**PROCEEDINGS OF THE ASSISTANT COMMISSIONER (APPEALS)**
**STATE GOODS AND SERVICES TAX, KANNUR**
**Present : Vineth Krishna.U**

***Date of Order: 16.01.2020***

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| KVATA Appeal order VATA No. | : | VATA 113/19 |
| Instituted on | : | 29.03.2019 |
| From the orders of the | : | Order no.32122283984/2011-12 dated. 19.03.2018 of Commercial Tax Officer, Payyannur |
| Year of assessment | : | 2011-12 |
| Name of appellant | : | M/s. Has Trading Co, Perumba |
| Turnover assessed | : | |
| Tax demanded Income Tax/Super Tax/CST/ST | : | Section 25(1) of the KVAT Act, 2003 |
| Section /Rule under assessment made | | |
| Date of Hearing | : 27.12.2019 | |
| Present for Appellant | : NIL | |

## APPELLATE ORDER AND GROUNDS OF DECISION

The appellant M/s Has Trading Co, Perumba filed appeal against the assessment order of Commercial Tax Officer, Payyannur passed u/s 25(1) of the Act issued vide proceedings dated 19.03.2018 demanding tax Rs.90053/- for the year 2011-12

The assessment for the year was revised on the basis of variation in purchase turnover between annual return and audit report and on the basis of purchase suppression detected on scrutiny. Irregular claim of input tax on discount received not supported with documents was also assessed to tax.

When the appeal was posted for hearing Sri. Anil Kumar, Advocate filed argument notes and expressed his inconvenience to attend hearing and requested to dispose the case after considering the argument notes. The contentions put forth by the appellant are as follows.

1. *The order of the State Tax Officer, Payyannur, is opposed to law, facts and circumstances of the case.*
2. *Where the assessing authority has failed to consider the reply filed by the appellant in the correct perspective and in the light of the applicable legal provisions. This is in violation of the principles of natural justice in view of the judgment of the Hon'ble Supreme Court in Asst. Commissioner, Commercial Taxes Department, Works Contract and leasing, Kota vs. Shukla and brothers [(2010) 30 VST 114 (SC) at Page 120], and also of the Hon'ble High Court of Kerala in M.S. Jewellery vs. Assistant Commissioner (Assessment) (1994) 2 KTR 389 (Ker.).*
3. *The assessment is clearly barred by the limitation. The assessment relate to the year 2011-12 as such the time limit for reopening the self assessment under Section 25(10 expired on 31-03-2017. As such where notice was issued only on 19-10-2017, it was beyond the time limit prescribed under Section 25(1) and the assessment iis clearly without jurisdiction*

*in the light of the judgment of the Hon'ble High Court of Kerala in Cholayil Pvt Ltd. Vs Assistant Commissioner (Assessment) [2015(4)KLT516(FB)] and also the judgment dated 19-07-2017 in WA.230/2017 (Commercial Tax Officer and Others Vs S Najeem and another) [2018-VIL-422-KER]The order is not a speaking one. The Officer had failed to rebut the contentions raised by the appellant. The order is therefore in violation of the ratio of judgment in Steel Authority of India Ltd Vs Sales Tax Officer Rourkere-1 &others [(2010) 18 KTR 143 (SC)].*

4. *After having found that the explanation offered by the appellant was acceptable the assessing authority has grossly erred in making arbitrary estimate of suppressed turnover. Where the appellant had explained that the transaction covered by the Invoice No.6018 dated 31-03-2012 and invoice no. 1586 dated 31-03-2012 as having been included in return for April, 2018. The assessing authority has erred in treating it as suppressed transaction in 2011-12. The assessing authority ought to have noted that even if certain invoices were omitted to be included in the purchase list uploaded along the return filed, they were duly accounted for in the books of accounts an dthe sales out of that was also conceded in the return filed so long as no sales suppression has been detected, treating the purchases as suppressed and estimating the sales turnover based on that is illegal in the light of the judgment of the Hon'ble High Court of Rajasthan in Princestone Company Vs Commercial Taxes Officer, Anti Evasion, Quota [(2012)20KTR235(RAJ)]*
5. *The assessing authority ought to have noted that the variation alleged in the turnover conceded as per return and that conceded in Audit report in Form.13 & 13 A are nonexistent. He ought to have noted that the difference was detected during audit. Where the appellant had filed revised return, for which the appellant was entitle to under Sec.42 (2) of the Act alleging the suppression and estimating turnover is illegal and arbitrary.*
6. *In the light of the judgment of the Hon'ble High Court of Karnataka in M/s Federal Mogul Goets (India) Ltd Vs Asst. Commisioner Taxes Audit and Others [(2012)20KTR3509KAR)]. Even assuming but not conceding that the variation actually existed the estimate of GP is without any rationale and hence illegal. The Assessing authority ought to have noted that in the case of discount receive, the supplier had not claimed any inspection and had paid tax, under the Act. As such the denial of Input Tax credit is illegal.*
7. *The estimate made for probable omission and suppression is in gross violation of the provisions of the rule 39(5) of the KVAT Rules*
8. *The levy of interest on a demand created as per best judgment assessment, with retrospective effect, is illegal and arbitrary. The assessing authority ought to have noted that in the case of best judgment assessment, interest will accrue only if the payment of the amount demanded is not made within the time specified in the demand notice. The demand of interest is therefore illegal in the light of the judgment of the Hon'ble Supreme Court in Bhai Jaspal Singh and another vs. Asst. Commissioner of Commercial Taxes and another [(2011) 19 KTR 255 (SC)] and of the Hon'ble High Court of Kerala in Hotel Doubloon vs. Asst. Commissioner and others (12 KTR 358).*

*The appellant also filed the following argument notes.*

*1. The order of the State Tax Officer, Payyannur, is opposed to law, facts and circumstances of the case.*

2. *Where the assessing authority has failed to consider the reply filed by the appellant in the correct perspective and in the light of the applicable legal provisions. This is in violation of the principles of natural justice in view of the judgment of the Hon'ble Supreme Court in Asst. Commissioner, Commercial Taxes Department, Works Contract and leasing, Kota vs. Shukla and brothers [(2010) 30 VST 114 (SC) at Page 120], and also of the Hon'ble High Court of Kerala in M.S. Jewellery vs. Assistant Commissioner (Assessment) (1994) 2 KTR 389 (Ker.).*

3. *The assessment is clearly barred by the limitation. The assessment relate to the year 2011-12 as such the time limit for reopening the self assessment under Section 25(10 expired on 31-03-2017. As such where notice was issued only on 19-10-2017, it was*

*beyond the time limit prescribed under Section 25(1) and the assessment iis clearly without jurisdiction in the light of the judgment of the Hon'ble High Court of Kerala in Cholayil Pvt Ltd. Vs Assistant Commissioner (Assessment) [2015(4)KLT516(FB)] and also the judgment dated 19-07-2017 in WA.230/2017 (Commercial Tax Officer and Others Vs S Najeem and another) [2018-VIL-422-KER]. The order is not a speaking one. The Officer had failed to rebut the contentions raised by the appellant. The order is therefore in violation of the ratio of judgment in Steel Authority of India Ltd Vs Sales Tax Officer Rourkere-1 &others [(2010) 18 KTR 143 (SC)].*

4. *After having found that the explanation offered by the appellant was acceptable the assessing authority has grossly erred in making arbitrary estimate of suppressed turnover. Where the appellant had explained that the transaction covered by the Invoice No.6018 dated 31-03-2012 and invoice no. 1586 dated 31-03-2012 as having been included in return for April, 2013, the assessing authority has erred in treating it as suppressed transaction in 2011-12. The assessing authority ought to have noted that even if certain invoices were omitted to be included in the purchase list uploaded along the return filed, they were duly accounted for in the books of accounts and the sales out of that was also conceded in the return filed so long as no sales suppression has been detected, treating the purchases as suppressed and estimating the sales turnover based on that is illegal in the light of the judgment of the Hon'ble High Court of Rajasthan in Princestone Company Vs Commercial Taxes Officer, Anti Evasion, Quota [(2012)20KTR235(RAJ)]*

*5. The assessing authority ought to have noted that the variation alleged in the turnover conceded as per return and that conceded in Audit report in Form.13 & 13 A are nonexistent. He ought to have noted that the difference was detected during audit. Where the appellant had filed revised return, for which the appellant was entitle to under Sec.42 (2) of the Act alleging the suppression and estimating turnover is illegal and arbitrary in the light of the judgment of the Hon'ble High Court of Karnataka in M/s Federal Mogul Goets (India) Ltd Vs Asst. Commisioner Taxes Audit and Others [(2012)20KTR3509KAR)]. Even assuming, but not conceding, that the variation actually existed the estimate of GP is without any rationale and hence illegal.*

*6. The Assessing authority ought to have noted that in the case of discount received, the supplier had not claimed any inspection and had paid tax, under the Act. As such the denial of Input Tax credit is illegal.*

*7. The estimate made for probable omission and suppression is in gross violation of the provisions of the rule 39(5) of the KVAT Rules.*

8. *The levy of interest on a demand created as per best judgment assessment, with retrospective effect, is illegal and arbitrary. The assessing authority ought to have noted that in the case of best judgment assessment, interest will accrue only if the payment of the amount demanded is not made within the time specified in the demand notice. The demand of interest is therefore illegal in the light of the judgment of the Hon'ble Supreme Court in Bhai Jaspal Singh and another vs. Asst. Commissioner of Commercial Taxes and another [(2011) 19 KTR 255 (SC)] and of the Hon'ble High Court of Kerala in Hotel Doubloon vs. Asst. Commissioner and others (12 KTR 358).*

*For these and such other grounds as may be permitted to be raised at the time of hearing it is prayed that the assessment under challenge may be set aside and the appeal may be allowed."*

1. *All the grounds raised in the appeal memorandum are pressed.*

2. *As regards the omission of purchase covered by Invoice No.6018 dated 31-03-2012 and invoice no. 1586 dated 31-03-2012 the appellant had explained that the said purchases had been included in the return for April, 2013 and where the assessing authority found that the explanation was correct, the assessing authority has grossly erred in treating the purchases as suppressed purchases. Where invocies are issued by the suppliers on the last day of a month and goods are received by the buyer only during the subsequent month there is nothing illegal in the buyer conceding such purchases in the month in which the goods are received. As such treating such purchases as suppressed and making arbitrary estimates during the year 2011-2012 is illegal and arbitrary.*

3. *The variation alleged in the turnover conceded as per return and that conceded in Audit report in Form.13 & 13 A are non-existent. The difference was detected during audit. Sec.42 (2) of the Act permits a dealer to file revised return where such difference is detected during audit. Where that was done, alleging suppression and estimating turnover is illegal and arbitrary in the light of the judgment of the Hon'ble High Court of Karnataka in M/s Federal Mogul Goets (India) Ltd Vs Asst. Commisioner Taxes Audit and Others [(2012)20KTR3509KAR)].*

4. *The estimate of G.P. @20% is also illegal. The accounts of the appellant had been audited by a Chartered Accountant and audit*

*report has been issued which was duly filed before the assessing authority. A copy each of the audit report and Trading and {Profit and Loss account is produced herewith as Annexure-I. The G.P. as per accounts is only 4.37%. As such estimating the G.P. @20% is illegal and arbitrary.*

5. *The assessing authority has treated the discounts received from the suppliers as turnover of the appellant. The trading and profit and loss account for the year 2011-12 would show that the appellant had not sold the goods at a price lower than the purchase price. The only provision which permits addition of an amount other than that received from the buyer to the selling price as turnover is Explanation VII to clause (lii) of section 2 of the Act, which reads:*

*"Explanation VII.—Where a dealer sells any goods purchased by him at a price lower than that 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."*
*The meaning assigned to the word "reimbursement" in the Webster's Encyclopedic Unabridged Dictionary of the English Language is as follows:*
*"to make repayment to for expense or loss incurred; to pay back; to refund."*

*So, the primary condition for attracting the provisions the explanation is that the dealer should sell the goods at a price lower than the purchase price. A perusal of the Trading and Profit and loss account would show that the appellant had sold the goods at a profit. The second condition is that the discounts should be received by way of reimbursement of the balance of the sale price. In the present case, the discount allowed by the suppliers does not have any relation to the selling price fixed by the appellant. The Hon'ble High Court of Kerala, has, in the judgment dated 2-12-2015 in W.P.(C) No.24872 of 2012 (K.K. Kunhikomu Vs. Assistant Commissioner & others) laid down the following principles with regard to the application of Explanation VII to clause (lii) of section 2 of the Act and also reversal of input tax with reference to the discounts received:*

*" 6……..in the absence of any claim for refund of tax paid by the supplier, the input tax claimed by the petitioners cannot be varied or modified, save in the situations mentioned in Section 11 of the KVAT Act, such as, for instance, where the goods in question are sold at a price lower than that at which they were purchased or when the goods are sold at a subsidized rate.*

*7. ……*

*8. In my view, three factual situations can arise and in the said situations, the course of action to be adopted by the assessing authority would vary based on the provisions of the KVATA Act.*

*(i) Firstly, there cannot be an insistence on an automatic reversal of input tax credit availed by the petitioners, proportionate to the discount subsequently received by them from their suppliers. The assessing authority would have to first ascertain the sale price of the product in the hands of the petitioners, and determine the output tax paid by the petitioners. If, thereafter, it is found that the output tax paid by the petitioner is less than the input tax that he has taken credit of, then the appropriate course of action would be to direct the petitioners to restrict the input tax credit to the extent provided in the second proviso to Section 11(3) of the KVAT Act.*

*(ii) Secondly, if the discount amounts received by the petitioners from their suppliers, can be demonstrated to be amounts received by them towards balance of the sale price of the goods, then the sales turnover of the petitioners can be enhanced to that extent alone and the output tax payable by the petitioner computed accordingly. Against this output tax found to be payable by the petitioners, the input tax availed by them would have to be set off to the extent possible. In this event the assessing authorities would be acting in accordance with Explanation VII to Section 2(lii) to determine the output tax payable by the petitioner on the enhanced sales turnover.*

*(iii) Thirdly, if it is found that the petitioners' sale price in respect of the product, is less than his purchase price, but it cannot be demonstrated that the discount subsequently received by the petitioners is an amount received towards the balance of the sale price, then, so long as the supplier of the goods to the petitioners has paid his output tax, on the price inclusive of the discount that was subsequently offered to the petitioners, the input tax credit availed by the petitioners cannot be varied, taking note of the provisions of the 5th proviso to Section 11(3) of the KVAT Act."*

*The assessing authority has grossly erred in overlooking this. The suppliers have not claimed any exemption in respect of the discount allowed to the appellant and has paid tax on the sale value as per the invoice issued to the appellant. A copy each of the certificates issued by the suppliers had been produced before the assessing authority as is evidenced from the assessment order itself. However, the assessing authority alleged that credit note for Rs.26,631/- is not as contemplated by the provisions of the KVAT Act. Even if the assessing authority was of the opinion that certificate issued by the suppliers was defective, the assessing authority ought to have returned the same to the appellant for curing the defect. The assessing authority has not even stated what the defect in the certificates is. In Hevea Crumb Rubber (P) Ltd. vs. Superintendent of Central Excise (1983 KLT 679), this Honourable Court had discussed the principles of natural justice as follows:*
*"The assessee is entitled to know and should be informed, the basis on which the Revenue proceeds to assess it, so that the opportunity given to the assessee will be real and effective and not illusory and make believe."*

*As such denial of the benefit in respect of Rs.26, 631/- is illegal.*

*After having found that the appellant had produced necessary certificates in respect of the discounts received from the suppliers, the assessing authority has charged reverse tax in relation to discount for an amount of Rs.2,85,175/-. This is illegal. The appellant had not reduced the amount of discount as the discounts were received on other grounds as is stated in the assessment order itself. From the trading account itself it can be found that the appellant had not shown the discount as a reduction from the purchase price and still there was a gross profit of Rs.6, 51, 664.96. As such inclusion of the amount received as discount in turnover or denial of input tax credit on the amount representing discount is not permissible in the light of the judgment of the Hon'ble High court of Kerala in Priya Agencies Vs. CTO (2008) 16 KTR 287 and K.K. Agencies vs. Commercial Tax Officer [W.P.(C). No.9931 of 2008 dated 3-04-2008]. As such treatment of the discounts received by the appellant as turnover or denial of input tax credit in relation to such discount is illegal.*

6. *The addition made for probable omission and suppression (Rs.1,17,887/-) is also illegal. The assessing authority has taken the entire details from the KVATIS or from the Statement of Accounts filed by the appellant. As such making a further addition for probable omission and suppression is in gross violation of the provisions of Rule 39(5) of the KVAT Rules.*

*7. The levy of interest on a demand created as per best judgment assessment, which is ultravires the provisions of the KVAT Act, with retrospective effect is illegal and arbitrary. The assessing authority ought to have noted that in the case of best judgment assessment, interest will accrue only if the payment of the amount demanded is not made within the time specified in the demand notice. The demand of interest is therefore illegal in the light of the judgment of the Hon'ble Supreme Court in Bhai Jaspal Singh and another vs. Asst. Commissioner of Commercial Taxes and another [(2011) 19 KTR 255 (SC)] and of the Hon'ble High Court of Kerala in Hotel Doubloon vs. Asst. Commissioner and others (12 KTR 358).*

*8.It is therefore prayed that the appeal may be allowed.*

The appellant further prayed that the impugned assessment the order may be set aside on the above grounds.

I have considered the contentions raised by the appellant the records before me and the merits in it.

The issue involved in this case is as to the sustainability of assessment made..

The appellant argued that the assessing authority failed to consider the reply filed by appellant in the correct perspective. They stated that transaction covered by invoice no.6018 dated 31/03/2012 and invoice no 1586 dated 31.03.2012 was included in return for April 2013. They stated that variation alleged in the turnover conceded as per return and that conceded in Audit report are non -existent. They stated that in the case of discount received, the supplier has not claimed any deduction and paid tax under the Act. They also objected against estimate made towards probable omission and suppression. They objected against GP adopted @20%.

The assessing authority finalised the assessment after considering the reply filed by the appellant. Cases which were found genuine was also deleted from the assessment proposal. As such there is no violation of natural justice as alleged by them. The assessing authority has deleted all the purchases which were found accounted by the appellant. Cases which were not proved was confirmed. The appellant apart from their arguments has not produced any evidence to show that they accounted invoice no.6018/31.03.2012 and 1586/31.03.2012. Hence their argument cannot be accepted.

The appellant apart from the arguments failed to show that they requested for revision of returns under section 42 of the Act. They also failed to show that the variation in

purchase is reflected in either sales or stock. Hence their argument cannot be accepted. Assessment made in this behalf is sustainable and hence upheld.

The details of purchase suppression was placed before the appellant with reasonable certainty. Cases proved to be genuine by the appellant was deleted from assessment. The appellant failed to to discharge the burden of proof vis-a-vis other cases. The purchases can only be considered as effected by the appellant but failed to account and return. Hence assessment made on the basis of purchase suppression detected is sustainable and hence upheld.

The purchase suppression detected spreads over more than one return period. As such a pattern of suppression is clearly established. Hence the assessing authority is justified in making assessment towards probable omission and suppression. However considering the fact that the assessing authority scrutinized the data after the close of the financial year and also the facts and circumstances of the case, I am of the view that equal addition made in this case is a bit excessive. Addition @ 25% of suppression detected will be just and reasonable in this case. The assessing authority shall adopt the quantum of addition @ 25% of suppression detected instead of equal times made and modify the assessment.

The assessing authority had excluded the discount receipt of Rs.683475/- as the appellant filed certificates from the supplier to show that they had not claimed any exemption or refund on account of rebate and discount given. The appellant has not produced documents in support of their claim for Rs.285175/- and hence input tax credit on discount received was reversed. The appellant has not produced any documents in support of their claim at the appellate stage. Hence their argument cannot be accepted. Reversal of input tax credit made is in order and hence upheld.

The detection of purchase suppression makes it clear that the appellant failed in maintaining books of accounts properly. Hence conceded gross profit need not be adopted. Moreover the appellant has not produced any evidence in proof of their actual gross profit. The gross profit adopted is also not excessive and hence warrants no interference.

Interest levied under Section 31(6) of the Act is in order in the light of decision of Hon'ble High Court of Kerala in Chickoo Broiler Farm Vs. State Of Kerala (OT Rev.101/14)

No other points for consideration. Ordered accordingly.

**RESULT : MODIFIED**

Assistant Commissioner (Appeals),
Kannur.

To : The appellant through Advocate
Copy submitted to The Joint Commissioner (Law), CCT, Tvpm.
The Deputy Commissioner, Kannur
Copy to :
The Law Officer, Commercial Taxes, Kozhikode
The Inspecting Assistant Commissioner, Kannur
The State Tax Officer, Payyannur
Spare/index/file