IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

WP(C).No. 14338 of 2012 (N)

PETITIONER :

M/S.ANNA ALUMINIUM COMPANY PVT.LTD.
KIZHAKKAMBALAM, ALUVA-683562
REPRESENTED BY THE MANAGING DIRECTOR.

BY ADVS.SRI.ANIL D. NAIR
SRI.J.R.PREM NAVAZ
SMT.NIVEDITA A.KAMATH

RESPONDENTS :
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1. THE ASSISTANT COMMISSIONER,
DEPARTMENT OF COMMERCIAL TAXES,
SPECIAL CIRCLE, MATTANCHERRY AT ALUVA-683101.

2. THE INTELLIGENCE OFFICER (IB)
IDUKKI AT THODUPUZHA, 685584.

3. THE STATE OF KERALA
REPRESENTED BY ITS SECRETARY (TAXES)
THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI. LIJU V. STEPHEN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26-11-2015, ALONG WITH WPC. 15341/2012, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

bp

WP(C).No. 14338 of 2012 (N)

APPENDIX

PETITIONER(S) EXHIBITS

EXHIBIT P1: TRUE COPY OF THE ASSESSMENT ORDER DATED 25-11-2010 PASSED BY THE FIRST RESPONDENT.

EXHIBIT P2: TRUE COPY OF THE JUDGMENT IN WPC NO. 7955/2011 DATED 14-03-2012.

EXHIBIT P3: TRUE COPY OF THE RECTIFIED ORDER DATED 20-06-2012 PASSED BY THE FIRST RESPONDENT.

EXHIBIT P4: TRUE COPY OF THE ORDER OF THE DEPUTY COMMISSIONER (APPEALS), KOLLAM FOR ASSESSMENT YEAR 2007-08 DATED 09-07-2010 IN THE CASE OF M/S. CHOICE AGENCIES.

EXHIBIT P5: TRUE COPY OF THE ORDER OF THE KVAT APPELLATE TRIBUNAL, ERNAKULAM DATED 12-11-2010.

EXHIBIT P6: TRUE COPY OF THE REPLY FILED BY THE PETITIONER BEFORE THE SECOND RESPONDENT.

EXHIBIT P7: TRUE COPY OF THE RELEVANT PAGES OF THE FINANCE BILL 2011-12.

EXHIBIT P8: TRUE COPY OF THE PENALTY ORDER DATED 31-01-2012 PASSED BY THE SECOND RESPONDENT.

RESPONDENTS' EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

bp

A.K.JAYASANKARAN NAMBIAR, J.

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W.P.(C).No.14338 of 2012

&

W.P.(C).No.15341 of 2012

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Dated this the 26th day of November, 2015

J U D G M E N T

As both these writ petitions involve a similar issue, they are taken up together for consideration and disposed by this common judgment.

2. The petitioner in W.P.(C).No.14338 of 2012 is a manufacturer of aluminum vessels, pressure cookers and other house hold utensils. In the instant cases, the goods involved are referred to as thermal rice cooker or "Choodarapetty" which according to the petitioner merits classification under Entry No.137 of the IIIrd Schedule to the Kerala Value Added Tax Act (hereinafter referred to as the KVAT Act) attracting tax at the rate of 4% ad valorem. For the assessment year 2009-2010, the assessment of the petitioner was completed under the KVAT Act by assessing the petitioner to tax at the rate of 12.5% in respect of the aforementioned item. Ext.P1 is the assessment order dated 25.11.2010. Against Ext.P1 assessment order, the petitioner preferred a rectification application before the assessing authority

since the petitioner was informed that in the case of a dealer of the same product, who had purchased the product from the petitioner, the appellate Tribunal in an appeal preferred by the said dealer against an order of assessment in relation to the same product, had found that the product attracted tax only at the rate of 4% under Entry 137 of the IIIrd Schedule to the KVAT Act. The rectification application was allowed by the assessing authority by Ext.P3 order dated 20.06.2011 and it was found that the rice cooker sold by the petitioner would attract tax only at the rate of 4%. In the writ petition, the petitioner is aggrieved by Ext.P8 order dated 31.01.2012 whereby a penalty has been imposed on him for alleged misclassification of the item-thermal rice cooker. The grievance of the petitioner against Ext.P8 order is essentially that, when the assessment proceedings have been completed by recognising the classification of the product as a "Choodarapetty" under Entry 137 of the IIIrd Schedule to the KVAT Act and tax has been levied at the rate of 4%, there was no justification for completing the penalty proceedings against the petitioner by assuming the classification of the item under the residual head attracting tax at the rate of 12.5%.

3. In W.P(C).No.15341 of 2012, the petitioner is a dealer of the item thermal rice cooker otherwise known as “Choodarapetty”. The assessment years in question are 2008-2009 and 2009-2010 and the orders impugned are Exts.P5 and P6, both dated 22.02.2012, where a penalty has been imposed on the assumption that the item in question would merit classification under the residual head attracting tax at the rate of 12.5%. In the case of the petitioner in this writ petition also the assessment proceedings in respect of the said item culminated in an order of the appellate Tribunal where the classification of the item under Entry 137 of the IIIrd Schedule to the KVAT Act attracting tax at the rate of 4% was accepted. Here again the contention of the petitioner is essentially that, inasmuch as the assessment proceedings culminated in a finding that the goods were classifiable under Entry 127 of the IIIrd Schedule to the KVAT Act attracting tax at the rate of 4%, there was no justification for the imposition of a penalty for alleged misclassification of the item.

4. I have heard the learned counsel appearing on behalf of the petitioners in both the writ petitions as also the learned Government Pleader appearing for the respondents in both the writ

petitions.

5. On a consideration of the facts and circumstances of the case and the submissions made across the bar, I find that, this is a matter that involves the classification of a product for the purposes of levy of tax under the KVAT Act. The assessment proceedings that were initiated against the petitioners for the assessment years in question culminated in orders of the appellate Tribunal where the classification of the product under Entry 137 of the IIIrd Schedule to the KVAT Act, attracting tax at the rate of 4%, was recognised and accepted. It is in the back drop of the said fact that one has to consider whether there was any justification for the imposition of a penalty on the petitioner by alleging a misclassification of the product. It is the case of the department that penalty proceedings are independent proceedings and it would be open to the authorities under the KVAT Act to independently determine the classification of the item for the purposes of tax and, on finding that there has been a misclassification effected by the assessee, to proceed further and impose a penalty on the assessee. While it may be a fact that penalty proceedings under the KVAT Act are independent proceedings, independent of the assessment

proceedings that are contemplated under the Act, I am of the view that in cases involving a mixed question of fact and law, where the very liability to tax of the item in question has to be first determined, it would be prudent for the authorities entrusted with the task of imposition of penalty, to first await the order of the assessing authority who would be in a position to go through with the procedures contemplated in Sections 22 to 25 of the KVAT Act in connection with the assessment first, before proceeding to determine whether a penalty ought to be imposed on the assessee. Before the assessing authority, the assessee is given ample opportunity to demonstrate that the classification accorded to the product by him is the correct classification in respect of the product, and it is only when the assessing authority finds that the classification adopted by the assessee is wrong that he would proceed to assess the product under a different heading. In the instant cases, since it is not in dispute that the assessing authority has chosen to accept the classification adopted by the assessee, I am of the view that, it would not be in accordance with the scheme of the Act to impose a penalty on the petitioners for having adopted a classification which ultimately met with the approval of the assessing authority. I therefore quash Ext.P8 order in W.P(C).

No.14338 of 2012 and Exts.P5 and P6 orders in W.P(C).No.15341 of 2012 and allow the said writ petitions with consequential reliefs to the petitioners.

A.K.JAYASANKARAN NAMBIAR
JUDGE

mns/26.11.15