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. 4646 of 2015 (E)

PETITIONER(S) :

M/S. ROTANA INNS PVT.(HOTEL RAJ RESIDENCY),
KALLUVATHUKKAL, KOLLAM, PIN- 691 578,
REPRESENTED BY ITS MANAGING DIRECTOR,
D. THYAGARAJAN.

BY ADVS.SRI.P.G.JAYASHANKAR
SMT.V.VIJITHA

RESPONDENT(S) :
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1. UNION OF INDIA,
   REPRESENTED BY ITS SECRETARY, DEPARTMENT OF REVENUE,
   MINISTRY OF FINANCE, CENTRAL SECRETARIAT,
   GOVERNMENT OF INDIA, NEW DELHI- 110 001.

2. THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX,
   PRESS CLUB ROAD, THIRUVANANTHAPURAM, PIN- 695 001.

3. THE ASSISTANT COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX,
   VARINJAM TOWERS, RESIDENCY ROAD, CHINNAKKADA,
   KOLLAM, PIN- 691 001.

4. THE COMMISSIONER OF COMMERCIAL TAXES, TAX TOWERS,
   THIRUVANANTHAPURAM, PIN- 695 002.

5. THE ASSISTANT COMMISSIONER,
   COMMERCIAL TAXES, SPECIAL CIRCLE, ASRAMAM,
   KOLLAM, PIN- 691 002.

6. THE DEPUTY TAHSILDAR(REVENUE RECOVERY),
   TALUK OFFICE, KOLLAM, PIN- 691 001.

7. THE DEPUTY COMMISSIONER (APPEALS),
   COMMERCIAL TAXES, ASRAMOM, KOLLAM, PIN- 691 002.

8. STATE OF KERALA,
   REPRESENTED BY ITS SECRETARY, TAXES DEPARTMENT,
   GOVERNMENT SECRETARIAT, TRIVANDRUM- 695 001.

R1 TO R3 BY ADVS. SRI.JOHN VARGHESE, S.C
SRI.THOMAS MATHEW NELLIMOOTTIL,SC,CB EX
R4 TO R8 BY GOVERNMENT PLEADER SMT.SOBHA ANNAMMA EAPEN

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

Msd.

WP(C).No. 4646 of 2015 (E)

APPENDIX

PETITIONER(S)' EXHIBITS

P1: TRUE COPY OF NOTIFICATION NO.34/2011-ST DATED 25.04.2011.

P2: TRUE COPY OF THE REGISTRATION CERTIFICATE DATED 24.05.2011.

P3: TRUE COPY OF THE ANNUAL RETURN UNDER THE KGST ACT FOR THE YEAR ENDING 31.03.2012.

P4: TRUE COPY OF THE ST-3 RETURNS OF THE PERIOD APRIL 2011 TO SEPTEMBER 2011.

P5: TRUE COPY OF THE ST-3 RETURNS OF THE PERIOD OCTOBER 2011 TO MARCH 2012.

P6: TRUE COPY OF THE LETTER BEARING O.C.NO.86/2013 DATED 13.03.2013.

P7: TRUE COPY OF THE LETTER BEARING O.C.NO.109/2014 DATED 24.03.2014.

P8: TRUE COPY OF THE E-CHALAN NO. CK28463220 DATED 30.04.2013.

P8(A): TRUE COPY OF THE E-CHALAN NO. CK28462360 DATED 30.04.2013.

P9: TRUE COPY OF THE ASSESSMENT ORDER BEARING NO.32021306482 (12202062)/2011-12 DATED 31.01.2014.

P10: TRUE COPY OF THE APPEAL FILED BY THE PETITIONER AS STA 450/2014.

P10(A): TRUE COPY OF THE PETITIONER FILED BY THE PETITIONER IN STA.450/2014.

P11: TRUE COPY OF THE NOTICE IN FORM 1 ISSUED U/S 7 DATED 27.06.2014 SERVED ON THE PETITIONER ON 27.06.2014.

P11(A): TRUE COPY OF THE NOTICE IN FORM 10 ISSUED U/S 30 DATED 27.06.2014 SERVED ON THE PETITIONER ON 27.06.2014.

P12: TRUE COPY OF THE JUDGMENT IN W.P.(C).NO.23584 OF 2014 DATED 03.09.2014.

P13: TRUE COPY OF THE REFUND APPLICATION DATED 14.01.2015 ALONG WITH THE STATEMENT OF REMITTANCE OF SERVICE TAX.

P14: TRUE COPY OF THE ORDER IN STA. (KLM) 450/14 DATED 02.02.2015.

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

A.K.JAYASANKARAN NAMBIAR, J.

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W.P.(C).No.4646 of 2015

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Dated this the 13th day of February, 2015

J U D G M E N T

The petitioner is running a bar hotel and is registered with the Sales Tax Department of the State Government, as well as Service Tax Department of the Central Government, as an assessee. Consequent to the introduction of service tax on bar hotels, by the Finance Act, 2011, the petitioner adopted the practice of paying service tax on 30% of the turnover with effect from 01.05.2011. As a result of this, the petitioner was paying turnover tax to the State Government only on 70% of the turnover which, according to the petitioner, represented the sales turnover. Consequent to the judgment of this Court in **Union of India and others v. Kerala Bar Hotel Association and Others [2014 (36) STR 1206]**, where this Court held that the Union Government does not have any power to levy a service tax on restaurant sales, the petitioner approached the 3rd respondent with an application for refund of the service tax amount paid by the petitioner. Ext.P13 is the refund application that was filed by the petitioner before the 3rd respondent. On the other hand, in an appeal that was preferred by the petitioner against the sales tax assessment for the year 2011-2012, the 7th respondent, while considering the said petition that was filed along with the appeal, by Ext.P14 order, directed the petitioner to pay 40% of the balance tax and interest demanded for the year as a condition for the grant of stay of recovery of the amounts confirmed against the petitioner by the assessment order in question. Ext.P14 order, to the extent it directs the petitioner to remit 40% of the turnover tax attributable to 30% of the total turnover, on which the petitioner had already paid service tax to the Central Government, is impugned in the writ petition.

2. I have heard Sri.P.G.Jayashankar, for the petitioner and Sri.John Varghese, thelearned Standing counsel for respondents 1 to 3 and also the learned Government Pleader on behalf of respondents 4 to 8. Sri.John Varghese, the learned Standing counsel, would point out that Ext.P13 refund application preferred by the petitioner is belated.

3. On a consideration of the facts and circumstances of the case and the submissions made across the bar, I note that the challenge against Ext.P14 conditional order of stay is only to the limited extent that the said order directs a payment of 40% of the

tax due on 30% of the sales turnover of the petitioner, which represents the service element, and on which the petitioner had already paid service tax. It is not in dispute that Ext.P14 order contains reasons for the direction contained therein. In that view of the matter, I do not find any illegality or impropriety in the 7th respondent demanding 40% of the balance tax as a condition for a grant of stay of recovery of the amounts confirmed against the petitioner in the assessment order. The said order therefore need not be interfered with in these proceedings under Article 226 of the Constitution of India. I take note, however, of the submission on behalf of the petitioner that it was obliged to pay the service tax, on the said 30% turnover, based on the provisions of law as they then stood and it was only pursuant to the judgment of this Court in the decision referred to above, that the levy of service tax was held to be unconstitutional. I also take note of the fact that the petitioner has since approached the 3rd respondent with Ext.P13 refund application and the same is pending consideration by the said respondent. It is the case of the petitioner that if the amounts that are available to him by way of refund are obtained from the 3rd respondent, then the said amounts can be used for the purposes of discharging the liability under Ext.P14 conditional order. Taking note of the said submission, therefore, I dispose the writ petition with the following directions:

i. The 3rd respondent, before whom Ext.P13 refund application of the petitioner is pending consideration, shall consider the same and pass orders thereon on or before 20.03.2015, after hearing the petitioner. While doing so, the 3rd respondent shall also consider the petitioner's contentions, as reagrds the refund application being filed on time, on merits.

ii. The petitioner is permitted to comply with the condition of deposit of 40% of the balance tax and interest demanded for the assessment year 2011-2012, as directed in Ext.P14 order, by paying the said amount in two equal and successive monthly instalments commencing from 30.03.2015. It is made clear that, if the petitioner remits the amounts as directed above, and complies with the condition with regard to furnishing of security for the balance amount in Ext.P14, then the directions in Ext.P14 shall be treated as complied with, and the 7th respondent shall proceed to hear the appeals on merits.

A.K.JAYASANKARAN NAMBIAR
JUDGE

mns/