IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

WP(C).No. 8022 of 2011 (C)

PETITIONER:

AI- MAHAMOOD, I.S. PRESS ROAD,
ERNAKULAM, KOCHI, (REPRESENTED BY
PROPRIETOR MAHAMOOD SUBAIR).

BY ADVS.SRI.VIJAYAN. K.U.
SRI.K.N.SREEKUMARAN

RESPONDENT(S):
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1. COMMERCIAL TAX OFFICER,
   IST CIRCLE, ERNAKULAM - 682 015.

2. DEPUTY COMMISSIONER (APPEALS),
   COMMERCIAL TAXES, ERNAKULAM, PIN - 682 015.

3. INSPECTING ASSISTANT COMMISSIONER,
   ERNAKULAM AT KAKKANAD - 682 030.

4. ADMINISTRATOR,
   UNION TERRITORY OF LAKSHADWEEP,
   WILLINGTON ISLAND - COCHIN -682 003.

5. STATE OF KERALA, REPRESENTED BY
   SECRETRY TO GOVERNMENT, TAXES DEPARTMENT,
   GOVERNMENT SECRETARIAT,
   THIRUVANANTHAPURAM, PIN - 695 001.

R1 TO R3 & R5 BY GOVT. PLEADER SRI.LIJU V.STEPHEN
R4 BY SRI.S.RADHAKRISHNAN,SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 04-11-2015 ALONG WITH WPC. 6286/2013& CONNECTED CASES,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

mbr/

WP(C).No. 8022 of 2011 (C)

APPENDIX

PETITIONER(S)' EXHIBITS:

EXT.P1:	TRUE SAMPLE COPIES OF THE DECLARATION IN FORM 42 FILED BY THE PETITIONER ALONG WITH THE RETURN BEFORE 1ST RESPONDENT.
EXT.P2:	TRUE COPIES OF THE PRE-ASSESSMENT NOTICES ISSUED TO PETITIONER U/S 25 BY 1ST RESPONDENT FOR 2005-06 TO 2010-11.
EXT.P3:	TRUE COPY OF THE COMMON REPLY FILED BY THE PETITIONER IN PURSUANCE TO EXT. P3.
EXT.P4:	TRUE COPIES OF THE LETTERS ADDRESSED BY 4TH RESPONDENT TO THE COMMISSIONER AND OTHER LETTERS TO PETITIONER.
EXT.P5 :	TRUE COPIES OF ASSESSMENT ORDERS DATED 2.11.2011 FOR THE YEARS 2005-06 TO 2010-11 ISSUED BY 1ST RESPONDENT.
EXT.P6 :	TRUE COPIES OF THE APPEALS ALONG WITH APPLICATIONS FOR STAY AND URGENT HEARING FILED AGAINST EXTS.P5 BEFORE THE 2ND RESPONDENT.
EXT.P7 :	TRUE COPIES OF THE DEMAND NOTICES FOR 2005-06 TO 2010-11 BEARING NOS.A5-53/11 TO 57/11 DATED 21.1.2011 ISSUED BY THE 3RD RESPONDENT.
EXT.P8 :	TRUE COPY OF THE REPRESENTATION DATED 25.1.2011 FILED BY PETITIONER EFORE THE 5TH RESPONDENT.
EXT.P9 :	TRUE COPY OF THE FORWARDING LETTER DATED 18.5.2011 ENCLOSING CHEQUE FOR RS.4,64,000/- TO THE 1ST RESPONDENT.
EXT.P10 :	TRUE COPY OF THE PRE-ASSESSMENT NOTICE DATED 28.9.2012 ISSUED BY 1ST RESPONDENT TO PETITIONER.
EXT.P11 :	TRUE COPY OF THE REPLY FILED ON 9.10.2012.
EXT.P12 :	TRUE COPY OF THE ASSESSMENT ORDER NO.32071574924/2010-11 DATED 18.10.212 SERVED ON 22.10.2012.

RESPONDENT(S)' EXHIBITS: NIL

//TRUE COPY//

P.S. TO JUDGE

mbr/

A.K.JAYASANKARAN NAMBIAR, J.

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W.P.(C). Nos. 8022 of 2011, 6286 of 2013,
1331 of 2014 & 12163 of 2015

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Dated this the 4th day of November, 2015

JUDGMENT

Since the issue involved in all these writ petitions is the same, they are taken up for consideration together and disposed by this common judgment. For the sake of convenience, the reference to facts and exhibits is from WP(C) No.8022 of 2011.

The petitioner, who is a dealer in consumer items registered under the provisions of the Kerala Value Added Tax Act and Central Sales Tax Act, hereinafter referred to as the "KVAT Act" and "CST Act", on the rolls of the Commercial Tax Officer, KVAT Circle-I, Ernakulam. The sales effected by the petitioner are mainly to the Lakshadweep Administration. As per the provisions of 1st proviso to Section 6 (1) of the KVAT Act, where a sale is effected to the Administrator, Union Territory of Lakshadweep, Laccadive Co-operative Marketing Federation Kozhikode or the Lakshadweep Harbour Works and registered dealers certified by the Administrator, Union Territory of Lakshadweep, the tax payable under Clause (d) of Section 6 (1), is to be at the rate of 4% (upto 01.04.2012 and 5% after 14.04.2012) subject to such conditions as may be prescribed. The conditions are prescribed in Rule 12C (1) of the KVAT Rules, 2005, which reads as under:

> "**12C. Procedure for claiming exemption or reduction in rates of tax.-**
>
> (1) Every dealer who makes any sale to the Administrator, Union Territory of Lakshadweep, Laccadive Co-operative Marketing Federation, Kozhikode or the Lakshadweep Harbour Works or any registered dealer certified by the Administrator, Union Territory of Lakshadweep under the proviso to sub-section (1) of section 6 shall obtain a declaration in Form No.42, duly signed and sealed by the buyer along with the copy of the shipping Bill, or similar document duly attested by the Port Authorities and file a copy each of the same along with the return filed under Rule 22. The originals shall be retained by the dealer and shall be provided on demand by any authority under the Act."

3. The grievance of the petitioner in the writ petition is that in the case of supplies effected to the Lakshadweep Administration, the petitioner was facing a practical difficulty in producing a copy of the shipping bill, or similar document duly attested by the Port authorities, since the shipping activity in respect of the products supplied to the Lakshadweep Administrator was not carried out by the petitioner. It is relevant in this regard to notice the contents of the letters dated 03.11.2010 and 14.02.2011, written to the Commissioners of Commercial Taxes, Thiruvananthapuram/Ernakulam by the Office of the Executive Engineer, Lakshadweep Public Works

Department/Department of Education, Administration of the Union Territory of Lakshadweep, wherein, the stand taken is that the stores and articles that are required for the purposes of Union Territory of Lakshadweep are purchased by the Administration through tenders duly approved by the competent authorities. The purchases are made by the Executive Engineer as per the provisions of the CPWD Manual and all the stores/articles supplied by the suppliers are delivered to the Store Keeper attached to the Stores Sub Divisions at Kochi and Beypore. The supply for a particular year could last for a year and the stores/articles, procured and stored in the Stores Sub Division, are sent to various Sub Divisions in Lakshadweep islands as and when they indent for the same, subject to availability of space in Ship/Cargo vessels. It is clarified in the said letter that the articles supplied to the Store Keeper are not shifted immediately on receipt from the suppliers, and the administration has to invariably wait till the supply is completed by various suppliers, which process could take more than a year, before the articles are shipped to the island. The consolidated shipment list is prepared as and when all the stores/articles are received from various suppliers, and the items are loaded in ships/cargo vessels subject to availability of space as allotted by the Port authorities. It is further stated that there is no Port in the different islands that constitute the archipelago and the articles are unloaded in Barges in the open sea. It is further clarified that the stores and articles are generally not sent to the individual islands during the monsoon season between May and September, since the unloading of the articles from ship to Barges in the open sea during that time, is not possible.

4. The letters aforementioned, which are together marked as Ext.P4 in the writ petition, make it clear that the procurement of stores/articles by the Lakshadweep Administration is effected in the mainland and the goods that are procured are stored in Stores at Kochi and Beypore, and from the said stores they are transported to the islands over the course of one or two years by various ships/barges to the individual islands, which have indented for the items. The letters also indicate that the payment of the price for the articles purchased is made as soon as the supplier supplies the goods to the Lakshadweep Administration by delivering them to the Store Keeper in the mainland. It would appear from the aforesaid letters that, in the matter of effecting supplies to the Lakshadweep Administration, the role of the

petitioner supplier ends with the supply of articles to the Store Keeper at Kochi or Beypore. From there, the transportation to the individual islands within the Lakshadweep archipelago is the responsibility of the Lakshadweep Administration and the petitioner and other similarly situated dealers do not have any role to play in the transportation of the goods to the individual islands, that constitute the archipelago.

5. While the petitioner had claimed the concessional rate of tax as envisaged under 1st proviso to Section 6 (1) of the KVAT Act, and filed returns claiming the said concessional rate of tax in respect of supplies effected to the Lakshadweep Administration and also furnished the necessary declaration in Form-42, duly signed and sealed by the Administrator of Lakshadweep Administration, the petitioner was served with a notice proposing an assessment under Section 25(1) of the KVAT Act by denying the concessional rates of tax in respect of supplies effected to the Lakshadweep Administration on the ground that the petitioner had not complied with the requirement in Rule 12C of the KVAT Rules, of furnishing a copy of the shipping bill or similar document duly attested by the Port authorities, along with the return that was

filed under Rule 22 of the KVAT Rules. Although the petitioner had filed detailed replies to the pre-assessment notice by pointing out the aspect of impossibility of complying with the conditions regarding producing a shipping bill, under circumstances where the petitioner was not involved in any way with the transportation of the goods to the archipelago, by the various assessment orders that are impugned in the writ petition, the respondent assessing authority denied the petitioners the benefit of the concessional rate of tax envisaged under the 1st proviso to Section 6 (1) of the KVAT Act. It is under these circumstances, that the petitioners have approached this Court with the present writ petitions impugning the assessment orders as also challenging the provision of Rule 12C of the KVAT Rules to the extent it makes the production of shipping bill duly attested by the Port authorities a mandatory condition for claiming concessional rate of tax in respect of supplies effected to the Lakshadweep Administration.

6. I have heard the learned counsel appearing for the petitioners as also the learned Government Pleader appearing for the respondents.

7. The learned Government Pleader would submit that the 1st proviso to Section 6(1) read with Rule 12C (1) and Rule 32 of the KVAT Rules constitute a complete code in the matter of grant of concessional rate of tax to dealers effecting supply to the Lakshadweep Administration. It is his contention that inasmuch as the statute provides for a concessional rate of tax subject to such conditions as may be prescribed, and the prescription under Rule 12C of the KVAT Rules, is to the effect that the concessional rate of tax will be applicable only on the supplying dealer producing Form-42 declaration duly signed by the buyer, along with a copy of the shipping bill duly attested by the Port authorities, the supplier will not get the benefit of the concessional rate of tax. It is also his submission that the provision in question being one that grants a concession to an assessee, the provisions have to be strictly interpreted against the assessee and in favour of the revenue. It is his contention therefore, that inasmuch as the petitioners have not complied with the mandatory condition for obtaining the concessional rate of tax, the assessment orders, that are impugned in the writ petition cannot be found fault with and they have to be upheld.

8. On a consideration of the facts and circumstances of the case and the submissions made across the bar, I find that as rightly pointed out by the learned Government Pleader, the provisions of the Act read with Rule 112C (1) of the KVAT Rules have to be seen as a complete code in respect of the grant of concessional rate of tax to dealers effecting supply of articles to the Lakshadweep Administration. The 1st proviso to Section 6(1) mandates that a dealer effecting supplies, inter alia, to the Lakshadweep Administration, can claim the benefit of concessional rate of tax in respect of the supplies so effected. This concessional rate of tax envisaged for supplies effected to the Lakshadweep Administrator, is subject only to such conditions as may be prescribed in the Rules. The rules therefore, have to be construed in a manner that is designed to effectuate the object of the statutory provision namely, the 1st proviso to Section 6(1). In other words, the conditions stipulated in Rule 12C (1) have to be interpreted in such a way that they would further the object, that is envisaged in the 1st proviso to Section 6(1). When so read, it would follow that in cases where the dealer in question supplies goods to the Lakshadweep Administration in the archipelago, by effecting transportation of the goods from the mainland to the

archipelago, then for claiming a concessional rate of tax in respect of the supply so effected, the dealer would have to satisfy the twin requirements of furnishing a declaration in Form No-42, duly signed and sealed by the Administrator of Lakshadweep Administration, and also produce a copy of the shipping bill or other similar document attested by the Port authority, evidencing the fact of transportation of the goods to the archipelago. It would also follow, on a reasonable construction of the statutory provision, that in a situation where the dealer effecting supplies to the Lakshadweep Administration, is not required in terms of the contract between the parties to effect supplies of the goods in the archipelago, but rather has to effect supplies to the Lakshadweep Administration only in the mainland, then the requirement of production of a copy of the shipping bill duly attested by the Port authorities cannot be fulfilled by the supplying dealer, since he is not in any way involved with the transportation of the goods to the archipelago. While it is a settled proposition that, when a statutory provision prescribes a manner of doing nothing, it shall be done only that manner, the said rule is always subject to the basic principle that the Court must as far as possible attach a construction which effectuates the legislative intent and purpose of the statute. It is also a well settled proposition in taxation law, that exemption provisions under a taxation statute are normally construed strictly against the assessee and in favour of the revenue. The said principle however, has been interpreted in subsequent decisions, as meaning that the strict interpretation of the exemption provision is only at the stage of determining whether the assessee is entitled to the exemption. Once it is found that the assessee is entitled to exemption then the provision has to be liberally construed so as to retain the assessee within the scope of exemption. (See Commissioner of Trade Tax, UP v. Kanhai Ram Thekedar **[2005 (4) SCC 472],** Andra Pradesh Steel Re-Rolling Mill Ltd. v. State of Kerala **[2007 (2) SCC 725]** and Novopan India Ltd., Hyderabad v. Collector of Central Excise and Customs, Hyderabad **[1994 Supplementary (3) SCC 606]**). On applying the said principles to the facts of the instant case, I am of the view, that inasmuch as it is discernible from Ext.P4 letters that the transportation of goods to the Lakshadweep archipelago was not within the scope of the obligations expected of the petitioners, in the sale agreement between the petitioners and the Lakshadweep Administration, the entitlement of the petitioners to the concessional rate of tax envisaged under the 1st proviso to Section

6(1) of the KVAT Act, cannot be denied solely for the reason that they had not produced a copy of the shipping bill attested by the Port authorities to evidence the fact of shipping of the goods to the Lakshadweep archipelago. It is trite that an assessee cannot be expected to be perform the impossible. It is not in dispute in the instant cases that the petitioners had produced the necessary declaration in Form No.42 duly signed and sealed by the buyer concerned and in that respect, there was substantial compliance with the requirement of Rule 12C for the purposes of claiming the concessional rate of tax envisaged under the 1st proviso to Section 6(1) of the KVAT Act. I am, therefore, of the view that the impugned orders of assessment in all these writ petitions namely, Exts.P5 and P12 in WP(C) No.8022 of 2011, pertaining to assessment years 2005 -06 to 2010-11, Ext.P6 in WP(C) No.6286 of 2013 pertaining to the assessment year 2009-10, Ext.P3 in WP(C) No.12163 of 2015 pertaining to assessment year 2012-13 and Ext.P7 in WP(C) No.1331 of 2013 pertaining to assessment year 2008-09, cannot be legally sustained and I therefore, quash the said orders with a direction to the respective assessing authority to redo the assessment in relation to the petitioners for the said assessment years after granting them the benefit of concessional rate of tax envisaged under the 1st proviso to Section 6(1) of the KVAT Act, by accepting the Form No-42 declaration produced by them in compliance with the provision of Rule 12C of the KVAT Rules. The assessing authority shall take note of the letters issued by the Lakshadweep Administration, stating that the obligation to transport the goods from the mainland to the Lakshadweep archipelago is with the Lakshadweep Administration, and not the supplier of the goods to the Lakshadweep Administrator, while determining whether the petitioner/dealer is required to satisfy the further condition in Rule 12C with regard to production of the shipping bill or other document duly attested by the Port authorities. While passing fresh orders as directed, the assessing authorities shall also take note of the amounts paid by the petitioners during the pendency of the writ petition and give credit to the said amounts, while computing the demand, if any, pursuant to the assessment orders to be passed afresh, as per the directions of this Court.

9. In WP(C) No.1331 of 2014, the petitioner, while impugning Ext.P7 order to the extent it denies the concessional rate of tax under the 1st proviso to Section 6(1) of the KVAT Act,

has also preferred Ext.P9 rectification application before the 1st respondent assessing authority, for rectifying certain factual errors that had crept into the said order in respect of other issues that were decided against the petitioner by the said order. Ext.P9 is the rectification application preferred by the petitioner. As I have already quashed Ext.P7 order, to the extent it denies the petitioner the benefit of concessional rate of tax referred to above, while directing the 1st respondent assessing authority to redo the assessment of the petitioner under the KVAT Act, for the assessment year 2008-09, I also direct the assessing authority to consider Ext.P9 rectification application preferred by the petitioner, which is pending before him and pass a fresh order dealing with both the aspects, pursuant to the directions in this judgment. As regards, Ext.P7(a) order of assessment under the CST Act, which is also impugned in the said writ petition, I am of the view that the petitioner should be relegated to his alternate remedy of filing an appeal against Ext.P7 order before the appellate authority under the CST Act. Accordingly, if the petitioner files an appeal against Ext.P7(a) order, before the appellate authority, within a period of one month from the date of receipt of a copy of this judgment, then the appellate authority shall consider the same and pass appropriate orders thereon on merits, after hearing the petitioner. The stay of recovery proceedings pursuant to Ext.P7(a) order, that has been granted by this Court in the present writ petition, shall continue to be in force, for a period of one month, to enable the petitioner to pursue his appellate remedy against Ext.P7(a) order.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

das /04.11.15