IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

TUESDAY, THE 13TH DAY OF OCTOBER 2015/21ST ASWINA, 1937

WP(C).No. 25880 of 2015 (H)

PETITIONER:

AMON & COMPANY CALCUTTA PVT LTD.,
OLD HARBOUR HOTEL, 1/328, TOWER ROAD,
FORT KOCHI, KOCHI - 682 001,
REPRESENTED BY ITS DIRECTOR.

BY ADV. SRI.G.KRISHNAKUMAR

RESPONDENT(S):

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1. THE INTELLIGENCE OFFICER,
   COMMERCIAL TAXES, MATTANCHERRY,
   MAIN CIVIL STATION, ALUVA - 693 101.

2. ASSISTANT COMMISSIONER OF COMMERCIAL TAXES,
   SPECIAL CIRCLE (PRODUCE) MATTANCHERRY,
   COCHIN - 682 002.

3. STATE OF KERALA,
   REPRESENTED BY ITS SECRETARY,
   DEPARTMENT OF TAX, GOVERNMENT SECRETARIAT,
   THIRUVANANTHAPURAM - 695 005.

BY GOVERNMENT PLEADER SRI.LIJU V.STEPHEN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 13-10-2015, ALONG WITH WPC. 26069/2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

mbr/

WP(C).No. 25880 of 2015 (H)

APPENDIX

PETITIONER(S)' EXHIBITS:

P1: TRUE COPY OF THE LICENCE ISSUED BY THE EXCISE COMMISSIONER, THIRUVANNTHAPURAM.

P2: TRUE COPY OF THE CERTIFICATE/REPORT BY A QUALIFIED CHARTERED ACCOUNTANT.

P3: A TRUE COPY OF THE NOTICE DATED 10/12/2013 ISSUED BY THE 1ST RESPONDENT.

P4: A TRUE COPY OF THE REPLY DATED 13/1/2014 PREFERRED BY THE PETITIONER TO THE 1ST RESPONDENT OBJECTING EXHIBIT P3 DEMAND.

P5: A TRUE COPY OF THE LETTER DATED 1/2/2014 ISSUED BY THE PETITIONER'S TAX CONSULTANT TO THE PETITIONER.

P6: A TRUE COPY OF THE ORDER DATED 6/3/20154 OF THE 1ST RESPONDENT.

P7: TRUE COPY OF THE NOTICE DATED 27/8/2014 ISSUED BY THE 1ST RESPONDENT, INCREASING THE COMPOUNDING FEE.

P8: TRUE COPY OF THE REPLY DATED 25/9/2014 PREFERRED BY THE PETITIONER IN RESPONDSE TO EXT.P7.

P9: TRUE COPY OF THE NOTICE DATED 24/7/2015.

P10: TRUE COPY OF THE ORDER DATED 26.8.2015 ISSUED BY THE 2ND RESPONDENT.

RESPONDENTS' EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

mbr/

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C).NO.25880 OF 2015 (H)
&
W.P.(C).NO.26069 OF 2015 (G)

Dated this the 13th day of October, 2015

J U D G M E N T

The petitioner is a company engaged in hospitality business and is a registered dealer under the Kerala Value Added Tax Act [KVAT] with effect from 1.4.2007. It had opted for the compounding scheme for payment of tax as envisaged under Section 8 of the KVAT Act and it was paying tax @ 0.5% on the sales turnover of cooked food till the year 2009-10. For the assessment year 2009-10, the petitioner once again opted for the compounding scheme for payment of tax and commenced remitting tax @ 0.5% on the sales turnover of cooked food. At the time of opting for compounding, the petitioner did not have a beer and wine parlour license, and therefore, the respondents had permitted the petitioner to pay tax at the compounded rate. The petitioner however obtained a beer and wine parlour license with effect from 19.8.2009, and thereafter, while the petitioner paid turnover tax in respect of the sales of beer and wine, in accordance with the provisions of the Kerala General Sales Tax Act [KGST], it continued to pay tax on the sales of cooked food @ 0.5% by relying on the compounding option that was exercised by it. By Ext.P3 notice dated 10.12.2013 issued under Section 67 of the KVAT Act, the respondents found that the petitioner could not have paid the tax @ 0.5% on the sales of cooked food, and accordingly, demanded enhanced rate of tax on the sales turnover of cooked food after the date of obtaining the beer and wine license, and also proposed a penalty on the petitioner. The petitioner then chose to compound the offence alleged against him in Ext.P3 notice, departmentally, by resorting to the provisions of Section 74 of the KVAT Act. The request of the petitioner was accepted by the 1st respondent, who passed Ext.P6 order, permitting the compounding of the offence and levying a compounding fee of Rs.4,00,000/- over and in addition to the tax liability determined against the petitioner. The petitioner paid the said amount that was demanded by way of compounding fee. The respondents, however, by Ext.P7 notice dated 27.8.2014, found that the compounding fee that was to be paid by the petitioner was in a sum of Rs.8,00,000/- and not Rs.4,00,000/-, and therefore, demanded the differential amount of Rs.4,00,000/- from the petitioner. In the meanwhile, the petitioner challenged Ext.P6 order that directed him, to pay an amount of Rs.4,00,000/- by way of compounding fee, through W.P.(C).No.26069/2015, where, his challenge was essentially against the order of compounding, the claim of the petitioner being that the compounding proceedings were culminated through coercive steps initiated by the respondents and the decision to compound the offence under Section 74 of the KVAT Act was not taken voluntarily by the petitioner. Pursuant to the said stand of the petitioner, which the petitioner also informed the respondents of, through Ext.P8 letter, the 2nd respondent issued Ext.P9 notice dated 24.7.2015 proposing a best judgment assessment in relation to the petitioner for the assessment year 2009-10, by estimating the turnover of cooked food for the said assessment year. The said proposal eventually culminated in Ext.P10 order dated 26.8.2015, whereby, the 2nd respondent completed the assessment against the petitioner on best judgment basis under Section 25(1) of the KVAT Act. In W.P.(C).No.25880/2015, Ext.P10 assessment order is impugned inter alia on the ground that the said assessment order could not have been completed against the petitioner without first cancelling the permission granted to the petitioner for the assessment year in question to pay tax at compounded rate under Section 8(c)(i) of the KVAT Act.

2. I have heard the learned counsel for the petitioner in both the writ petitions as also the learned Government Pleader for the

respondents in both the writ petitions.

3. On a consideration of the facts and circumstances of the case as also the submissions made across the bar, I find that the challenge in W.P.(C).No.26069/2015 against Ext.P6 order, to the extent it levies a compounding fee of Rs.4,00,000/- on the petitioner, as a condition for permitting the petitioner to compound the offence that was intimated in Ext.P3 notice, is premised on the contention that the option to compound the offence departmentally was exercised by the petitioner under coercion. I am of the view that such a contention cannot be legally sustained because the decision, as to whether or not to contest Ext.P3 notice or to compound the offence departmentally, was one that the petitioner had to independently arrive at, and there was no compulsion on the petitioner to choose any particular course of action. The petitioner, having opted to compound the offence departmentally, cannot be permitted to resile from the above choice, once the same has been accepted by the Department. Thus, the acceptance of the offer to compound the offence departmentally, by the Department, resulted in a contract between the petitioner and the respondents from which neither side can resile. Having said that, I find that the respondents can demand only such amounts as are

legally permissible under Section 74 of the KVAT Act pursuant to the compounding option by the petitioner. In the instant case, the offence alleged against the petitioner was admittedly one that was spread over different return periods in the financial year 2009-10. In that event, the maximum compounding fee that could have been collected by the respondents, in respect of the offence alleged against the petitioner, as per the proviso to Section 74(1)(a) of the KVAT Act, was only Rs.2,00,000/-. As against the said amount, what the respondents have actually collected from the petitioner is an amount of Rs.4,00,000/-, and the petitioner has also been served with a demand for a differential amount of Rs.4,00,000/- by taking the amount of Rs.8,00,000/- as the compounding fee collectible from the petitioner. Inasmuch as the maximum compounding fee that can be collected from the petitioner is only Rs.2,00,000/-, I find that, Ext.P6 order, to the extent it collects an amount of Rs.4,00,000/- from the petitioner towards compounding fee, cannot be legally sustained. Accordingly, I quash Ext.P6 order to that extent and hold that Ext.P6 order shall be seen as permitting the petitioner to compound the offence departmentally, on his paying an amount of Rs.2,00,000/- by way of compounding fee . The respondents shall refund the excess collection of Rs.2,00,000/- to the petitioner or adjust the said amount towards other tax dues outstanding from the petitioner, within a period of three weeks from the date of receipt of a copy of this judgment.

4. As regards the challenge in W.P.(C).No.25880/2015, against Ext.P10 order of assessment completed against the petitioner, on best judgment assessment basis, I find that the plea of the petitioner that once an option exercised by the petitioner, for paying tax at compounded rates for the assessment year in question, was accepted by the respondents, they could not resile from the same and demand tax in accordance with the regular provisions under the KVAT Act, cannot be legally sustained, since to permit the petitioner to continue to pay tax in accordance with the permission granted by the respondents would do violence to the express provisions of Section 8 (c)(i) of the KVAT Act. Even if the petitioner puts forth his case, based on the principles of promissory estoppel, I find that the principle of estoppel cannot be relied upon to defeat the express provisions of a Statute. I am therefore not persuaded to interfere with Ext.P10 order of assessment that has been passed in relation to the petitioner under Section 25(1) of the KVAT Act in these proceedings under Article 226 of the Constitution of India.

The upshot of the above discussion is that Ext.P6 order in W.P.(C).No.25880/2015, as well as in W.P.(C).No.26069/2015, to the extent it levies a compounding fee in excess of Rs.2,00,000/- on the petitioner, is quashed and the said order shall now operate against the petitioner only to the extent of permitting the compounding of the offence and levying a compounding fee of Rs.2,00,000/- in accordance with the first proviso to Section 74(1)(a) of the KVAT Act. W.P.(C).No.26069/2015, in its challenge against Ext.P6 order is allowed to that extent. The challenge of the petitioner against Ext.P10 order in W.P.(C).No.25880/2015 is rejected, and the writ petition in respect of the said challenge, is dismissed.

A.K.JAYASANKARAN NAMBIAR
JUDGE

prp/14/10/15