

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

TUESDAY, THE 6TH DAY OF OCTOBER 2015/14TH ASWINA, 1937

WP(C).No. 18120 of 2015 (L)

PETITIONER :

**M/S. COCHIN BLUE METAL INDUSTRIES (P) LTD.,
CHOOZHICKARA, METHIRI.P.O., RAMAPURAM,
KOTTAYAM, REPRESENTED BY ITS DIRECTOR,
CLEMENT K.JOSE.**

**BY SRI.K.SRIKUMAR,SENIOR ADVOCATE
ADVS. SRI.K.MANOJ CHANDRAN
SRI.P.R.AJITHKUMAR**

RESPONDENT(S):

- 1. THE INTELLIGENCE OFFICER,
SQUAD NO.II, DEPARTMENT OF COMMERCIAL TAXES,
KOTTAYAM AT PALA.**
- 2. THE ASSISTANT COMMISSIONER,
SPECIAL CIRCLE, DEPARTMENT OF COMMERCIAL TAXES,
KOTTAYAM.**
- 3. THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES,
DEPARTMENT OF COMMERCIAL TAXES, KOTTAYAM.**

BY GOVERNMENT PLEADER SRI.LIJU V. STEPHEN

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 29-09-2015 , THE COURT ON 06-10-2015 DELIVERED THE
FOLLOWING:**

sts

WP(C).No. 18120 of 2015 (L)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1	TRUE COPY OF THE PROPOSAL NOTICE DT 22-11-2014
EXT.P2	TRUE COPY OF THE APPLICATION DATED 29-04-2013
EXT.P2(A)	TRUE COPY OF THE COMPOUNDING APPLICATION IN FORM NO.IB DATED 25-05-2013
EXT.P3	TRUE COPY OF THE CLARIFICATION ORDER NO C3/707/11/ DATED 09/01-2012
EXT.P4	TRUE COPY OF THE REPLY DATED 12-12-2014
EXT.P5	TRUE COPY OF THE REQUEST DATED NIL
EXT.P6	TRUE COPY OF THE ORDER DATED 23/01/2015
EXT.P7	TRUE COPY OF THE LETTER DATED 21-02-2015
EXT.P8	TRUE COPY OF THE ORDER NO.ISK II CR-26/2013-14 DATED 23-01-2015

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.A.TO JUDGE

sts

(CR)

A.K.JAYASANKARAN NAMBIAR, J.

.....
W.P.(C).No.18120 of 2015

.....
Dated this the 6th day of October, 2015

J U D G M E N T

The petitioner is a registered dealer under the KVAT Act, engaged in the business of production of granite metal and M-sand. In connection with the said business, the petitioner had installed at his unit primary as well as secondary crushers. Over and above the said machinery, the petitioner had also installed an Auto Sand Machine for the purposes of producing M-sand. For the purposes of assessment under the KVAT Act, the petitioner opted for payment of tax on compounded basis in terms of S.8 of the KVAT Act, and the revenue authorities accepted his application for the same. The petitioner accordingly filed returns and paid tax as contemplated under S. 8 of the KVAT Act.

2. Pursuant to an inspection conducted at his unit by the revenue authorities, the petitioner was served with Ext.P1 notice by the 1st respondent proposing to impose a penalty on the petitioner for suppressing the actual production of granite metal and M-sand produced in the unit. The basis for the said notice was the allegation that the petitioner had not, in his application for compounding, and while declaring the machinery used for the purposes of his business, declared the Auto Sand Machine that was

used for producing M-sand. It was the stand of the 1st respondent that the non-declaration of the said machine nullified the option exercised by the petitioner for payment of tax at compounded rates. The proposal in the notice was to impose a penalty of Rs.7,58,62,458/- on the petitioner.

3. Faced with Ext.P1 proposal for the imposition of a huge penalty, the petitioner approached the 1st respondent with a proposal for compounding the offence in terms of S. 74 of the KVAT Act, the provisions of which read as follows:

“74. Composition of offences.-(1) The assessing authority or other officer or authority authorised by the Government in this behalf may accept from any person who has committed or is reasonably suspected of having committed an offence against this Act, other than those specified under clause (e) of sub-section (1) or clauses (b), (c) or (d) of sub-section (2) of section 71 by way of compounding of such offence.-

(a) where the offence consists of the evasion of any tax payable under this Act, in addition to the tax so payable a sum of money equal to the

amount of tax so payable subject to a minimum of rupees five hundred and maximum of rupees eight lakh; and

Provided that the maximum compounding fee collectable against a single offence spread over several return periods in a financial year shall be two lakh rupees.

(b) in other cases, a sum of money not exceeding ten thousand rupees.

Provided that the Commissioner may by order authorize any officer to compound the offence under this section on payment of a reduced amount.

(2) On payment of such amount under subsection (1), no further penal or prosecution proceedings shall be taken against such person, in respect of that offence."

4. It is relevant to note that, in the meanwhile, there were several writ petitions filed before this Court challenging the demand of the revenue authorities for payment of tax on Vertical Shaft Impactor (VSI) machines, that were used by dealers engaged

in the business of production of granite metal, for production of M-sand. The contention of the dealers in the said writ petitions was essentially that, inasmuch as the statutory provision under S. 8 of the KVAT Act envisaged the payment of compounded rate based on machines of specified description used in the respective premises, and the VSI machine was not a machine that was specified under the statute, the said machine could not be reckoned for the purposes of determining the rate of tax to be paid on compounded basis. Taking note of the pendency of the said writ petitions, and anticipating a favourable verdict in the matter from this Court, the petitioner, while preferring Ext.P5 application for compounding the offence, qualified the same with a request to reduce the compounding fee payable to 60% of the compounding fee that was payable in respect of cone crushers, inasmuch as the said rate was stipulated under the statute, as amended by the Finance Act, 2014, and with a further stipulation that, in the event of this Court finding in favour of the assesseees in the writ petitions referred to above, the compounding fee would be refunded with interest. While, initially, the 1st respondent did not consider the request of the petitioner favourably, on the petitioner re-iterating its request before the 1st respondent, the latter deviated from his earlier

proposal and proposed a computation of compounding fee at 60% of the maximum compounding fee payable for the cone crusher, for the Auto sand machine, and another 60% for the VSI machine, for the year 2013-14. This proposal was then put to the petitioner, who then put in a compounding application, admitting the offence and seeking departmental composition. The said application was accepted by the 1st respondent and he proceeded to pass Ext.P8 order, fixing the tax and compounding fee payable at Rs. 8,00,000/- each and noticing that the petitioner had already paid these amounts on 23.01.2015.

5. It would appear that, immediately thereafter, this Court by its judgment dated 06.03.2015 rendered in WP (C) No. 2873/2014 and connected cases held that inasmuch as the VSI machine was not a machine that was specified under the S.8 of the statute during the relevant period, the said machine could not be reckoned for the purposes of determining the rate of tax to be paid on compounded basis. The demand of differential tax that was made on the dealers in those cases was also quashed by this Court. In the present writ petition, the petitioner impugns the compounding orders passed (Exts.P6 as modified by Ext.P8) inter alia, on the

contention that the petitioner, being similarly situated as the petitioners in WP(C) No. 2873/2014 and connected cases, could not have been penalized for not paying tax in respect of the Auto Sand Machine that was used by him in his premises and, therefore, the compounding proceedings itself were liable to be quashed as illegal. In the alternative, it is contended that, insofar as the petitioner had qualified his offer for compounding with a stipulation that, in the event of this Court finding in favour of assesseees in the writ petitions referred to above, the compounding fee should be refunded with interest, the respondents were obliged to refund the amounts collected from him by way of compounding fee. It is his further contention that, at any rate, insofar as the offence in question was one that attracted the provisions of the proviso to S. 74(1)(a), the maximum compounding fee that could have been imposed was only Rs. 2 Lakhs as against the Rs. 8 Lakhs that was imposed.

6. I have heard the learned Senior Counsel Sri. K. Srikumar for the petitioner and the learned Government Pleader for the respondents. Learned Senior Counsel would vehemently canvass for the proposition that, in the instant case, the compounding

proposal put forth on behalf of the petitioner, subject to certain stipulations, had been accepted by the 1st respondent and accordingly, the petitioner was entitled to reap the benefits that flowed from a declaration, of the legal position with regard to liability for penalty, in the judgment dated 06.03.2015 rendered in WP (C) No. 2873/2014 and connected cases. In the alternative, he would submit that the offence itself was not compounded in the absence of payment of the balance tax amounts by the petitioner. To substantiate his contentions, he would place reliance on the decisions in **Chandrasan v. State of Kerala [1994 KHC 328], Assistant Commercial Tax Officer (intelligence) v. N.N.Jariwala [1992 (86) VST 229 (Kar)] and State of Karnataka v. Veerchand [1992 (87) VST 138 (Kar-FB)]**. It is also contended that, even if it is assumed that the offence was compounded in terms of S.74 of the KVAT Act, in as much as it was not in dispute that the provisions of the proviso to S. 74 (1)(a) was attracted in the instant case, the maximum compounding fee that could have been collected from the petitioner in terms of the statute was only Rs. 2 Lakhs.

7. Per Contra, the learned Government Pleader would defend

Ext.P8 order of compounding passed by the 1st respondent and maintain that, since the petitioner had chosen to compound the offence and thereby claim immunity from prosecution under the Act, he could not subsequently turn around and avail the benefit of the judgment that held that no penalty could be imposed in respect of the allegations leveled against the petitioner. He would also contend that the provisions of the proviso to S. 74 (1)(a) have to be interpreted in the light of the main provisions of S. 74 (1)(a), and when so interpreted, it is obvious that the figure of Rs. 2 Lakhs specified therein, is a mistake and the compounding fee ought to be taken as Rs. 8 Lakhs, as in the main provision of S. 74 (1)(a) of the Act. He places reliance on the decisions in, **M.Pentiah and Others v. Muddala Veeramallappa and Others [AIR (1961) SC 1107]** and **Union of India v. Madras Telephone SC & ST Social Welfare Association [2006 (8) SCC 662]**

8. On a consideration of the rival submissions, I find that two issues arise for consideration in the instant writ petition, namely, (i) whether the petitioner can escape from his liability to pay the compounding fee demanded in Ext.P8 order by placing reliance on a subsequent declaration of law by this court? and (ii) Whether, in

the event of the petitioner having to pay the compounding fee demanded in Ext.P8 order, he can claim a reduction in the fee payable by invoking the provisions of the proviso to S. 74 (1)(a) of the KVAT Act?

9. As regards the first issue, I find that although the petitioner, when confronted with a penalty proposal, had put in an application for compounding the offence in terms of S.74 of the KVAT Act, he had qualified his offer for compounding the offence with certain stipulations namely, (i) that the compounding fee payable should be reduced to 60% of the compounding fee that was payable in respect of cone crushers, inasmuch as the said rate was stipulated under the statute, as amended by the Finance Act, 2014, and (ii) that, in the event of this Court finding in favour of assessees, in the writ petitions that were pending on the issue of liability to penalty, the compounding fee would be refunded with interest. The said application of the petitioner was considered by the 1st respondent who revised his earlier proposal, partly acceding to the request of the petitioner, and proposed a computation of compounding fee at 60% of the maximum compounding fee payable for the cone crusher, for the Auto sand machine, and another 60%

for the VSI machine, for the year 2013-14. He did not, however, accede to the second condition proposed by the petitioner. The modified proposal was then put to the petitioner, who in turn put in a compounding application, admitting the offence and seeking departmental composition based on the modified proposal. The said application was accepted by the 1st respondent and he proceeded to pass Ext.P8 order, fixing the tax and compounding fee payable at Rs. 8,00,000/- each and noticing that the petitioner had already paid these amounts on 23.01.2015. As the petitioner had paid the amount demanded as compounding fee in Ext.P8 order, the compounding proceedings stood completed, and the petitioner thereby obtained the benefit of immunities from penalty and prosecution, that flowed from such a statutory composition of the offence. This action of the petitioner serves to distinguish the case of the petitioner from the facts in the judgments relied upon by the petitioner. Having obtained the statutory benefits flowing from the composition of the offence, the petitioner cannot now turn around and question the very proposal for imposition of penalty, based on a subsequent judgment of this Court. The conduct of the petitioner would estop him from attempting such a course of action. The challenge in the writ petition, against Ext.P8 order of the 1st

respondent, on the aforesaid ground is therefore rejected.

10. As regards the second issue, regarding the quantum of compounding fee payable, I find that the statutory provisions in this regard are very clear. The proviso to S. 74(1)(a) of the KVAT Act, which has already been extracted above, clearly indicates that the maximum compounding fee collectable against a single offence spread over several return periods in a financial year shall be two lakh rupees. In the instant case, it is not in dispute that the above provision stood attracted in the petitioner's case, the contention of the respondents being only that the mention of the figure of two lakh rupees in the proviso should be viewed as a mistake in the statute. While the learned Government Pleader would vehemently contend that this Court ought to read in the figure of Rs. 8 lakhs, appearing in the main provision of S. 74 (1)(a), to substitute the figure of Rs. 2 Lakhs appearing in the proviso, I am afraid it is not within the realm of this Court to ignore the express provisions of a taxing statute. This is more so when the legislative history of the said provision clearly indicates that while there were two amendments, that enhanced the compounding fee payable under S.74 (1)(a), in 2009 and 2011, on both those occasions the

amending body did not deem it necessary to amend the proviso to the said provision. Thus, the proviso has to be read as it stands in the statute book, and when so read, Ext.P8 order of the 1st respondent, to the extent it fixes the compounding fee payable by the petitioner @ Rs. 8 Lakhs cannot be legally sustained. I therefore quash Ext.P8 order, to the extent it fixes the compounding fee payable by the petitioner as Rs. 8 Lakhs and declare that the compounding fee payable by the petitioner pursuant to Ext.P8 order is only in an amount of Rs. 2 Lakhs.

The writ petition is thus partly allowed.

A.K.JAYASANKARAN NAMBIAR
JUDGE

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