IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

WP(C).No. 17800 of 2007 (R)
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PETITIONER(S) :

CYRIL JACOB VELLAPPALLY,
JACOB VELLAPPALLY & CO., PULICKAL TRADE CENTRE,
NAGAMPADOM, KOTTAYAM.

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

RESPONDENT(S):
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1. **COMMERCIAL TAX OFFICER (WC),**
   O/O THE DEPUTY COMMISSIONER, COMMERCIAL TAXES,
   KOTTAYAM.

2. **COMMISSIONER, COMMERCIAL TAXES,**
   THIRUVANANTHAPURAM.

3. **STATE OF KERALA, REPRESENTED BY**
   SECRETARY TO GOVERNMENT, TAXES DEPARTMENT,
   GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI.LIJU.V.STEPHEN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29-10-2015, ALONG WITH W.P.(C).NO.18768 OF 2007 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Msd.

WP(C).No. 17800 of 2007 (R)

APPENDIX

PETITIONER(S)' EXHIBITS :
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EXHIBIT P1: TRUE COPY OF CIRCULAR NO.5/05 DATED 04.04.2005 ISSUED BY THE 2ND RESPONDENT.

EXHIBIT P1(A): TRUE COPY OF THE RELEVANT PAGE OF THE C FROM REGISTER SURRENDERED ON 15.09.2006.

EXHIBIT P1(B): TRUE COPY OF THE RELEVANT PAGES OF CIRCULAR NO.5/06 DATED 28.01.2006 ISSUED BY THE COMMISSIONER.

EXHIBIT P2: TRUE COPY OF THE OPTION FOR COMPOUNDING FILED BY THE PETITIONER BEFORE THE ASSESSING AUTHORITY.

EXHIBIT P3: TRUE COPY OF THE RETURNS FILED BY THE PETITIONER FOR THE PERIOD FROM 01.04.2005 TO 31.03.2006.

EXHIBIT P4: TRUE COPY OF THE LETTER DATED 15.09.2006 FOR CANCELLATION OF CST REGISTRATION SUBMITTED BY THE PETITIONER.

EXHIBIT P5: TRUE COPY OF THE NOTICE NO.320516/05-06 DATED 20.03.2007 ISSUED BY THE 1ST RESPONDENT.

EXHIBIT P6: TRUE COPY OF THE OBJECTIONS RAISED BY THE PETITIONER ON 30.03.2007 AGAINST EXT-P5 NOTICE.

EXHIBIT P7: TRUE COPY OF THE ORDER NO.32051604644/05-06 DATED 11.04.2007 ISSUED BY THE 1ST RESPONDENT.

RESPONDENT(S)' EXHIBITS :
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NIL

//TRUE COPY//

P.S.TO JUDGE.

Msd.

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C).NOS.17800, 18768, 19675, 21219,
23062 & 26474 OF 2007

Dated this the 29th day of October, 2015

J U D G M E N T

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

2. W.P.(C).Nos.17800/2007, 18768/2007 and 21219/2007 deal with the assessment year 2005-06 and cover orders of assessment as well as penalty for the said assessment year. W.P.(C). Nos.19675/2007, 23062/2007 and 26474/2007 deal with the assessment orders for the assessment year 2006-07 under the Kerala Value Added Tax Act, hereinafter referred to as the 'KVAT Act'. The issue involved in these writ petitions concerns the option for payment of tax at compounded rates, that was extended to dealers who were engaged in works contracts. As per the provisions of Section 8(a)(i) of the KVAT Act, as it stood on 1.4.2005, any works contractor who was not an importer or a dealer effecting first taxable sale in the State could, at his option, instead of paying tax in accordance with the

provisions of the said section, pay tax at 2% of the whole contract amount. For those who opted for payment of tax at compounded rates, but did not satisfy the conditions in S. 8 (a)(i) of the Act, compounded tax was payable at the rate of 4% of the contract amount. S. 8 (a)(i) was amended by Act 39 of 2005 dated 28.8.2005 with effect from 1.4.2005 to read as follows:

> "(i) any works contractor <u>not being a dealer registered under the provisions of the Central Sales Tax Act, 1956</u>, or a dealer effecting first taxable sale in the State may, at his option, instead of paying tax in accordance with the provisions of the said section, but subject to payment of tax if any, payable under sub-section (2) thereof, pay tax at two per cent of the whole contract amount."

During the relevant time, the corresponding provisions of the CST Act, 1956, and in particular, Section 7(5) of the CST Act contemplated as follows:

> <u>Section 7(5) of the CST Act:</u>
>
> (5) A registered dealer may apply in the prescribed manner not later than six months before the end of a year to the authority which granted his certificate of registration for the cancellation of such registration, and the authority shall unless the dealer is liable to pay tax under this Act, cancel the registration accordingly, and where he does so, <u>the cancellation shall take effect from the end of the year</u>.

3. In the writ petitions, the petitioners are persons who applied for payment of tax on compounded basis in accordance with the

provisions of Section 8(a)(i) of the KVAT Act, as it stood during the relevant time. For those petitioners who opted for compounding at the commencement of the assessment year 2005-06, their applications were filed on various dates, prior to the amendment dated 28.8.2005 coming into force. They had, immediately after filing their applications for payment of tax on compounded basis, also filed the necessary returns and paid tax thereon, on the basis of the applications filed by them for payment of tax, at the concessional rate of 2%, on compounded basis. In some cases, the petitioners also surrendered their CST registrations during the assessment year 2005-06, and before the date of the amendment of S. 8 (a) (i). In the case of some others, the petitioners surrendered their CST registrations only subsequent to the date of the amendment, namely, 28.8.2005. The Assessing Officers, taking note of the amendment that was introduced on 28.8.2005 with effect from 1.4.2005, proceeded to issue notices to the petitioners proposing to cancel their option for payment of tax on compounded basis at the concessional rate of 2% and to tax them on compounded basis at the higher rate of 4% as stipulated under Section 8(a)(ii) of the KVAT Act. Although the petitioners filed detailed replies objecting to the said proposal, the Assessing Officers proceeded to confirm the proposals in the notices issued to the petitioners and directed the petitioners to pay the differential tax calculated on compounded basis by adopting the higher rate of tax at 4%. The said orders of the Assessing Officer are impugned in the writ petitions for the assessment year 2005-06.

4. As regards the writ petitions concerning the assessment year 2006-07, it is seen that the petitioners had applied for a cancellation of the CST registration only at the commencement of the assessment year 2006-07. Their applications for payment of tax on compounded basis at the lower rate of tax under Section 8(a)(i) of the KVAT Act, were rejected by the Assessing authorities and they were asked to remit tax at the higher compounded rate of 4% in accordance with Section 8(a)(ii) of the KVAT Act. The said orders of the Assessing authorities are impugned in these writ petitions for the assessment year 2006-07.

5. I have heard Sri.K.U.Vijayan and Sri.K.N.Sreekumar, the learned counsel appearing for the petitioners in all these writ petitions as also Sri.Liju V. Stephen, the learned Government Pleader appearing for the respondents in all these writ petitions.

6. On a consideration of the facts and circumstances of the case as also the submissions made across the bar, I find that the contention of the petitioners is essentially that, for the assessment year 2005-06, they had opted for payment of tax on compounded basis at the lower rate of 2% in accordance with Section 8(a)(i) of the KVAT Act, as it stood prior to its amendment, on 28.8.2005, and had commenced payment of tax at the said rate by filing necessary returns with the respondent authorities. It was while so that the amendment dated 28.8.2005 came into force with effect from 1.4.2005 and the petitioners found themselves in a situation where they could not comply with the condition regarding surrendering of their CST registration certificates so as to conform to the status of a dealer not holding a registration under the CST Act during the assessment year 2005-06. The case of the petitioners, therefore, is that for the assessment year 2005-06, inasmuch as it was impossible for them to comply with the requirements for cancellation of the certificate of registration under the CST Act, as contemplated in Section 7(5) of the CST Act, the respondents ought not to have denied them the benefit of payment of tax at the concessional compounded rate of 2% that was envisaged under Section 8(a)(i) of the KVAT Act. It is also contended that there was no justification for the imposition of penalties on them

during the said assessment years. I find force in the said contention of the learned counsel for the petitioners insofar as it relates to the assessment year 2005-06. The petitioners had opted for compounding at the concessional rate of compounded tax of 2% under Section 8(a)(i) at a time when the Section did not contemplate the holding of a registration under the CST Act as a disqualification for exercise of an option to pay tax at the concessional rate of compounded tax under Section 8(a)(i). The amendment to Section 8(a)(i) having come into force in the middle of the assessment year, and it being almost impossible on account of the statutory provisions of Section 7(5) of the CST Act, to get a cancellation of the certificate of registration issued to them under the CST Act in 2005-06 itself, it would be unfair on the part of the respondents to insist on the higher rate of compounded tax under Section 8(a)(ii) of the KVAT Act being paid by the petitioners on the works contracts executed by them. The orders of penalty imposed on the petitioners on this ground also cannot be legally sustained. I therefore quash the orders impugned in W.P.(C).Nos.17800/2007, 18768/2007 and 21219/2007, to the extent they demand differential tax under Section 8(a)(ii) of the KVAT Act and impose a penalty on the petitioners for erroneously opting to pay tax under Section 8(a)(i) of the Act during the said assessment year. The said writ petitions are therefore allowed, as above, with consequential reliefs to the petitioners.

As regards W.P.(C).Nos.19675/2007, 23062/2007 and 26474/2007, I find that, in these cases, the petitioners, who were well aware of the amendments that were effected to Section 8(a)(i) of the KVAT Act, on 28.8.2005, with effect from 1.4.2005, and could have applied for a surrender of their certificate of registration under the CST Act during the assessment year 2005-06 itself, for reasons best known to them, did not choose to apply for a cancellation of the CST registration before the commencement of the assessment year 2006-07. The inaction on the part of the petitioners, in not surrendering their registration certificates under the CST Act, disentitled them to prefer an option for payment of tax at the concessional rate of compounded tax under Section 8(a)(i) of the KVAT Act at the commencement of the assessment year 2006-07, because, on that date, they continued to be persons who held a CST registration under the CST Act. I am not persuaded by the submission of the learned counsel for the petitioners that the assessment years in question, being the initial years of transition from the KGST Act to KVAT Act, the petitioners were not fully aware of the procedural formalities and statutory provisions that were to be complied with in connection with the exercise of their option under Section 8(a)(i) of the KVAT Act. I find that the petitioners had ample time during the assessment year 2005-06 itself to ensure that they were duly qualified for exercising their option under Section 8(a)(i) for the assessment year 2006-07. The petitioners having not chosen to do so, and having opted for payment of tax at the lower rate of compounded tax under Section 8 (a)(i), when they were not entitled for the same, the orders impugned in these writ petitions, where the Assessing officers find that the petitioners are not entitled to the rate of tax under Section 8(a)(i) of the KVAT Act, cannot be said to be illegal. I therefore dismiss these writ petitions, in their challenge against the orders impugned therein. Thus, W.P.(C).Nos.19675/2007, 23062/2007 and 26474/2007 are dismissed, as above.

A.K.JAYASANKARAN NAMBIAR
JUDGE

prp/30/10/15