IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

WP(C).No. 2283 of 2011 (I)

PETITIONER :

GAIA PROPERTIES AND INFRASTRUCTURE INDIA (P) LTD.,
YMCA CROSS ROAD, CALICUT
REP. BY K.C. JAMSHAD AHAMED, MANAGING DIRECTOR.

BY ADVS.SRI.P.RAGHUNATH
SRI.PREMJIT NAGENDRAN

RESPONDENT :

INTELLIGENCE OFFICER (IB) I,KOZHIKODE
O/O. THE DEPUTY COMMISSIONER (INT.), COMMERCIAL TAXES
KOZHIKODE-673 006.

BY GOVT. PLEADER SRI. R. RANJITH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 28-10-2015, ALONG WITH WP(C).NO. 19797/2012 & WP(C). NO.22056/2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Mn

WP(C).No. 2283 of 2011 (I)

APPENDIX

PETITIONER'S EXHIBITS :

EXHIBIT P1-	PHOTOCOPY OF BUILDING PERMIT DT. 14-07-2008.
EXHIBIT P2-	PHOTOCOPY OF AGREEMENT DT. 31-12-08.
EXHIBIT P3-	PHOTOCOPY OF NOTICE DT. 19-07-2010 FOR 2008-09.
EXHIBIT P4-	PHOTOCOPY OF NOTICE DT. 19-07-2010 FOR 2009-10.
EXHIBIT P5-	PHOTOCOPY OF REPLY DT. 28.7.10 FOR 2008-09.
EXHIBIT P6-	PHOTOCOPY OF REPLY DT. 28.7.10 FOR 2009-10.
EXHIBIT P7-	PHOTOCOPY OF CIRCULAR NO. 3/2010 DATED 05-03-2010.
EXHIBIT P8-	PHOTOCOPY OF ADDITIONAL REPLY DT. 26.10.2010.
EXHIBIT P9-	PHOTOCOPY OF ORDER U/S. 67(1)(d) DT. 3.12.2010 FOR 2008-09.
EXHIBIT P10-	PHOTOCOPY OF ORDER U/S. 67(1)(d) DT. 3.12.2010 FOR 2009-10.

RESPONDENT'S EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

Mn

A.K.JAYASANKARAN NAMBIAR, J.
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W.P.(C). Nos. 2283 of 2011,
19797 and 22056 of 2012
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Dated this the 28th day of October, 2015

JUDGMENT

As the petitioner in all these cases is the same, and the issue involved in all these writ petitions are similar, they are taken up for consideration together and disposed by this common judgment.

WP(C) No.2283 of 2011

The petitioner is stated to be a person, who constructs apartments in land owned by him, and sells the finished apartments, as per agreements, to various buyers on terms and conditions stipulated in the agreement for sale. In the writ petition, the petitioner is aggrieved by Exts.P9 and P10 orders of penalty that were passed against the petitioner under Section 67 (1) (d) of the Kerala Value Added Tax Act, hereinafter referred to as the KVAT Act. The essence of the contentions in the writ petition is that the respondent Intelligence Officer had, while passing Exts.P9 and P10 orders, merely followed the decision of the Hon'ble Supreme Court in the case of K. Raheja Development Corporation v. State of Karnataka **[2005 (5) SCC 162]** without going into the factual aspect of the case of the petitioner that, it was not engaged in any construction pursuant to any tripartite agreement entered into between the owner of the land, the builder and the prospective customer. The contention of the petitioner therefore, is that the respondent authority had proceeded to pass the penalty orders without considering whether the decision of the Hon'ble Supreme Court in **Raheja Development Corporation** cited supra, had any application to the facts of the petitioner's case.

2. I have heard the learned counsel appearing for the petitioner as also the learned Government Pleader appearing for the respondent.

3. On a consideration of the facts and circumstances of the case and the submissions made across the bar, I find force in the contention of the learned counsel for the petitioner that Exts.P9 and P10 orders imposing a penalty on the petitioner were passed mechanically by placing reliance on the decision of the Hon'ble Supreme Court in the case of **Raheja Development Corporation** cited supra. Although in Exts.P9 and P10 orders, there is a reproduction of the objections preferred by the petitioner to the notice proposing the imposition of penalty, there is no consideration of the factual aspects pertaining to the

petitioner's case, while arriving at a conclusion that the petitioner was liable to pay amounts by way of penalty for the assessment years in question. In my view, Exts.P9 and P10 orders suffer from a patent non-application of mind and therefore, deserve to be quashed for that reason alone. I also find however, that there is no consideration by the respondent Intelligence Officer, of the aspect of whether the petitioner had willfully evaded payment of tax that was due and payable by him. This aspect assumes importance in matters of penalty because, the decision of the Supreme Court in E.I.D. Parry (1) Ltd. v. Assistant Commissioner of Commercial Taxes and Another **[2000 (Vol.117) STC 457]** clearly mandates that, before imposition of a penalty on an assessee, the authority concerned must be satisfied of the existence of the necessary mens rea as would attract the penal provisions under the Act. In particular, it was stated by the Supreme Court that, if the correct position of law was in doubt, and the assessee had not included amounts in the return of turn over in the bona fide belief that they were not includable in the taxable turnover, then the assessee could not be said to have acted in deliberate defiance of the law, and its conduct could not be seen as dishonest or in conscious disregard of its obligations under the Act. While quashing Exts.P9 and P10 orders and relegating the matter to the assessing authority, therefore, I also direct the assessing authority to consider whether a penalty can be imposed on the petitioner assessee at all, considering the fact that the decision of the Supreme Court in **Raheja Development Corporation** cited supra, was subsequently doubted by the Supreme Court and referred to a larger bench, which pronounced its judgment only on 26th September 2013, through the decision in Larsen and Toubro Limited and Another v. State of Karnataka and Another **[2013 (65) VST 1 SC]**. Accordingly, the writ petition is allowed by quashing Exts.P9 and P10 orders and relegating the matter to the assessing authority for a fresh de novo consideration in accordance with the directions issued above.

3. I make it clear that it is taking note of the submission of the learned counsel appearing for the petitioner that, writ petitions, challenging a proposed assessment of the petitioner for the relevant assessment year under Section 25 (1) of the KVAT Act, were subsequently withdrawn by the petitioner and the said assessments are now pending before the assessing authority, that I felt it would be in the interests of justice, and to avoid a

multiplicity of proceedings, that directions should be issued to the assessing authority of the petitioner namely, the Commercial Tax Officer, Works Contract, Kozhikode, to consider the issue of imposition of penalty on the petitioner as well.

WP(C) Nos.19797 and 22056 of 2012

The challenge in these writ petitions is against Exts.P3 notice issued by the respondent authority, proposing a penalty under Section 67(1)(d) of the KVAT Act, for the assessment years 2010-11 and 2011-12 respectively. As the challenge in the writ petitions is against the notices proposing penalty, and in the judgment in relation to WP(C) No.2283 of 2011, I have already directed the assessing authority to consider the aspect of imposition of penalty on the petitioner, taking note of the observations in the said judgment, I am of the view that these writ petitions can also be disposed by directing the assessing authority, namely the Commercial Tax Officer, Works Contract, Kozhikode, to consider and pass orders pursuant to Ext.P3 notices that are impugned in these writ petitions, after taking note of the observations in the judgment pertaining to WP(C) No.2283 of 2011. These writ petitions are thus disposed with the aforesaid direction to the assessing authority.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

das /28.10.15