

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

THURSDAY, THE 12TH DAY OF NOVEMBER 2015/21ST KARTHIKA, 1937

WP(C).No. 3196 of 2012 (Y)

PETITIONER(S):

**M/S.THOPPIL CONSTRUCTIONS,
THATTADTHUMALA, ADAYAMON, THIRUVANANTHAPURAM 695 614,
REPRESENTED BY ITS PROPRIETOR A.NIZAMUDEEN.**

BY ADV. SRI.N.J. MATHEWS

RESPONDENT(S):

**1. STATE OF KERALA,
REPRESENTED BY SECRETARY,
DEPARTMENT OF COMMERCIAL TAXES, GOVERNMENT OF KERALA,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM 695 601.**

**2. COMMERCIAL TAX OFFICER,
(WORKS CONTRACTS) KOLLAM 691 013.**

BY GOVERNMENT PLEADER SRI.LIJU STEPHAN

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 12-11-2015,
ALONG WITH WPC. 16258/2012 AND CONNECTED CASES, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:**

PJ

APPENDIX

PETITIONER(S) EXHIBITS

- EXHIBIT P1. PHOTOCOPY OF THE RECEIPT FOR REGISTRATION RENEWAL ISSUED BY THE PETITIONERS BY THE 2ND RESPONDENT.**
- EXHIBIT P2. PHOTOCOPY OF FORM NO.4D DATED 30.3.2011 ISSUED BY 2ND RESPONDENT FOR THE PERIOD 2010-2011.**
- EXHIBIT P3. PHOTOCOPY OF NOTICE DATED 7.7.2011 ISSUED UNDER SECTION 25 (1) OF THE KERALA VALUE ADDED TAX ACT, 2003 TO THE PETITIONERS BY THE 2ND RESPONDENT FOR THE PERIOD 2009-2010.**
- EXHIBIT P4. PHOTOCOPY OF OBJECTION DATED 8.8.2001 BY THE PETITIONERS TO THE 2ND RESPONDENT.**
- EXHIBIT P5. PHOTOCOPY OF THE ASSESSMENT ORDER DATED 30.12.2011 ISSUED TO THE PETITIONERS BY THE 2ND RESPONDENT FOR THE PERIOD 2009-2010.**
- EXHIBIT P6. PHOTOCOPY OF THE APPLICATION DATED 13.1.2012 SUBMITTED BY THE PETITIONERS TO THE 2ND RESPONDENT.**

RESPONDENTS' EXHIBITS

NIL.

/ TRUE COPY /

P.S. TO JUDGE

PJ

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C). Nos. 3196, 16258 & 24801 of 2012,
5826 of 2013 & 28133 of 2014

Dated this the 12th day of November, 2015

JUDGMENT

Since all these writ petitions involve a common issue, they are taken up for consideration together and disposed by this common judgment. The issue involved in all these writ petitions concerns the validity of the first proviso to Section 8(a) (ii) of the Kerala Value Added Tax Act, hereinafter referred to as the "KVAT Act". The assessment years in question are assessment years 2009-10 and 2010-11. For the sake of convenience, the reference to facts and Exhibits is from WP(C) 3196 of 2012.

2. The petitioner is a contractor executing works for the Public Works Department of the State of Kerala. He had applied for and obtained registration as required under the KVAT Act and the said registration continues to be valid even today. He had applied for permission to pay tax on compounded basis at the rate of three per cent of the gross contract amount in terms of Section 8 (a)(ii) of the KVAT Act. This was because, the petitioner had, during the relevant period, a Central Sales Tax registration and further, he was also importing goods which were incorporated by him in the execution of various works contract. This prevented him

from availing the concessional rate of compounded tax under S. 8 (a) (i) of the KVAT Act. In respect of works executed by the petitioner for the Kerala State Construction Corporation, a wholly owned undertaking of the State Government, the petitioner had paid tax at the rate of three per cent in accordance with the main provision of Section 8(a) (ii) of the KVAT Act. The respondents however, initiated proceedings under Section 25(i) of the KVAT Act, and proposed to complete the assessment in relation to the petitioner by adopting the rate of four per cent in respect of works executed for the Kerala State Construction Corporation going by the 1st proviso to Section 8(a) (ii) of the KVAT Act. The proposals of the respondents culminated in Ext.P5 assessment order, wherein the demand against the petitioner was confirmed by the assessing authority. In the writ petition, Ext.P5 assessment order and consequential demand notice are impugned. While under normal circumstances, the petitioner would have had an effective alternate remedy against Ext.P5 assessment order, by way of filing a statutory appeal before the appellate authority under the KVAT Act, the petitioner approached this Court through the present writ petition with a contention that the 1st proviso to Section 8(a)(ii) of the KVAT Act is discriminatory and violative of Article 14 of the

Constitution of India, since, according to the petitioner, the said proviso provides for an impermissible classification between works contractors, who execute works for the State Government, Kerala Water Authority and Local Bodies, and works contractors who execute works for other awarders. It is on account of the said challenge to the validity of the statutory provision that the writ petition was admitted and the petitioner granted a stay against recovery proceedings pursuant to the assessment order and demand notice. The facts in the other writ petitions are also similar to the facts noticed above, except that the assessment orders pertain to different assessment years and the amounts demanded from the petitioner are also different.

3. I have heard the learned counsel appearing for the petitioners as also the learned Government Pleader appearing for the respondents in all these cases.

4. On a consideration of the facts and circumstances of the case as also the submissions made across the bar, I find that the challenge against the validity of the 1st proviso to Section 8(a) (ii) of the KVAT Act has already been considered by this Court in

Ernad Engineering Enterprises v. State of Kerala [2015 (2) KLT short note 55] wherein a learned Single Judge proceeded to uphold the validity of the proviso on the ground that it was well within the legislative competence of the State Legislature to provide for different rates of tax in respect of works awarded by the State Government, Kerala Water Authority or Local Authorities and works awarded by other persons. While this aspect was fairly conceded by the learned counsel appearing for the petitioner, the learned counsel would point to another aspect of the provision that is impugned, for contending that the provision is discriminatory in respect of a class of contractors. It is the contention of the learned counsel for the petitioner that the proviso to Section 8(a)(ii) of the KVAT Act envisaged a concessional rate of tax in respect of works done for the Government of Kerala, Kerala Water Authority and the Local Authority in that the rate of four per cent of the whole contract amount, that is prescribed in the said proviso was to be a concessional rate of tax in respect of the works executed for the said persons. The case of the petitioner is that when the provisions of Section 8(a)(ii) are applied to the facts of his case, then a payment of tax at three per cent of the contract amount, that is payable on works executed for persons other than those

mentioned in the proviso, results in a lower figure than the tax amount that would be payable in respect of works executed for the Government of Kerala, Kerala Water Authority or Local Authority. It is therefore, contended that the proviso to Section 8(a) (ii) of the KVAT Act, is discriminatory as far as the petitioner is concerned. Persuasive though the submission may appear at first blush, I am afraid, I cannot accept the proposition of the learned counsel for the petitioner, for the reasons stated below.

5. Section 8(a) of the KVAT Act 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), and who is not an importer may, at his option, instead of paying tax in accordance with the provisions of the said section, pay tax at three per cent of the whole contract amount;

[(ii) any works contractor not falling under clause (i) above may, at his option, instead of paying tax in accordance with the provisions of the said section, shall pay tax at three per cent of the contract amount after deducting the purchase value of goods excluding freight and gross profit element consigned into the State on stock transfer or purchased from outside the State and for the purchase value of goods so deducted shall pay tax at the scheduled rate applicable to such goods.]

Provided that notwithstanding anything contained in sub-clause (ii) above, the compounded tax payable by any

works contractor under this clause in respect of works contracts awarded by Government of Kerala, Kerala Water Authority or Local Authorities shall be four per cent of the whole contract amount:

Provided further that the provisions of this clause shall not apply to any works contract in which the transfer of material is in the form of goods:

Provided also that notwithstanding anything contained elsewhere in this Act, a works contractor who intends to pay tax at compounded rate in accordance with this clause in respect of all works undertaken by him during a year, may, instead of filing separate application for compounding for individual works, file a single option or payment of tax under this clause before 30th day of April of the year to which the option relates, subject to eligibility:

Provided also that in the case of any work covered under the above provisos which remains unexecuted fully or partly at the end of the year, the contractor shall continue to pay tax in respect of such works in accordance with the provisions of this clause.

[Provided also that notwithstanding anything contained in this Act, in cases of works which commenced prior to 1st April, 2008 and which remains partly unexecuted as on 1st April, 2008, the contractor shall pay tax at the rates as it existed prior to 1st April, 2008 till the completion of work, or up to 31st March, 2009, whichever is earlier.

Provided also that notwithstanding anything contained in this Act, contractors who have opted for payment of tax under sub-clause (ii) of clause (a) of section 8 during the previous years shall continue to pay tax on that portion of the works remaining unexecuted as on 1st April, 2009, at the rates applicable as on 1st April, 2009.]

[Explanation 1].- For the purpose of this clause "whole contract amount" shall not include the amount paid to sub-contractors for execution of the portion of works contract if the

sub-contractor is a registered dealer liable to tax under sub-section (1) or sub-section (1A) of section 6, and the contractor claiming deduction in respect of such amount furnishes certificates in such form as may be prescribed.]

[Explanation 2.- Notwithstanding anything contained in any other Act, a dealer who had surrendered his registration and unused declaration forms under the Central Sales Tax Act, 1956 (74 of 1956), before the assessing authority on or before 31st March, 2008 and who does not have any closing stock of materials purchased interstate as on 31st March, 2008 or who pays tax on such closing stock at scheduled rates, shall be eligible for paying compounded tax under sub-clause (i) of this clause, for the year 2008-2009.]

6. A plain reading of Section 8(a)(ii) would indicate that the concessional rate of three per cent tax envisaged therein, is in respect of any works contractor not falling under clause (i), and the liability to pay tax in respect of the works contract executed by him is fixed at three per cent of the contract amount, after deducting the purchase value of goods, excluding freight and gross profit element, consigned into the State on Stock transfer or purchase from outside the State, provided that in respect of the purchase value of the goods so deducted, the contractor pays tax at the scheduled rate applicable to such goods. The proviso to Section 8(a)(ii), on the other hand, clarifies that the compounded tax payable by the works contractor who falls under 8(a)(ii), in respect of works contracts awarded by Government of Kerala,

Kerala Water Authority or Local Authority shall be only four per cent of the whole contract amount. In other words, a reading of the main portion of Section 8(a)(ii) and the proviso to the said provision would indicate that, while in the former, the liability of a works contractor, in respect of works done for persons other than those mentioned in the proviso, is to pay tax at the rate of three per cent of the contract amount, together with tax at the scheduled rates in respect of the purchase value of goods that are consigned into the State on stock transfer or purchased from outside the State, the tax liability in respect of a contractor who executes works contracts in favour of the persons indicated in the proviso is only four per cent of the whole contract amount. Thus the liability to pay tax under the main provision of Section 8(a)(ii) and the proviso to Section 8(a)(ii) is based on different formulae. The mere possibility of a particular contractor finding himself in a situation where his tax liability is more when he executes works for the persons mentioned in the proviso, cannot be a ground to challenge the proviso itself as discriminatory, since, while considering the aspect of validity of the statutory provision, what is to be looked into is the statutory scheme as a whole and whether the provision as it stands occasions a discrimination between two

persons, who are identically situated. Inasmuch as the formula in the main provision of Section 8(a)(ii) is distinct and different from the formula in proviso to Section 8(a)(ii), when it comes to determining the tax liability of a works contractor, I do not find any force in the contention of the petitioner, that the proviso to Section 8(a)(ii) is discriminatory and violative of Article 14 of the Constitution of India. I therefore, reject the challenge in the writ petitions against the validity of the 1st proviso to Section 8(a)(ii) on this ground urged by the petitioner.

The learned counsel for the petitioner would submit that, in the assessment orders impugned in the writ petitions, there are certain other defects noticed in that, the interest computation is made applying a wrong rate of interest, and further, the assessing authority has not given credit to the tax originally paid by the petitioners at the rate of three per cent, while demanding the differential tax pursuant to the assessment orders passed against the petitioner. In my view, these are matters that the petitioner can take up with the assessing authority by filing appropriate rectification applications, seeking a correction of the rate of interest adopted as also to obtain credit of the tax already paid by

them, prior to the passing of the impugned assessment orders. Thus, without prejudice to the rights of the petitioners to approach the assessing authorities with rectification applications seeking correction of the mistakes pointed out in the writ petition, I dismiss these writ petitions in their challenge against the validity of the 1st proviso to Section 8(a)(ii) of the KVAT Act.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE