IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

FRIDAY, THE 27TH DAY OF FEBRUARY 2015/8TH PHALGUNA, 1936

WP(C).No. 6341 of 2015 (P)

PETITIONER(S):

A.V.JOY @ JOY ALUKKAS AGED 58 YEARS
JOY ALUKKAS INDIA PVT.LTD., PEEVEES TRITON
MARINE DRIVE, ERNAKULAM.

BY ADVS.SRI.JOSEPH PRABAKAR
SRI.RAJESH NAIR
SRI.BIJOY CHANDRAN

RESPONDENT(S):
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1. **CUSTOMS**
   EXCISE & SERVICE TAX APPELLATE TRIBUNAL
   (SOUTH ZONAL BENCH), BANGALORE-9, KARNATAKA STATE.

2. **COMMISSIONER OF CENTRAL EXCISE, CUSTOMS & SERVICE TAX**
   C.R.BUILDING, I.S.PRESS ROAD, COCHIN-682018.

BY ADVS. SRI.TOJAN J.VATHIKULAM,SC,C.B. EXCISE
SRI.THOMAS MATHEW NELLIMOOTTIL,SC,CB EX

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 27-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 6341 of 2015 (P)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT-P1:	COPY OF THE ORDER DATED FEBRUARY 11, 2013 PASSED BY THE SECOND RESPONDENT.
EXHIBIT-P2:	COPY OF THE APPEAL (ST/26544/2013) FILED BEFORE THE 1ST RESPONDENT.
EXHIBIT-P3:	COPY OF THE STAY APPLICATION (ST/STAY/26887/2013) FILED BEFORE THE 1ST RESPONDENT.
EXHIBIT-P4:	COPY OF THE ORDER DATED 05.01.2015 OF THE 1ST RESPONDENT.
EXHIBIT-P5:	COPY OF THE ORDER DATED 19.08.2013 OF THE 1ST RESPONDENT.

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.A. TO JUDGE

JJJ

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C).NO. 6341 OF 2015 (P)

Dated this the 27th day of February, 2015

J U D G M E N T

The challenge in this writ petition is against Ext.P4 conditional order of stay passed by the 1st respondent Tribunal, in an appeal that was preferred by the petitioner against Ext.P1 order of the 2nd respondent.

2. The main ground of challenge against Ext.P4 is that, while the petitioner had raised a specific contention regarding the extended period of limitation, that was invoked in the present case to fasten the liability of service tax on him, inter alia, by pointing out that the 2nd respondent, while passing Ext.P1 order, had not specifically adverted to any act of suppression or willful misrepresentation warranting the invocation of the larger period of limitation against the petitioner assessee, the 1st respondent Tribunal, in Ext.P4 order, did not specifically deal with the said contention of the petitioner or the decision of the Supreme Court in **Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur - 2013 (288) E.L.T.161 (S.C)** that was relied upon by him to substantiate his contention. It is the case of the petitioner that, in Ext.P4 order, the 1st respondent

Tribunal merely recorded his submission on the issue of limitation, and thereafter proceeded to pass orders in the stay petition assuming that the 2nd respondent had found the existence of suppression/wilful misrepresentation to justify the invocation of the larger period of limitation in the case at hand. It is also pointed out that the 1st repondent Tribunal ought to have considered its own decision in **H.L.Passey Engineering Pvt.Ltd. v.s Commissioner of C.Ex., Bhopal - 2014(33) S.T.R. 189 (Tri.-Del.),** which was cited on behalf of the petitioner, wherein at paragraph 12.2 it was specifically found as follows:

> “The Commissioner's order does not discuss as to how on the basis of the above criteria for “wiful misdeclaration and suppression of facts” laid down by the Apex Court, in the above-mentioned judgments, the appellant's conduct would amount to wilful misdeclaration or suppression of facts so as to attract extended period. For this purpose the matter has to be remanded to the Commissioner for de novo examination of the issue of limitation on the basis of the criteria in this regard laid down by the Apex Court on the above-mentioned judgments. If longer limitation period under proviso to Section 73 (1) is not invokable, there will be no case for

> imposition of penalty under Section 78 as the condition for imposing penalty under Section 78 and the conditions for invoking longer limitation period under proviso to Section 73 (1) are identical."

Counsel for the petitioner contends that Ext.P4 order is vitiated by a patent non application of mind and ought to be set aside by this Court.

3. I have heard Sri.Joseph Prabakar, the learned counsel for the petitioner and Sri.Tojan J.Vathikulam, the learned standing counsel 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 Ext.P4 order, the 1st respondent Tribunal, while considering the grant of stay of a demand of Rs.61,20,000/-, that stood confirmed against the petitoner through Ext.P1 order of the 2nd respondent, eventually granted a stay subject to the condition that the petitioner deposits an amount of Rs.20 lakhs within a period of eight weeks from the date of the order. Although the condition imposed by the 1st respondent Tribunal, by itself, appears to be reasonable, I find from a perusal of

Ext.P4 that, the observations therein, with regard to the establishment of the fact of suppression/wilful misrepresentation against the petitioner assessee, are not borne out by anything on record. A perusal of Ext.P1 order would clearly indicate that there is no express finding by the 2nd respondent on the aspect of existence of any suppression/wilful misrepresentation, that could justify the invocation of the larger period of limitation under the statute, while raising a demand on the petitioner. In my view the 1st respondent Tribunal ought to have dealt with the specific contention of the petitioner with regard to the non establishment, by the 2nd respondent Commissioner, of the fact of wilful misrepresentation/suppression, while dealing with the contentions of the petitioner on limitation.

5. Be that as it may, I find that, on the facts of the instant case, the 1st respondent Tribunal has only directed the petitioner to pay an amount of Rs.20 lakhs, out of the confirmed demand of Rs.61,20,000/-. The amount required to be deposited works out only to 33% of the amount confirmed against the petitioner by Ext.P1 order. In that view of the matter, I refrain from interfering with the directions in Ext.P4 order, save to the limited extent of permitting the petitioner to pay the said amount on or before 31.03.2015.

6. Resultantly, if the petitioner remits the amounts directed to be deposited by the 1st respondent Tribunal in Ext.P4 order, by 31.03.2015, the same shall be treated as compliance with the directions in Ext.P4 order and the 1st respndent Tribunal shall thereafter proceed to hear the appeal preferred by the petitioner on merits.

The writ petition is thus disposed as above.

Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE

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