

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

WEDNESDAY, THE 2ND DAY OF DECEMBER 2015/11TH AGRAHAYANA, 1937

WP(C).No. 5077 of 2009 (D)

PETITIONER:

**M/S. DEVICES DISTRIBUTORS,
K.T. COMPLEX, JAIL ROAD, CALICUT - 673 004,
REPRESENTED BY ITS MANAGING PARTNER,
SRI.P.C. FRANCIS.**

**BY ADVS.SRI.P.B.SAHASRANAMAN
SRI.K.JAGADEESH
SRI.T.S.HARIKUMAR**

RESPONDENT(S):

- 1. STATE OF KERALA,
REPRESENTED BY ITS PRINCIPAL SECRETARY,
REVENUE DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM.**
- 2. THE ASSISTANT COMMISSIONER,
SPECIAL CIRCLE I, COMMERCIAL TAXES,
KOZHIKODE.**

BY GOVERNMENT PLEADER SRI.LIJU V.STEPHEN

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 02-12-2015 ALONG WITH WPC. 9499/2009 & CONNECTED
CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

mbr/

APPENDIX

PETITIONERS' EXHIBITS:

- EXT. P1 : TRUE PHOTOSTAT COPY OF THE JUDGMENT IN WP(C)NO.8626 OF 2008 AND CONNECTED CASES OF THIS HON'BLE COURT, DATED 2ND APRIL, 2008.
- EXT. P2 : TRUE PHOTOSTAT COPY OF THE JUDGMENT IN WP(C)NO.36318 OF 2007, DATED 10TH APRIL, 2008.
- EXT. P3 : TRUE PHOTOCOPY OF THE ASSESSMENT ORDER NO.32110290314/06-07, DATED 23.1.2009 FOR THE ASSESSMENT YEAR 2006-07.
- EXT. P4 : TRUE PHOTOCOPY OF THE ASSESSMENT ORDER NO.32110290314/07-08, DATED 27.1.2009 FOR THE ASSESSMENT YEAR 2007-08.

RESPONDENTS' EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

mbr/

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C) Nos.5077 & 9499 of 2009

W.P.(C).No.10506 of 2010

**W.P.(C) Nos.11129, 12972, 19976, 22835, 22997,23541,
23566, 24863 & 24872 of 2012**

&

W.P.(C).Nos.27088 & 7985 of 2014

Dated this the 2nd day of December 2015

JUDGMENT

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

2. The issue involved in these writ petitions is with regard to the availment of input tax credit by dealers, of the tax paid by them at the time of purchase of goods from their suppliers. An incidental issue that arises for consideration is whether amounts offered by way of discount through credit notes issued by the supplier of the goods, at a point in time subsequent to the sale of the goods to the petitioners, can be added to the sales turnover of the petitioners' by invoking the provisions of explanation VII to the definition of turnover under Section 2(lii) of the KVAT Act. In W.P.(C). 19976/2012, it is the first issue that comes up for consideration and

in all the other writ petitions, it is the second incidental issue that arises for consideration.

The brief facts necessary for a disposal of the writ petitions are as follows:-

3. The petitioners are all registered dealers under the KVAT Act trading in the commodity, Cement. The petitioners purchase Cement from various suppliers/manufacturers and, at the time of purchase of the Cement, they pay the price indicated in the invoice raised on them by the suppliers. Immediately on payment of the price inclusive of tax, indicated in the invoice raised by the supplier, the petitioners avail input tax credit of the tax so paid. In the course of trade, the petitioners also receive certain amounts, by way of discount from the supplier of the goods. The said discount is often given to them by way of credit notes raised on them, and the said amount is not claimed by way of discount by the supplier, while filing returns before his assessing authority, for the purposes of completion of his assessment under the KVAT Act or the corresponding state enactment in his State. The petitioner subsequently sells the Cement purchased by him from his supplier, at prices, which are sometimes lower than the price at which he purchased the goods, but invariably at a price higher than his purchase price, as reduced by the discount amount received by him, by

way of credit notes. The assessment authorities under the KVAT Act, proceeded to issue notices to the petitioners, under Section 25(1) of the KVAT Act, raising demands on the following two contentions, namely,

i) In so far as the petitioner had paid tax on the Cement purchased by him from his supplier, at a price lower than his purchase price, the petitioner would have to reverse the input tax credit, which he had availed at the time of receipt of the goods, from the supplier.

ii) In so far as the petitioner had sold the Cement purchased by him from the supplier at a price lower than the purchase price indicated in the invoice of the supplier, the discount amount subsequently received by the petitioner by way of credit notes, would have to be added to the sales turnover of the petitioner in accordance with Explanation VII to Section 2(l ii).

4. Pursuant to notices issued to the petitioners in many of the cases, assessment orders were also passed, confirming the proposals in the pre-assessment notices. These assessment orders have also been impugned in the various writ petitions. In those cases, where the assessment orders have not been passed, the notices issued to the petitioner have been impugned.

5. I have heard the learned senior counsel Sri. Sreekumar, duly

instructed by Sri.P.R.Ajith Kumar, Sri.Premjith Nagendran and Sri.Sahasranaman, learned counsel on behalf of the petitioners and Sri. Liju V.Stephen, Learned Government Pleader for the respondents.

6. On a consideration of the facts and circumstances of the case and the submissions made across the Bar, I find that the issues in all these writ petitions have to be considered in the light of the statutory provisions under the KVAT Act and in particular, the provisions of Section 11 of the KVAT Act r/w Section 2(l ii) therein. As per the scheme of taxation on value addition contemplated under the KVAT Act, the legislative machinery adopted, for ensuring that there is no cascading effect of the tax paid at various stages in the supply chain, is to provide the dealer with a facility of setting off the tax paid by him at the time of purchase of particular goods, against the tax to be paid at the time of subsequent sale by him of the same goods. The essence of the scheme, in other words, is that, whenever tax is paid by a dealer at the time of purchase of goods, he is entitled to take credit of the tax so paid and to set off the said tax amount against the output tax to be paid by him at the time when he sells the product. A variation of the input tax credit availed by him is called for only in a situation where, it is found that the tax paid by the supplier of the goods, of which credit was taken by the petitioner as input tax credit, is subsequently reduced on

account of a refund granted to the supplier, of the tax initially paid by him. It follows that, 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 subsidised rate.

7. In the instant cases, it is only in W.P(C)No.19976/2012, where Ext.P6 and P7 orders are impugned, that there is a direction to the petitioner to reverse the alleged excess input tax credit availed by him, corresponding to the amount received by him by way of discount from the supplier, under circumstances where it is undisputed that there was no refund claimed by the supplier of the tax paid by him. In the remaining writ petitions, the claim for differential tax, as proposed in the notices issued to the petitioner, and in some cases confirmed by the assessment orders subsequently passed, is premised on the contention that, in so far as the petitioners had sold the Cement at prices lower than the purchase price indicated in the invoice raised on him by the supplier, the provisions of Section 2(l ii) r/w Explanation VII thereto could be invoked, so as to add the discount amount, subsequently received by him through credit notes, to the sales turnover of the goods

which they have sold at a reduced price. The impugned notices and assessment orders do not, however, consider the impact, if any, that the grant of discount would have on the input tax credit availed by the petitioners.

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 KVAT Act.

9. 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.

10. 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 turn over.

11. 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 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.

12. In my view, on a perusal of the notices and assessment orders that are impugned in these writ petitions, the assessing authorities have not examined the issue in the light of the aforesaid

principles. The assessment orders impugned in these writ petitions are therefore vitiated by a non-application of mind and I quash the same. I direct the respondent assessing authorities in all these writ petitions, to complete the assessment proceedings, initiated against the petitioners through the notices issued to them under Section 25(1) of the Act, by taking note of the observations in this judgment, and after granting the petitioners an opportunity of being heard in the matter. The assessing authorities shall intimate the petitioners of the date of personal hearing, for the purpose of completion of assessment, sufficiently in advance and shall ensure that they have a minimum of 15 days' notice of the date of hearing. The assessing authorities shall thereafter proceed to pass fresh orders, as directed. I make it clear that all the issues covered by the notices issued to the petitioners are left open for consideration by the assessing authorities, pursuant to the directions in this judgment.

These writ petitions are disposed as above.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

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