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. 2619 of 2011 (B)

PETITIONER :

M/S.PRESTIGE ESTATES PROJECTS LTD.,
NO.32, BAY PRIDE MALL, MARINE DRIVE
ERNAKULAM, KOCHI-31
REPRESENTED BY THANKACHAN THOMAS V.
HEAD- BUSINESS OPERATIONS-KERALA.

BY ADVS.SRI.HARISANKAR V. MENON
SMT.MEERA V. MENON
SRI.MAHESH V. MENON

RESPONDENT(S) :
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1. COMMERCIAL TAX OFFICER (WC),
OFFICE OF THE DY. COMMISSIONER, COMMERCIAL TAXES
ERNAKULAM, KOCHI-682 015.

2. STATE OF KERALA
REPRESENTED BY SECRETARY TO GOVERNMENT,
TAXES DEPARTMENT, GOVT.SECRETARIAT,
THIRUVANANTHAPURAM – 695 001.

R1 & R2 BY GOVT. PLEADER SRI. R. RANJITH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 28-10-2015, ALONG WITH WP(C) NO. 975/2011 & WP(C) NO. 9663/2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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...2/-

WP(C).No. 2619 of 2011 (B)

APPENDIX

PETITIONER'S EXHIBITS :

EXT.P1	**:**	**COPY OF NOTICE ISSUED BY THE IST RESPONDENT DATED 15-1-2009.**
EXT.P2		**COPY OF NOTICE ISSUED BY THE IST RESPONDENT DATED 15-1-2009.**
EXT.P3		**COPY OF APPLICATION FILED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DATED 29-1-2009.**
EXT.P4		**COPY OF LETTER FILED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DATED 5.2.09.**
EXT.P4(a)		**COPY OF LETTER FILED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DATED 5.2.09.**
EXT.P5		**COPY OF NOTICE ISSUED BY THE IST RESPONDENT DATED 11-2-2009.**
EXT.P6		**COPY OF REPLY FILED BY THE PETITIONER DATED 12-3-2009.**
EXT.P7		**COPY OF NOTICE ISSUED BY THE IST RESPONDENT DATED 2-4-2009.**
EXT.P8		**COPY OF APPLICATION FILED BY THE PETITIONER DATED 22-4-2009.**
EXT.P9		**COPY OF LETTER SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DATED 2-5-2009.**
EXT.P10		**COPY OF ORDER ISSUED BY THE 1ST RESPONDENT DATED 2-5-2009.**
EXT.P11		**COPY OF JUDGMENT IN WP(C) NO. 549/2010 OF THIS HON'BLE COURT DATED 22-1-2010.**
EXT.P12		**COPY OF NOTICE ISSUED BY THE 1ST RESPONDENT DATED 19-10-2010.**

(Contd...)

EXT.P13 COPY OF LETTER SUBMITTED BY THE PETITIONER DATED 28-10-2010.

EXT.P14 COPY OF NOTICE ISSUED BY THE IST RESPONDENT DATED 24-11-2010.

EXT.P15 COPY OF REPLY FILED BY THE PETITIONER DATED 6-12-2010.

EXT.P16 COPY OF ORDER ISSUED BY THE IST RESPONDENT DATED 09-12-2010

RESPONDENT'S EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

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A.K.JAYASANKARAN NAMBIAR, J.

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W.P.(C). Nos. 2619, 975 & 9663 of 2011

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Dated this the 28th day of October, 2015

JUDGMENT

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

2. In Writ Petition 2619 of 2011, the petitioner is an estate developer and marketer of apartments. It is stated that he carries on construction activities through a third party contractor and the apartments that are constructed are then sold to various buyers. The challenge in the writ petition is against Ext.P16 assessment order, whereby the petitioner has been fastened with a tax liability on the assumption that the petitioner is a dealer liable to pay tax in connection with the construction activities. The stand of the petitioner is essentially premised on the decision of the Hon'ble Supreme Court in State of Andhra Pradesh v. Larsen & Toubro Ltd. & Others **[2008 (17) VST 1]** where the Hon'ble Supreme Court found that in cases where there is an agreement between an awarder and a contractor, and the entire work under the contract is sub contracted to a sub contractor by the main contractor, the execution of the work then involved a transfer of material in the course of execution of the works contract, directly from the sub

contractor to the awarder of the contract. It was, therefore held that the persons like the petitioner, who were the main contractors and who had executed the construction work through sub contractors, would not be liable to pay tax in respect of the supply of materials in the course of execution of the works contract. Ext.P16 assessment order, that is impugned in the present writ petition proceeds to assess the petitioner for the supply of materials during the course of execution of works contract and therefore, is passed contrary to the law laid down by the Supreme Court in the case of State of Andhra Pradesh v. L&T cited Supra. No doubt, the assessing officer relies on yet another decision of the Supreme Court in the case of K. Raheja Development Corporation v. State of Karnataka **[2005 (5) SCC 162]** which may not apply in the strict sense to the facts of the instant case. I also note that, following the judgment of the Supreme Court in the case of State of Andra Pradesh v L&T cited supra, this Court had in Surya Constructions v. Commercial Tax Officer **[2015 (83) VST 352]** quashed similar assessment orders to the extent they demanded tax from the main contractors. Inasmuch as the facts in the instant writ petition are also similar to the facts in Surya Constructions cited supra, I quash Ext.P16 order and relegate the matter to the assessing authority for a fresh consideration in the light of the decisions referred to above. The 1st respondent shall

pass fresh orders of assessment in relation to the petitioner, within a period of three months from the date of receipt of a copy of this judgment, after hearing the petitioner.

WP(C) 975 of 2015

In this writ petition, the challenge is against Exts.P13 to P15 order of penalty under the Kerala Value Added Tax Act, hereinafter referred to as the "KVAT Act", in respect of the petitioner, who is an estate developer, who purchases land and effects constructions on the said land through a sub contractor. In view of the findings in this judgment relating to WP(C) 2619 of 2011, which deals with the assessment proceedings against the same petitioner, I am of the view that Exts.P13 to P15 orders of penalty, which have been passed against the petitioner on the same reasoning as has already been found to be erroneous while dealing with WP(C) 2619 of 2011, I quash Exts.P13 to P15 orders of penalty. Inasmuch as, I have already directed the 1st respondent assessing officer to redo the assessment in relation to the petitioner, I am of the view that, it would be prudent to relegate the issue of penalty to be considered by the same officer, namely the 1st respondent, after he has considered the assessment in relation to the petitioner for the assessment year in question.

Thus, WP(C) No.975 of 2011 is allowed, by quashing Exts.P13 to P15 orders and remitting the matter to the 1st respondent for a fresh consideration, after passing assessment orders in relation to the petitioner for the relevant assessment years.

WP(C) No.9663 of 2011

The challenge in this writ petition is against Ext.P8 series of penalty orders passed against the petitioner for the assessment years 2005-06 to 2009-10. In the light of the view that I have already taken in respect of WP(C) Nos. 2619 and 975 of 2011, I am of the view that Ext.P8 series of penalty orders in this writ petition cannot also be legally sustained. Thus, I quash the said orders and direct that the penalty proceedings against the petitioner for the aforementioned assessment years shall be initiated only if it is found necessary pursuant to the completion of the assessment proceedings, which are stated to be pending before various appellate authorities. The writ petition is therefore, allowed by quashing Ext.P8 series of penalty orders.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

das /28.10.15