IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

FRIDAY, THE 13TH DAY OF FEBRUARY 2015/24TH MAGHA, 1936

WP(C).No. 4222 of 2015 (C)

PETITIONER:

COCHIN SANITARY STORES,
T.D. ROAD, ERNAKULAM, KOCHI-682 031,
REPRESENTED BY PARTNER,
SRI.K.J. SUDHAKARA KAMMATH.

BY ADVS.SRI.VIJAYAN. K.U.,
SRI.K.V.VIMAL.

RESPONDENTS:
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1. INTELLIGENCE OFFICER, SQUAD NO.1,
   COMMERCIAL TAXES, MATTANCHERRY AT
   MINI CIVIL STATION, ALUVA-682 101.

2. COMMERCIAL TAX OFFICER (RECOVERY),
   OFFICE OF THE DEPUTY COMMISSIONER,
   COMMERCIAL TAXES, MATTANCHERRY-682 002.

3. ASSISTANT COMMISSIONER,
   SPECIAL CIRCLE , COMMERCIAL TAXES,
   MATTANCHERRY AT ALUVA-682 101.

BY GOVT. PLEADER SMT.SHOBA ANNAMMA EAPEN.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 13-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

rs.

WP(C).No. 4222 of 2015 (C)

APPENDIX

PETITIONER'S EXHIBITS:-

EXT P1:- TRUE COPY OF THE RELEVANT PORTION OF THE SL. NO. 101.

EXT P2:- TRUE COPY OF THE REQUEST FOR CLARIFICATION SOUGHT BY SREE PADMANABHA ENTERPRISES ON 04/10/2005.

EXT P3:- TRUE COPY OF CLARIFICATORY LETTER NO C8.48888/05/CT DATED 08/03/2006 ISSUED BY THE COMMISSIONER OF COMMERCIAL TAXES.

EXT P4:- TRUE COPY OF THE RE-CLARIFICATION ISSUED BY THE COMMISSIONER VIDE LETTER NO. C8-48888/2005/CT DATED 27/04/2006.

EXT P5:- TRUE COPY OF THE DECISION IN O.T. APPEAL NO. 5/2006 DATED 26/05/2008.

EXT P6, P7, P8, P9 & P10:- TRUE COPIES OF NOTICE NOS. ISM 37/14-15(2009-10)- ISM-37A/14-15(2010-11), ISM-37B/14-15(2011-12), ISM- 37C/14-15 (2012-13) & ISM-37D/14-15(2013-14) ALL DATED 04/11/2014.

EXT P11, P12, P13, P14 & P15:- TRUE COPIES OF THE REPLIES FOR THE YEARS 2009-10 TO 2013-14 ALL DATED 14/11/2014.

EXT P16, P17, P18, P19 & P20:- TRUE COPIES OF THE PENALTY ORDERS FOR THE YEARS 2009-10, 2010-11, 2011-12, 2012-13 & 2013 -14 ALL DATED 15/01/2015.

RESPONDENT'S EXHIBITS:- NIL.

//TRUE COPY//

P.A. TO JUDGE

rs.

A.K.JAYASANKARAN NAMBIAR, J.

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W.P.(C) No.4222 of 2015 (C)

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Dated this the 13th day of February, 2015

JUDGMENT

The petitioner is aggrieved by Exts.P16 to P20 orders of penalty that have been passed against him under the Kerala Value Added Tax Act, 2003, for the assessment years 2009 - 2010 to 2013 - 2014.

2. It is the specific case of the petitioner that, he is a dealer in water supply and sanitary goods including articles of brass. The articles of brass are specifically covered under entry 3(2) of Schedule III of the Kerala Value Added Tax Act, 2003 and attract tax @ 5%. As against this, the respondents have proposed to classify the item under S.R.O No.82 of 2006 and S.R.O.No.119 of 2008 as a residual item under serial No.101. The 1st respondent in Ext.P16 to P20 orders has proceeded to impose a penalty on the petitioner, on the ground that, the petitioner has not correctly paid tax on the sanitary equipments and fittings that are made of brass, by wrongly classifying the said items as articles of brass attracting tax only at 5%. The impugned orders of penalty proceed to hold the petitioner liable for twice the actual tax payable on the said items, if classified under the residual head under the SROs mentioned above. Challenging the said orders, inter alia on the ground that they wrongly decided an issue of classification, and also on the ground that the petitioner was not afforded an opportunity of hearing prior to the passing of the said orders, the petitioner has approached this Court through the present writ petition.

3. I have heard Sri.K.U.Vijayan, learned counsel appearing for the petitioner and Smt.Sobha Annamma Eappen, learned Government Pleader appearing for the respondents.

4. On a consideration of the facts and circumstances of the case and the submissions made across the Bar, I find that in Exts.P16 to P20 orders, the 1st respondent has proceeded to determine the issue of classification of sanitary equipments and fittings made of brass, by holding it to be classifiable under entry 101 of SRO No.82 of 2006. The finding of the 1st respondent is based on an erroneous understanding of the rules of interpretation to be applied while interpreting the entries under the schedule to the KVAT Act. There is no consideration in the said orders of the specific entry that deals with articles of brass, where there is a reference to an eight digit HSN code. Exts.P16 to P20 orders do not indicate as to why the products in question would not merit classification under the specific entry, and would rather be classifiable under the residual entry. In my view, such an exercise has necessarily to be done by an authority who proposes to impose a penalty on an assessee on the ground of mis-classification of an item. The issue of classification being a mixed question of law and fact, it is incumbent upon the taxing authority to correctly determine the classification of the item, before arriving at a finding that the item in question has been misclassified by the assessee dealer.

5. In that view of the matter, I feel that, the 1st respondent is required to re-consider the aspect of imposition of penalty on the petitioner, for the assessment years in question. To enable the 1st respondent to do so, I quash Exts.P16 to P20 orders, and direct the 1st respondent to pass fresh orders in the matter, after hearing the petitioner and considering the clarifications, if any, issued by the authority for clarification under the KVAT Act, the judgments of this Court and the Supreme Court on the aspect of classification of items under taxing statutes, as also the rules for interpretation of the entries in the KVAT tariff, which are specifically mentioned under the KVAT Act and Rules. The 1st respondent shall pass orders as directed within a period of two months from the date of receipt of a copy of this judgment. The petitioner shall appear before the 1st respondent at 11 a.m. on 28.02.2015 with all documents necessary for substantiating his case on merits.

The writ petition is allowed as above.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

AMV/16/02/