

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

FRIDAY, THE 11TH DAY OF SEPTEMBER 2015/20TH BHADRA, 1937

WP(C).No. 27101 of 2015 (K)

PETITIONER(S):

**CANMEC OFFICE TECHNOLOGIES
REPRESENTED BY ITS MANAGING PARTNER JYOTHISH C.U.
1ST FLOOR, IMMATTY BUILDINGS, OLD RAILWAY STATION ROAD
KACHERIPPADY, KOCHI - 682 018.**

BY ADV. SRI.ANTONY MUKKATH

RESPONDENT(S):

- 1. STATE OF KERALA
REPRESENTED BY ITS SECRETARY, TAXES DEPARTMENT
GOVERNMENT SECRETAIRAT
THIRUVANANTHAPURAM - 695 001.**
- 2. THE COMMERCIAL TAX OFFICER
1ST CIRCLE, ERNAKULAM.**
- 3. INTELLIGENCE OFFICER (IB)
COMMERCIAL TAXES, MATTANCHERRY AT MINI CIVIL STATION
ALUVA - 682 101.**

R BY GOVERNMENT PLEADER, SRI. LIJU V. STEPHEN

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
11-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1 - PHOTOCOPY OF THE NOTICE NO. IBM-II/13/14 DT. 26.3.2014 ISSUED BY THE 3RD RESPONDENT.
- EXT.P2 - PHOTOCOPY OF THE REPLY OF THE CANMEC OFFICE TECHNOLOGIES.
- EXT.P3 - PHOTOCOPY OF THE NOTICE NO. IBM-II/IR-96/2012-13/14-15 DT. 07.10.14 OF THE 3RD RESPONDENT.
- EXT.P4 - PHOTOCOPY OF THE OTICE NO. IBM-II/IR-97/2013-14/14-15 DT. 07.10.2014 OF THE 3RD RESPONDENT.
- EXT.P5 - PHOTOCOPY OF THE OBJECTIONS DT. 05.11.2014 ALONGWITH ANNEXURES 1 TO 5 OF THE CANMEC OFFICE TECHNOLOGIES.
- EXT.P6 - PHOTOCOPY OF THE NOTICE NO. IBM-II/IR-96/2012-13/14-15 & IBM-II/IR-97/2013-14/14-15 DT. 12.6.2015 OF THE 3RD RESPONDENT.
- EXT.P7 - PHOTOCOPY OF THE NOTICE NO. IBM-II/IR-96/12-13/OR-17/15-16 DT. 11.8.2015 OF THE 3RD RESPONDENT.
- EXT.P8 - PHOTOCOPY OF THE ORDER NO. IBM-II/IR-97/13-14/OR-21/15-16 DT. 11.8.2015 OF THE 3RD RESPONDENT.
- EXT.P9 - PHOTOCOPY OF THE JUDGMENT DT. 19.12.2014 IN WPC NO. 33728/2014 OF THIS HON'BLE COURT.

RESPONDENT(S)' EXHIBITS

NIL

// True copy //

PA to Judge

das

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C). No. 27101 of 2015

Dated this the 11th day of September, 2015

JUDGMENT

The petitioner is a registered dealer on the rolls of the 2nd respondent under the provisions of the Kerala Value Added Tax Act, 2003, hereinafter referred to as 'KVAT Act'. It is a dealer in printers, peripherals and its parts. During the assessment years from 2012-13 and 2013-14, the petitioner had classifies the item sold by it as a Multi-Function printer and included the turnover in respect of the said item in the returns filed with the respondents under Entry 69(22)(c)(i) of the 3rd Schedule to the KVAT Act. In the returns, the petitioner stated that the applicable rate of tax for the said item was 5%. It is not in dispute that, for the above assessment years, the assessment of the petitioner has not been called into question by the assessing authority and the returns filed by the petitioner for the said assessment years have not been interfered with by the assessing authority. It is a case of the petitioner that the classification under the 3rd Schedule was effected by taking note of the fact that the supplier of the machines to the petitioner had also classified the item under the same head and discharged his tax liability accordingly. The 3rd respondent, however, proposed a classification of the item sold by the petitioner as a photocopier by classifying the same under Entry 30 of SRO

82/2006 attracting tax at the rate of 14.5%. Exts.P3 and P4 notices were also issued to the petitioner for the assessment years 2012-13 and 2013-14, proposing the imposition of a penalty under Section 67 of the KVAT Act on the ground that the petitioner had filed an untrue and incorrect returns for the said assessment years. In the notice, it was made clear that the basis of the proposal in the notice was the erroneous classification allegedly done by the petitioner in respect of the machine in question. Although the petitioner preferred detail replies to the said notices, the 3rd respondent passed Exts.P7 and P8 orders confirming the proposals in the notices and imposing penalties on the petitioner for misclassification of the product. In the writ petition, Exts.P7 and P8 orders are impugned, inter alia, on the ground that the 3rd respondent had exceeded its jurisdiction in imposing a penalty on the petitioner on a matter relating to classification of products under the KVAT Act.

2. I have heard the learned counsel appearing for the petitioner as also the learned Government Pleader appearing for the respondents.

3. The learned Government Pleader would vehemently oppose the prayers in the writ petition. It is his contention that, in a case of the petitioner, the classification of the item in question as photocopier was never in doubt. It is pointed out with reference to the material relied upon by the 3rd respondent, while passing Exts.P7 and P8 orders that, the petitioner had himself produced a copy of the manufacturer's brochure, which clearly indicated that the base material that was dealt with by the petitioner was a photocopier machine and the facility of using the same as a printer was an option that was available in respect of the machine in question. It is therefore, his contention that the 3rd respondent while passing Exts.P7 and P8 orders, had correctly decided the issue of classification of the product in question and was justified in imposing the penalty on the petitioner.

4. I have considered the rival submissions. On a perusal of Exts.P7 and P8 orders, I find that they are orders imposing a penalty on the petitioner for alleged contravention of Section 67 of the KVAT Act. Section 67 of the Act contemplates an imposition of penalty if the department is satisfied that any person has, inter alia, submitted an untrue or incorrect return and that the said act

of the dealer has resulted in an evasion of tax. In the instant case, the petitioner had filed returns before the assessing authority classifying the item as a multi functional printer falling under Entry 69(22) (c) (i) of the 3rd Schedule and attracting tax at 5%. The said classification appears to have been adopted by the petitioner, based on the fact that the supplier of the said machine to the petitioner had also classified the item under the same entry and discharged tax liability at the rate of 5%. It is not in dispute that the returns filed by the petitioner adopting the aforesaid classification have not been called into question by the assessing authority, in that there has been no notice issued to the petitioner for the aforesaid years questioning the classification adopted by the petitioner. It is in that background that one has to examine whether the 3rd respondent is justified in issuing notice a notice proposing a penalty on the petitioner for alleged misclassification of the product. This would assume importance especially in view of the fact that under Section 67 a penalty is contemplated only if there is any willful act on the part of the assessee with a possibility of evasion of tax. In the instant case, I find that inasmuch as the petitioner was justified in adopting a classification of the product based on the classification adopted by the supplier of the product

to the petitioner, the orders passed by the 3rd respondent confirming a penalty on the petitioner, merely because it was the view of the 3rd respondent that a classification of the product ought to have been under a different entry, cannot be legally sustained. In this connection, it is relevant to note the decision of this Court in Chakkiath Brothers v. Assistant Commissioner, Commercial Taxes, EKM and others [2014 (3) KLT 55] where it was held, under almost similar circumstances that, when there is a debatable issue with regard to a classification of the product, then it is for the assessing authority to first arrive at a decision with regard to the correct classification of the product, before penalty proceedings can be initiated against an assessee for misclassification of the product. The relevant paragraphs of the said judgment are extracted herein below:-

“7. In the present writ petition the penalty proceedings are with respect to the year 2011-12 and 2012-13. Notices were issued and were replied to; however, culminating in Exts.P13 and P14 orders imposing penalty at twice the amount of tax, alleged to have been evaded for the respective years. That assessee disclosed the turn over, in the books of accounts, as also the annual returns, is not disputed at all. The power of the Assessing Authority to look into the annual return as also the books of accounts and determine the classification of a product cannot also be brought into question, nor is it up for consideration herein. The assessee having included the goods dealt with by the assessee as turn over, it would have been competent for the Assessing Officer to classify exempted goods

as being exigible to tax and adjudicate upon the classification under the relevant entries; and to have modified the assessment accordingly.

8. In almost similar circumstances the Honourable Supreme Court in *Cement Marketing Co. of India Ltd. (supra)*, held that if the assessee does not include a particular item to tax under a *bona fide* belief that he is not liable so to include it, the return filed cannot be condemned as a 'false' one which finding alone would invite imposition of penalty. What then, is the scope of a penalty proceedings, is this Courts concern, herein. In that case the assessee deducted the freight charges from the price shown in the invoice since the invoice showed the 'free on rail destination railway station' price. The amount of freight paid to the assessee, according to them, was not exigible to sales tax and hence was not included in the taxable turn over, in the returns filed. Despite the finding that freight formed part of the sale price, on facts, it was held that "imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the Section cannot be invoked for imposing penalty" (sic). The principle was reiterated in *E.I.D Parry (i) Ltd. v. Assistant Commissioner of Commercial Taxes*.

9. On point is the decision of the Honourable Supreme Court in *Sree Krishna Electricals v. State of Tamil Nadu and Another*, paragraph 7 of which is extracted hereunder:-

"So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's accounts books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities includes these items in the dealers' turnover disallowing the exemption penalty cannot be imposed. The penalty levied stands set aside."

10. On the strength of the above binding precedents and on the fairly neat facts stated above, this Court finds that no penalty

proceedings can be initiated in the aforesaid case on the basis of a mere dispute in classification; which, as noticed above, according to the assessee, the Assessing Authority and the Intelligence Officer are under three different entries. Such a debatable issue definitely cannot lead to a presumption of any contumacious conduct on the part of the assessee or a finding of attempt to evade tax. The assessee has made a claim, in turn which can be rejected or accepted in assessment proceedings. Even on rejection, sufficient grounds do not exist for attracting penalty.”

5. Taking cue from the said judgment of this Court, which has been subsequently followed in Ext.P9 judgment of this Court, I am of the view that Exts.P7 and P8 orders cannot be legally sustained. I therefore, quash Exts.P7 and P8 orders as illegal and allow the writ petition. I make it clear that nothing in this judgment shall be seen as precluding the respondents from questioning the classification of the product in assessment proceedings for the assessment years in question.

The writ petition is allowed as above.

sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE