IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

TUESDAY, THE 31ST DAY OF MARCH 2015/10TH CHAITHRA, 1937

WP(C).No. 10423 of 2015 (C)

PETITIONER(S) :
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1. **SECRETARY TO GOVERNMENT**
   DEPARTMENT OF AGRICULTURE, GOVERNMENT OF KERALA,
   GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. **THE DIRECTOR OF AGRICULTURE**
   OFFICE OF THE DIRECTORATE OF AGRICULTURE
   VIKAS BHAVAN, THIRUVANANTHAPURAM.

   BY SPL. GOVT. PLEADER DR. SEBASTIAN CHAMPAPPILLY (TAXES)

RESPONDENT(S) :
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1. **UNION OF INDIA**
   REPRESENTED BY THE SECRETARY
   MINISTRY OF FINANCE, (DEPARTMENT OF REVENUE)
   NEW DELHI, PIN – 110 011.

2. **COMMISSIONER**
   OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE AND CUSTOMS,
   T.N. NO. 26/34, PRESS CLUB ROAD, ICE BHAVAN
   THIRUVANANTHAPURAM – 695 001.

   R1 BY ADV. SRI.N.NAGARESH, ASGI
   BY ADV. SRI.SUVIN R. MENON, CGC
   R2 BY ADV. SRI.THOMAS MATHEW NELLIMOOTTIL, SC

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 31-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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WP(C).No. 10423 of 2015 (C)

APPENDIX

PETITIONER'S EXHIBITS :

EXT.P1	:	COPY OF G.O. (MS) NO. 117/99/AD DATED 17.4.1999.
EXT.P1(a)		G.O.(MS) NO. 147/2003 DATED 29.9.2003.
EXT.P2		COPY OF THE AGREEMENTS EXECUTED BY THE SECRETARY, AGRICULTURAL URBAN WHOLESALE MARKET, MARADU DATED 1.10.2011.
EXT.P3		COPY OF THE LETTER NO. C IV/16/11/2011 PREV./4600/12 DT. 26.4.2012 ISSUED BY THE 2ND RESPONDENT.
EXT.P4		COPY OF THE LETTER NO. TM(1) 36359/11 DATED 11-6-2012.
EXT.P5		COPY OF THE LETTER NO. C IV/16/11/2011 PREV./17705/12 DT. 16.7.2012.
EXT.P6		TRUE LETTER NO. TM(1) 36359/11 DATED 27.8.2012.
EXT.P7		COPY OF THE ORDER NO. TVM-EXCUS-000-COM-48-14-15-DTD. 31.12.2014.

RESPONDENT'S EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

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A.K.JAYASANKARAN NAMBIAR, J.

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W.P.(C).No.10423 of 2015

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Dated this the 31st day of March, 2015

J U D G M E N T

The challenge in the writ petition is against Ext.P7 order of assessment, passed by the 2nd respondent, confirming a demand of service tax and penalty on the petitioner, which is a department of the State Government. The main ground of challenge against Ext.P7 order of the 2nd respondent, is with regard to the jurisdiction of the 2nd respondent to pass the said order. It is pointed out that, the petitioner, being a department of the State Government, cannot be subjected to the levy of service tax in as much as the services rendered by it are in the course of discharging sovereign functions and hence, the concept of a taxable service, for the levy of service tax, does not arise in the transactions between the petitioner and its clients. It is contended that leasing of property is a subject contemplated within Entry 35, read with Entry 18 of List II of the Constitution and hence only the State Legislature can levy a tax on services rendered in connection with leasing of immovable property. It is further contended that, inasmuch as the activity of leasing out property and receiving rent, in the instant case, is an administrative function envisaged under List II of the 7th Schedule read with Article 246, the levy of service tax as contemplated under the Finance Act,1994, as amended, cannot be made applicable to the services rendered by the State Government. It is further pointed out that, the levy of service tax is on services rendered by one person to another and, in the instant case, the State Government cannot be treated as "a person" for the purposes of the Act. It is also contended that, under Article 162 of the Constitution, the executive power of the State Government is co-extensive with the legislative power and, insofar as Exts.P1 and P1 (a) executive orders are issued by the State Government, based in turn, on agreements entered into between the Union of India and the European Union, and envisage certain services to be performed by the State Government in relation to setting up of Agricultural Wholesale Markets, the said transaction would be immune from central taxation. It is based on the above contentions, that the learned Government Pleader, for the petitioner, would submit that the petitioner cannot be relegated to the alternate remedy of preferring any appeal against Ext.P7 order since, the very jurisdiction of the respondents to subject the activities of the petitioners to tax under the Finance Act, 1994, is called in question, in the present writ petition.

2. I have heard the learned counsel for the petitioners and the learned Standing counsel for the respondents.

3. On a consideration of the facts and circumstances of the case as also the submissions made across the bar, I find that in Ext.P7 order, the levy of service tax, that was confirmed on the petitioners, was a tax on "renting of immovable property services" which, according to the respondents, was rendered by the petitioners in terms of Exts.P1 and P1(a) executive orders. Although, it is the contention of the petitioner that, by virtue of Entry 35 read with Entry 18 List II of the Constitution of India, leasing of property is a subject under the State List, and therefore, only the State legislature would have the power to legislate in respect of the said subject, I note that the said entries do not deal specifically with levy of a tax on renting of immovable property services. It is not in dispute that the legislative sanction for the levy of a service tax on renting of immovable property services is traceable to Entry 97 of List I of the Constitution of India. That being so, and there being no specific entry dealing with the subject of service tax in any of the other lists in the 7th Schedule to the Constitution of India, the competence of the Parliament to legislate in respect of service tax on renting of immovable property services cannot be called in question. As regards the contention of the

petitioners that the State, as a body, will not come under the coverage of the Finance Act, 1994, as amended, I note that, as per the specific provisions of Section 65(B)(37) of the Finance Act,1994, as amended, the word “person” is defined as including, inter alia, “Government”. Thus, as far as the applicability of the Finance Act, 1994, as amended is concerned, it would apply even in respect of services rendered by a State Government, unless the services fall under the negative list of services under the Statute. Thus, in the instant case, there is no ground to infer that, in passing Ext.P7 order, the respondents were acting under any jurisdictional error in confirming a demand of service tax on the petitioner in respect of the services rendered by the petitioner pursuant to Exts.P1 and P1(a) orders.

Counsel for the petitioner would point out that, by virtue of the provisions of Section 66 B, the services rendered by the petitioner would fall under the negative list of services under the Finance Act, 1994 as amended. I note that, this aspect was not urged by the petitioner before the 2nd respondent in the proceedings that led to Ext.P7 order. At any rate, it is open to the petitioner to raise the said point in an appeal which the petitioner is entitled to file against Ext.P7 order before the CESTAT. Thus, I relegate the petitioner to the alternate remedy of filing an appeal, against Ext.P7 order, before the CESTAT, in terms of the provisions of Finance Act, 1994, as amended.

Counsel for the petitioner would point out that as per the amendment dated 16.08.2014, effected in the Finance Act, 1994, there is a requirement of payment of 7.5% of the tax amounts confirmed against the petitioner, as a pre-condition for maintaining the appeal before the CESTAT. I note, in this connection, that this Court has taken a view that, in cases where the commencement of the lis is prior to the coming into force of the amendment dated 16.08.2014, the appeal to be filed by the assessee would be governed by the provisions of the Finance Act, 1994, as is stood prior to its amendment by the amendment dated 16.08.2014. Following the said view in the instant case, I make it clear that, if the petitioner prefers an appeal against Ext.P7 order, before the CESTAT, together with an application for waiver of pre-deposit and stay on or before 30.04.2015, then the Appellate Tribunal shall consider the same as an appeal filed by the petitioner in accordance with the provisions of the Finance Act, 1994, as it stood prior to its amendment on 16.08.2014, and the Appellate Tribunal shall number the appeal, and proceed to consider the application for waiver of pre-deposit and stay , and thereafter, proceed to hear the appeal itself on merits. To enable the petitioner to do so, I stay further proceedings for recovery of the amounts confirmed against the petitioner by Ext.P7 order, for a period of one month, making it clear that on expiry of the period of one month, the stay granted by this judgment will cease to operate.

A.K.JAYASANKARAN NAMBIAR
JUDGE

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