

PROCEEDINGS OF THE ASSISTANT COMMISSIONER(Appeals)

COMMERCIAL TAXES, ALAPPUZHA

PRESENT: S. PRASANNA

Date of order	:-	16.01.2020
Appeal no	:-	KVATA(ALPY)93/19
From the order of the	:-	State Tax Officer, Mavelikkara
Year of assessment	:-	2014-15
Name of appellant	:-	Sri.Alex A Varghese, M/s.Emgee Cashew Industries,Kallimel, Mavelikkara
Instituted on	:-	13.05.2019
Date of hearing	:-	07.01.2020

Present for appellant :-Sri. V.K.Mukundan Nair, Sales Tax Practitioner

APPELLATE ORDER AND GROUNDS OF DECISION

The appeal filed against the assessment order of State Tax Officer, Mavelikkara, Order No.32041082474/2014-15 dated.13.05.2019. The assessing authority completed the assessment based on CR file and KVATIS scrutiny. The defects found was purchase suppression. The assessing authority estimated the turnover, added back 15% Gross Profit on unaccounted purchase, added turnover suppression detected in the CR file, also added equal amount for probable omission and suppression for the above defect and levied tax plus interest.

The appellant has purchased raw cashews from local dealers. He has also imported raw cashews from abroad. Sales of cashew kernel were made locally in addition to export Disbelieving the returns and accounts the assessing authority has completed the assessment on a taxable turnover of Rs.18271413/- as worked out below:

Sales turnover estimated unaccounted sales (ie, $150135 \times 115 / 100$) Rs. 172655

Turnover suppression detected by the IO Rs.9049379

Add: equal times for probable omission and suppression Rs.9049379

Balance taxable turnover Rs.43453108

Less: Sales turnover conceded Rs.25181695

Rs.3732089.00

Unaccounted sales as per delivery note No.0964101

Dated.01.04.2014 recovered at the time of inspection Rs. 143490.00

Total unaccounted sales determined up to

13.08.2014 (1+2+3)

Rs.9049379.00

Consequently he has levied penalty of Rs.904938/- (ie double the amount of tax due on the said turnover) without considering the reply and documentary evidences produced.

It is contrary to facts that the appellant has failed to account the import of cashew as per Invoice No:HSS/RCN/ECJ/49/2014-15/31.07.14 for Rs.3110074/-. This has been duly entered in the purchase register Page 2. Total quantity covered by the said Invoice is 51.994 MT. The Intelligence Officer has affixed the signature just below the entry relating to the impugned transactions. Copy of the reply dated 17-08-2016 is herewith attached.

The assessing authority has failed to appreciate the fact that the books of accounts kept by the appellant were produced before the assessing authorities concerned then and there. Failure, if any, on the part of the appellant to produce the accounts was not a ground relied on for the rejection of accounts and estimation of turnover. Specific omissions and disparities adverted in form No:13&13A, reproduced below have been ignored by the assessing authority.

“High seas purchase Rs.3110073/- not included in monthly return. H Form Sales Rs.7494780/- overstated in the month of August 2014. Bill No.18 interstate purchases Rs.1289621/- not included in the monthly return. Local purchases Rs.39650/- over stated in the monthly return. Closing stock uploaded is cashew shell and husk instead of cashew kernels Rs.683824/-. Stock of shell and husk is not ascertainable and quantifiable”.

In as much as higher figure has been adopted in the accounts suppression of the turnover cannot be established in view of the decisions rendered in

18 KTR 110(SC) Sreekrishna Electricals Vs State of Tamil Nadu. The Petitioner could not revise the return since sanction was not accorded.

The Intelligence Officer could not establish unaccounted purchase, production and sales. He has not made any attempts to analyze the stock with reference to the purchase and sales bills available in the business premises and produced for verification. So estimation of turnover adding 20% is unsustainable .

The Intelligence Officer has not adduced any specific reason to impose maximum penalty in the instant case. Arguments in this regard are raised on the strength of the decision rendered by SC in 25 STC 211 Hindustan Steels Ltd Vs State of Orissa 141 STC 434 (KER) L.S Prasad Vs State Tax Officer.

In view of the decision of the High Court of Kerala in Monu Timbers Vs State of Kerala 2012 (3) KHC levy of penalty U/s.67 (on the estimated Turnover) is irregular and improper.

The appellant has filed the application for amnesty scheme in view of the provisions contained in Circular No.03/2019 dated.01-04-2019 which has been accepted by the assessing authority. He has not received any communication in this regard as prescribed in para 7 of the circular which runs as follows;

On receipt of the application from the dealer, the assessing authority shall verify the correctness of the arrear position stated by the assessee with reference to assessment records and relevant registers and intimate the amount payable under this scheme in Annexure 2 to the assessee within 15 days.

In the circumstances he was on the bonafide belief that penalty imposed under section 67 has been waived on the strength of the application filed by the appellant.

As per notice dated.29-04-2019 the assessing authority has proposed to complete the assessment on a taxable turnover of Rs.27320792/- including the estimated sales turnover of unaccounted purchase for Rs.172655/-. In view of the reply dated 06-05-2019 the taxable turnover has been refixed at Rs.1,82,71,413/- as worked out below:

Sales turnover estimated unaccounted sales (ie, $150135 \times 115 / 100$) Rs. 172655

Turnover suppression detected by the IO Rs.9049379

Add: equal times for probable omission and suppression	Rs.9049379

Balance taxable turnover	Rs.43453108
Sales turnover conceded	Rs.25181695

Balance taxable turnover	Rs.18271413

A copy of the reply is herewith submitted for kind consideration which will also form part of the hearing notes. It can be gathered from the impugned order that the assessing authority has confirmed the proposals stating that “ *the major arguments raised by the dealer is not acceptable.*” However the order of assessment is silent about the relevant arguments ought to have been incorporated therein. In order to point out the infirmities the arguments put forth by the appellant are reproduced below.

- I. You have proposed to complete the assessment ignoring the option filed by me as per circular referred to (2) above. In as much as the penalty has been waived there is no justification to make addition on this score. With due respect I may point out that further levy of tax placing reliance on the alleged offense is equivalent to imposition of penalty.
- II. You have proposed to complete the assessment violating the relief granted by the Honorable Finance Minister in the budget speech (para 257/1,2 & 7) which runs as follows.
 - a. *In cases where tax evasion has been detected and the offence has been compounded or penalty has been imposed, the assessment shall be done only on the suppressed turnover detected. However, in cases where pattern of suppression has been established, the assessment shall be completed by adding 50% of the suppressed turnover.*
 - b. *With respect to unaccounted purchases from registered dealers within the State, detected through KVATIS Scrutiny, input tax credit shall be granted on such purchases provided the dealer admits such purchases. In such cases, assessment shall be completed by adding 20% gross profit on the purchase value. In case of detection of variation in interstate purchases, interstate stock transfers, import and purchases from unregistered dealers, 25% gross profit shall be added to such purchases for arriving at the sale value and assessed to tax. If sales suppression is detected, only the differential turnover shall alone be assessed.*

- c. *Assessments on variations in annual return, trading, profit and loss account and audit report, shall be limited only to such variation.*

Evidently the assessing authority has violated the principles laid down in the following cases since he has failed to consider the reply in the proper perspective. The relevant portion of the decision is extracted below.

We are not satisfied with the orders passed in this case. When a proposal is sent to the assessee and the assessee has filed an objection, it is the duty of the assessing officer to deal with the objection separately. Sometimes, it may be true that the objection raised by the assessee may be untenable. But, when the assessing authority wants to rely on the proposal, objections have to be dealt with in seriatim. The assessing authority has to see that he is not the final authority under the Act. The decision could be challenged in two appeals and further in a revision to this court. The assessing authority has to give reasons for rejecting the objections. The appellate authority has to look into the reasons. If the reasons are tenable, it could overrule the objections. But the assessing authority has not looked into the objections. The same mistake has been committed by the appellate authority as well as the Tribunal. According to us, there has been no fair procedure in this case. After all, a person may be eager to know why the contentions raised by him were rejected. He has a right to know it. One cannot only look into vain to find out the reasons. We could have quashed the entire proceedings but we are of the view that the assessee should not gain by a bad order passed by the authorities. Hence, we quash the order passed by the Tribunal. We direct the Tribunal to rehear the matter, consider the objections of the assessee, find out whether the order passed by the lower authorities are proper.

- a. K Musthafa Vs.State of Kerala 122 STC 565
- b. K.K Hameed Vs CTO 57 VST 371
- c. Kurivithadam Agencies Pvt Ltd Vs AC 50 VST 357
- d. Bahuvalika Steel Industries Pvt Ltd Vs State of Kerala 6 KTR 470

The assessing authority has failed to consider the fact that the Chartered Accountant has clearly pointed out in the Audit Report that the total purchase turnover conceded as per the accounts is inclusive of Rs.3110073/- pertaining to High seas sale covered

Invoice No.HSS/RCN/ECJ/49/2014-15/31-07-2014. The appellant has sought permission to revise the return U/s 42(2) of the Act Vide letter dated.28-12-2017, 02/05/2019, 06/05/2019, 28/05/2019 and 20/06/2019. But the assessing authority has failed to recognize the fairness in procedure which tantamount to clear violation of the directions issued in Manikyampara Granites Pvt Ltd. Vs. STO (27 KTR 585)(KER). So the bonafide mistake could not be rectified. Neither the Intelligence Officer nor the Assessing Authority has established that the appellant has deliberately suppressed any transaction with ulterior motive. The Intelligence Officer erred in arriving at the variation treating the physical stock as excess in a case where books of accounts were produced before him. The allegation with regard to the unaccounted purchase is unfounded. Addition made for the year violating the instructions issued in circular No.3/19 dated.1.04.2019 and the relief granted in the budget speech (para 257/1,2 &7) is neither justifiable nor sustainable. Moreover it is unwarranted, highly arbitrary and has no nexus with the defects pointed on detailed verification of accounts and the alleged suppression. Admittedly the assessing authority has failed to pass speaking orders in the instant case, which is against the directions issued in Razia Greens Vs State of Kerala (8 KTR 55(KER) which runs as follows:

Reason is the soul of law. Principles of natural justice have assumed a wider horizon these days. Right to reason is, therefore, an indispensable part of sound system of judicial review. Without reason and order becomes soulless, lifeless. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. Reason pre-supposes logic. The various stages of reasoning should be properly interlinked. Jumping to a particular conclusion overlooking any intermediate fact or event, is a process opposed to reason. The giving of reasons is one of the fundamentals of good administration as observed by Lord Denning in Brage Vs. Amalgamated Engineering Union [(1971) 1 All Er 1149]. The requirement of furnishing reasons in a shackle on acting arbitrarily and whimsically it is the only visible safeguard against possible injustice and arbitrariness. They disclose how the mind is applied to the subject matter for a decision, whether it is considered in the set up of purely administrative or quasi-judicial order. They should reveal a rational nexus between the facts and conclusions reached. Only in this way can opinions or decisions recorded be shown manifestly just and reasonable. The failure to give reason can

lead to a very justifiable complaint that there has been a breach of natural justice. Reasons if given substitute objectively for subjectively.

An order has to be reasoned or speaking order. A speaking order means an order speaking for itself. To put it simply, every order must contain reasons in support of it. Giving of reasons in support of an order is considered to be the third principle of natural justice; the other two being (a) no man shall be a judge in his own cause (*Nemo debet esse iudex in propria causa*), (b) hear the other side, or both the sides must be heard or no man should be condemned unheard (*Audi Alteram Partem*). A party has a right to know not only the decision but also the reasons in support of the decision. Reasoned orders are necessary if judicial review is to be effective. The condition of record reasons introduces clarity and excludes arbitrariness. The principle requiring reasons to be given in support of an order is a basic principle of natural justice which must inform every quasi-judicial process and it must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.”

A speaking order is an order passed after applying one's mind to the issues, facts involved and giving the reasons for arriving at the decision. Speaking orders also means the quasi-judicial authorities must record the reasons for arriving at the decision after considering all relevant submissions. It is one of the settled principles of administrative law that taxation authorities are bound to pass speaking orders. The assessment orders to be passed should be self-explanatory, covering all the points. It is very necessary that a proper speaking order has to be passed and that the conclusions arrived at be supported by a process of logical reasoning and justification. Many a times courts have struck down the non-speaking orders passed by taxation authorities, as a non-speaking order is no order in the eye of law. Even the penalty orders must be speaking orders in the proper sense.

The supreme court in *Madhya Pradesh Industries Ltd. v. Union of India* AIR 1966 SC 671 delivered on August 16, 1965 has held that “the condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness. It gives satisfaction to the party against whom the order is made”.

The Division Bench of the Punjab and Haryana High Court in the case of the Commissioner of Income-tax v. Vikas Chemi Gum India reported in (2005) 276 ITR 32 (P&H) [DB] dated February 8, 2005 has held that “ the orders passed by income –tax authorities must be speaking orders. If the order of Tribunal is non-speaking order, it is vitiated due to violation of rules of natural justice”.

Scrutiny revealed that the physical stock ascertained on inspection has been treated as excess, value of which has been estimated at Rs.5173800/-. The assessing authority has no case that the books of accounts were not produced for verification. This aspects has not been disputed by the Intelligence Officer also. Yet no attempts are seen made to analyse the stock based on the documents connected therewith. Conceded turnover as per P & L account are found to be as follows.

Opening stock	Rs. 193800.00	
Purchases		
Raw Cashew Nuts	Rs.12000708.00	
High Sea	Rs. 1289621.00	
Interstate	Rs. 2568650.00	
	-----	Rs.15858979.00
Sales		
Cashew Kernels:		
H Form	Rs.13275297.14	
Local	Rs.4411620.03	
	-----	Rs.17686917.17

The Chartered Accountant who prepared the audit report has stated in unequivocal terms that there are omissions and mistakes as detailed below.

“High seas purchase Rs.3110073/- not included in monthly return. H Form Sales Rs.7494780/- overstated in the month of August 2014. Bill No.18 interstate purchases Rs.1289621/- not included in the monthly return. Local purchases Rs.39650/- over stated in the monthly return. Closing stock

*uploaded is cashew shell and husk instead of cashew kernels Rs.683824/-.
Stock of shell and husk is not ascertainable and quantifiable”.*

It is evident from the above that conceded turnover as per returns (Rs.2,51,81,695/-) is inclusive of the overstated amount of Rs.7494780/- involved in H Form Sales. The actual turnover as per accounts is only Rs.17686917/- (Rs.25181695- Rs.7494780). But ignoring all these aspects the assessing authority has determined the tax liability considering the turnover of Rs.25181695/- furnished in the annual return which was filed before finalizing the accounts.

The decision rendered by the SC in 18 KTR 110 will therefore squarely apply here. Since analysis of stock ascertained on inspection has not been properly made quantum of suppression arrived at cannot be considered as reasonable. The difference between return and accounts has been convincingly explained by the Chartered Accountant. So it is just and reasonable to adopt the conceded turnover as per accounts (Rs.17686917/-) for the purpose of assessments. Consequently basis adopted for estimation of turnover requires modification. No reasons have been adduced for the denial of permission to revise the returns ignoring the remarks offered by the Chartered Accountant with regard to the variations of turnover pertaining to high seas purchase (Rs.3110073/-) deemed export (Rs.7494780/-) local and interstate sales, Closing Stock etc. The assessing authority could not establish that the appellant has deliberately suppressed the transactions. Patten of suppression has also not been proved. Various arguments put forth by the appellant have been brushed aside simply stating that the **“major arguments raised by the appellant is not acceptable because the argument are baseless”**. The finding of the assessing authority is therefore not only premature but also vague. So the contentions of the authorized representative with regard to the failure to consider the reply, placing reliance on the judgments reported in K Musthafa Vs. State of Kerala 122 STC 565, K.K Hameed Vs Commercial Tax Officer 57 VST 371, Kurivithadam Agencies Pvt Ltd Vs Assistant Commissioner 50 VST 357 & Bahuvalika Steel Industries Pvt Ltd Vs State of Kerala 6 KTR 470, deserve merit.

According to the authorized representative the order under challenge is untenable being non speaking. He has requested that the conceded turnover as per accounts may be accepted since no specific reasons have been adduced for adopting the turnover as per return. Total turnover furnished is inclusive of export sales, which will come to 75% of the conceded turnover as per accounts. The assessing authority has finalized

the assessments without rebutting the various arguments put forth by the appellant. In the circumstances stated above and in view of the judicial pronouncements enumerated in the preceding paras the request for adopting the turnover as per accounts and for reduction of addition deserves merits.

The assessing authority is therefore directed to accept the turnover as per accounts for the purpose of assessments in question. Consequently I deem it appropriate to reduce the addition towards the irregularities detected on inspection, to 20% of the conceded turnover furnished in the Profit and Loss accounts for 2014-15. However sales turnover estimated by the assessing authority in respect of the unaccounted purchases will remain unaltered.

The order appealed against is modified to the extent stated supra. Order accordingly.

Result: Modified

ASSISTANT COMMISSIONER (APPEALS)
ALAPPUZHA

To The Appellant through a/r
Copy submitted to Joint Commissioner(Law)
Copy submitted to Deputy Commissioner,CT,Alappuzha
Copy to State Tax Officer, Mavelikkara/File