IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

WEDNESDAY, THE 25TH DAY OF FEBRUARY 2015/6TH PHALGUNA, 1936

WP(C).No. 28938 of 2010 (N)

PETITIONER(S):

F.HAIMER REYNOLD, MANAGING DIRECTOR,
ST.ANTONY'S CARS (P)LTD., KALLUMTHAZHAM, KILIKOLLOOR,
KOLLAM DISTRICT - 691 004.

BY ADV. SRI.JOHNSON GOMEZ

RESPONDENT(S):
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1. THE STATE OF KERALA, REPRESENTED BY
THE SECRETARY, DEPARTMENT OF LABOUR, SECRETARIAT,
TRIVANDRUM.

2. THE KERALA BUILDING AND OTHER
CONSTRUCTION WORKERS WELFARE BOARD, NIRMAN BHAVAN,
MEETTUKKADA, THYCADU P.O., THIRUVANANTHAPURAM.

3. THE ASSESSING OFFDICER,
DEPUTY LABOUR OFFICER, KOLLAM.

4. THE APPELLATE AUTHORITY UNDER BUILDING
AND OTHER CONSTRUCTIONS WORKERS CES ACT
(DISTRICT LABOUR OFFICER), KOLLAM - 691 013.

5. THE DIRECTOR, FACTORIES AND BOILERS
DEPARTAMENT, THIRUVANANTHAPURAM.

R1 & R3-R5 BY GOVERNMENT PLEADER SRI.R.RANJITH
R2 BY ADV. SRI.ASHIK K.MOHAMED ALI,SC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
25-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

msv/

WP(C).No. 28938 of 2010 (N)

APPENDIX

PETITIONER(S)' EXHIBITS:

EXT.P1: ATRUE COPY OF THE PROCEEDINGS NO.C/KLM/649/1869/09 DTD.13.11.2009 ISSUED BY THE THIRD RESPONDENT.

EXT.P2: ATRUE COPY OF THE REVIEW PETITION DTD.25.11.2009 SUBMITTED BY THE PETITIONER BEFORE THE THIRD RESPONDENT.

EXT.P3: ATRUE COPY OF THE PERMIT NO.61/2009 ISSUED BY THE FIFTH RESPONDENT AS PER ORDER NO.T2/2357/2009/F & B R.DIS DATED 7.5.2009.

EXT.P4; ATRUE COPY OF THE PROCEEDINGS NO.C/KLM/649/1896/09 DTD.11.12.2009 ISSUED BY THE THIRD RESPONDENT.

EXT.P5: ATRUE COPY OF THE RECEIPT DTD.23.12.2009 ISSUED BY THE THIRD RESPONDENT.

EXT.P6: ATRUE COPY OF THE ACKNOWLEDGMENT OF RECEIPT OF MONEY DTD.23.12.2009 ISSUED BY THE FOURTH RESPONDENT.

EXT.P7: ATRUE COPY OF THE APPEAL DTD.24.12.2009 SUBMITTED BY THE PETITIONER BEFORE THE FOURTH RESPONDENT.

EXT.P8: ATRUE COPY OF THE ORDER NO.G/3172/09 DTD.09-02-2010 ISSUED BY THE FOURTH RESPONDENT.

EXT.P9: ATRUE COPY OF THE FACTORY LICENSE NO.DO3/KUR/11/421/10 DTD.23.6.2010 OF THE FIFTH RESPONDENT.

EXT.P10: A TRUE COPY OF THE LICENSE DTD.7.5.2010 ISSUED BY THE INSPECTOR OF FACTORIES AND BOILERS.

RESPONDENT(S)' EXHIBITS:
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NIL

//TRUE COPY//

P.S.TO JUDGE

Ms**v/**

K. Vinod Chandran, J.

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W.P.(C)No.28938 of 2010

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Dated this the 25th day of February, 2015.

JUDGMENT

1. Petitioner challenges Ext.P1 assessment and Ext.P8 order of the Appellate Authority under the Building and other Construction Workers' Wefare Cess Act, 1996 (for brevity, the "Cess Act"). Petitioner is the Managing Director of a Private Limited Company, which is a dealer in automobiles. For the purpose of repair and service, the petitioner needed to construct a building, for which, the petitioner made an application under the Factories Act, 1948, since, repairing work and even washing and cleaning comes within the definition of manufacturing process, under the Factories Act.
2. Petitioner applied for building permit, which was granted as per Ext.P3 dated 7.5.2009. Petitioner carried on constructions, in accordance with the specification in Ext.P3 and on 23.6.2010, obtained Ext.P9 licence from the Department of Factories and

Boilers.

3. Petitioner was issued with a notice and the final assessment order dated 13.11.2009 as per the Cess Act was passed (Ext.P1). Learned Standing Counsel appearing for the Board as also the learned Government Pleader have identical contentions, to sustain the order of assessment.

4. Petitioner's claim for exemption, as provided under sub clause (d) of sub section (1) of Section 2 of Building and other Construction Workers' (Regulation of Employment and Conditions of Service) Act, 1996 (for brevity "Conditions of Service Act") is opposed, on the plea that, such constructions, in an already existing factory, alone is exempted. Learned counsel appearing for the Board specifically refers to the proceedings initiated and concluded, prior to the issuance of licence. Ext.P1 is dated 13.11.2009 and that was prior to Ext.P9 dated 23.6.2010. Hence, the construction, not having been carried on in the licensed factory, there could be no exemption

granted. Learned Standing Counsel for the Board specifically contends that, otherwise there would be exemption claimed on the basis of the subsequent use to which a building is put; as a factory.

5. At the outset, it has to be noticed that, the Board's apprehension that, a subsequent use, as a factory, would result in a claim of exemption being raised, cannot be countenanced, since, cess is a one time levy, on the construction of a building. Hence, the construction itself would have to be made, on the basis of a permit issued under the Factories Act, to claim an exemption under the Cess Act.

6. The Cess Act, by Section 3, imposes a levy on the constructions by an employer, both of which terms are defined under the Conditions of Service Act. The levy is at 1% of the cost of construction so incurred by the employer. Sub clause (d) of Section 2 of the Cess Act, import the definitions under the Conditions of Service Act to the Cess Act.

7. The building or other construction work, as defined under Section 2

(1)(d) of the Conditions of Service Act, exempts "any building or other construction work to which the provisions of the Factories Act, 1948 or the Mines Act, 1054 apply".

8. An interpretation of the said definition clause, cannot lead to a result that, only those constructions carried on in an already licensed factory premises, would be exempted under the said definition clause. The specific exclusion is of a building or other construction work, to which the provisions of the Factories Act apply. The incidence of cess being the construction carried on; if the said construction is carried on with a permit under the Factories Act, then, definitely, the same would stand exempted.

9. A licence issued can only be after the conclusion of the construction activity and prior to commencement of the manufacturing activity to be carried on in the premises. As was noticed, the definition of manufacturing process in the Factories Act include *inter alia* any repairing, washing and cleaning with a view to use, sale, transport,

delivery or disposal. The repair and maintenance work, carried on by the petitioner within the premises, definitely, would be a manufacturing process, as defined under the Factories Act.

10.Petitioner has also obtained necessary permit, as is indicated herein by Ext.P3, based on which, the construction activity was carried on. On conclusion of the same, Ext.P9 licence was also issued and the petitioner had been carrying on the business of repair and maintenance of cars in the said premises. In such circumstance, the petitioner's premises is exempted from the Cess Act, insofar as it is covered by the Factories Act.

11.The learned standing counsel for the Board has an alternate contention that, now the dealership is closed and there is no activity governed by the Factories Act, 1948, carried on in the said building. The Cess Act, but for granting an exemption, to constructions to which the provisions of the Factories Act applies, does not speak of a levy on such activity being discontinued and the building itself put to other use. The incidence of the levy is on the construction and as per the provisions of the statute, no levy can be made on any subsequent conversion of its use.

Exts.P1 and P8 would stand set aside. The writ petition is allowed. Parties are left to suffer their respective costs. Since the entire amount assessed in Ext.P1 have been paid by the petitioner, the same shall be refunded within two months from today.

K. Vinod Chandran, Judge.

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