No. 35 of 2013 ()

APPENDIX

PETITIONER'S EXHIBITS:

ANNEXURE - A:	**COPY OF THE SHOW CAUSE NOTICE DATED 18.11.2009 ISSUED BY THE COMMERCIAL TAX OFFICER (WORKS CONTRACT), KANNUR.**
ANNEXURE - B:	**COPY OF LETTER DATED 29.11.2009 SUBMITTED BY THE PETITIONER TO THE COMMERCIAL TAX OFFICER (WORKS CONTRACT), KANNUR.**
ANNEXURE - C:	**COPY OF THE ASST.ORDER U/S.25(1) DATED 22.1.2010 PASSED BY THE COMMERCIAL TAX OFFICER (WORKS CONTRACT), KANNUR.**
ANNEXURE - D:	**COPY OF THE ORDER OF THE DEPUTY COMMISSIONER (APPEALS) - II, KOZHIKODE IN VATA NO.219/10 DATED 9.9.2010.**
ANNEXURE - E:	**COPY OF THE PROCEEDINGS DATED 21.3.2011 PASSED BY THE COMMERCIAL TAX OFFICER (WORKS CONTRACT), KANNUR.**
ANNEXURE - F:	**COPY OF THE ORDER OF THE KVAT APPELLATE TRIBUNAL IN T.A.VAT NO.535/2011 DATED 26.11.2012.**
ANNEXURE - G:	**COPY OF THE RR NOTICE DATED 28.3.2011 COMMERCIAL TAX OFFICER (WORKS CONTRACT), KANNUR.**

RESPONDENT'S EXHIBITS - NIL

//TRUE COPY//

P.A TO JUDGE

THOTTATHIL B.RADHAKRISHNAN &
ANU SIVARAMAN, JJ.

O.T.Rev.No.35 of 2013

Dated this the 20th day of October, 2015

J U D G M E N T

Thottathil B.Radhakrishnan, J.

1. Heard the learned senior counsel for the revision petitioner and the learned Senior Government Pleader for the Department of Commercial Taxes.

2. The revision petitioner is a civil works contractor. For the assessment year 2005-2006, he opted to pay tax at compounded rate in terms of Section 8 (a) (1) of the Kerala Value Added Tax Act. That provision reads as follows:

> "8. Payment of tax at compounded rates- Notwithstanding anything contained in Section 6-
> (a)(i) any works contractor not being a dealer registered under the provisions of the Central Sales Tax Act, 1956 (Central Act 74 of 1956), or a dealer effecting

> first taxable sale in the State may, at his option, instead of paying tax in accordance with the provisions of the said section, but subject to payment of tax if any, payable under sub-section (2) thereof, pay tax at two per cent of the whole contract amount".

3. The revision petitioner filed his returns. Ultimately, he was faced with a notice under Section 25(1) issued by the Commercial Tax Officer (Works Contract), Kannur dated 18.11.2009 calling upon him to show cause against the proposal to complete assessment under Section 25 of the KVAT Act. Assessee objected to it. That was turned down. The first Appellate Authority reduced final impact of the assessment made under Section 25. The Tribunal refused to interfere at the instance of the assessee. He is therefore, before us with this revision under Section 63 of the KVAT Act.

4. Learned senior counsel appearing for the revision petitioner argued that the relevant provision quoted above does not contain any necessary corollary liability on the assessee to maintain books of accounts and show such documents as

would be required to exclude the purchase turn over from being brought into the levy along with the tax of compounded rate in terms of Section 8. He further argued that the proposal under Section 25 (1) and the consequential assessment under that provision on the basis that there is escaped turn over or escaped tax are merely on the basis of conjectures and surmises and absolutely, there is no factual foundation for the impugned assessment under Section 25. He, therefore, argued that the demand on the basis of assessment orders is illegitimate deprivation of property arising out of a decision with no factual situation.

5. Per contra, the learned Senior Government Pleader argued that having regard to the clear terms of the afore-quoted provision of Section 8, as it stood at the relevant point of time, the liability to pay purchase tax under Sub-section 2 of Section 6 on the purchase turn over is inexcusable and the mere fact that a dealer has opted for compounding scheme does not give him the eligibility to excuse himself from paying the purchase tax component due on the purchase turn over in terms of Sub-section 2 of Section 6 of the KVAT Act. It is further pointed

out that in response to the notice issued under Section 25 (1) of the KVAT Act, the assessee did not produce any material to show the purchase tax turn over as could be determined in terms of Sub-section 2 of Section 6. It is also pointed out that no such material was available along with the returns as well.

6. The purchase turn over is essentially a part of business turn over. Therefore, an escape of purchase turn over can be brought under the net of Section 25 for assessment of escaped turn over. Similarly, tax on such escaped purchase turn over can also be brought under proceedings under Section 25. Adverting to the provision of Section 8 (a) (1), as it stood at the relevant point of time; as quoted by us above; the liability of a person who opts for the compounding scheme under that provision includes the liability to pay purchase tax on the purchase turn over in terms of Sub-section 2 of Section 6. But, the issue in hand is as to whether there is any foundation or material whatsoever to initiate action under Sub-section 1 of Section 25. The proposal notified to the asseessee through the notice dated 18.11.2009 (Annexure A1) is not based on any material unearthed or otherwise available to the Commercial

Tax Officer to even prima facie assume that there was any escaped purchase turn over or the purchase tax component leviable on such purchase turn over. We say this in the context of the fact that even going by that notice, the fact of the matter remains that it is not much in dispute that the assessee is a contractor who is doing civil works of putting of roads, buildings, canals etc. The notice was issued on the specious premise that having regard to the quantum of work and the nature of work carried out by the assessee, 30% should be taken as the purchase turn over. We need to maintain for ourselves the different modalities in arriving at a concluded assessment. The process of arriving at the best of judgment assessment, the process of reaching out and making an assessment of escape turn over or escape tax component vis-a-vis the compounding scheme which is opted by an assessee and acceded to by the Department are matters to be viewed in the back-drop of the facts and materials on the basis of which assessment of escaped turn over or escaped tax is sought to be made by resorting to a procedure under Section 25 of the KVAT Act.

7. Reverting to Annexure A notice and the reply given by the assessee to that notice, we see that the Commercial Tax Officer had concluded the assessment merely by adding on the proposal on the assumption that there would be a 30% purchase turn over in relation to the nature of transactions of the assessee. We are of the view that this is wholly mis-placed in terms of the jurisprudential realm and the fiscal powers available to the Revenue through the mode of Section 25 of the KVAT Act. The entire proceedings commenced through Annexure A1 notice dated 18.11.2009 is, therefore, without any jurisdictional fact and material being available as the foundation for such proceedings. The entire proceedings, therefore, fails. The impugned orders are unsustainable.

In the result, this appeal is allowed, setting aside the orders impugned therein.

Sd/-
(THOTTATHIL B.RADHAKRISHNAN, JUDGE)

Sd/-
(ANU SIVARAMAN, JUDGE)

//TRUE COPY//

P.A TO JUDGE

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