

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

TUESDAY, THE 1ST DAY OF AUGUST 2023 / 10TH SRAVANA, 1945

WP(C) NO.21146 OF 2014

PETITIONER :-

M/S.SRINIVASA BUILDERS
3-6-69, 101, VENKATARAMANA TOWERS, BASHEERBAGH,
HYDERABAD-500 029, REPRESENTED BY ITS
MANAGING PARTNER MR.M.SRINIVASA RAO.

BY ADVS.
SRI.K.SRIKUMAR (SR.)
SRI.G.BIJU

RESPONDENTS :-

- 1 THE COMMERCIAL TAX OFFICER
DEPARTMENT OF COMMERCIAL TAXES, KATTAPANA,
IDUKKI DISTRICT, PIN-685 508.
- 2 THE DEPUTY TAHSILDAR (RR)
NEDUMKANDAM, IDUKKI DISTRICT, PIN-685 553.
- 3 THE ASSISTANT ENGINEER
66 KV SUB STATION,
KERALA STATE ELECTRICITY BOARD LIMITED,
NEDUMKANDAM, IDUKKI DISTRICT, PIN-685 553.
- 4 THE STATE OF KERALA REPRESENTED BY THE SECRETARY,
COMMERCIAL TAXES DEPARTMENT,
TRIVANDRUM, PIN-695 001.

BY ADVS.
SRI.T.R.RAJAN
SMT.RESMITHA R CHANDRAN, GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 23.6.2023, THE COURT ON 1.8.2023 DELIVERED THE FOLLOWING:

'CR'

JUDGMENT**Dated this the 1st day of August, 2023**

The petitioner is a partnership firm registered in Hyderabad. Due to fiscal incentives extended by the Government, the petitioner obtained all necessary approvals and registrations for the installation of a windmill at Ramakkalmedu in Idukki District in Kerala. Property was also identified and purchased and permission was obtained from the Agency for Non-Conventional Energy and Rural Technology (for short, 'ANERT'). Ext.P2 supply agreement was entered into with M/s.Vestas Technology India Limited for the supply of Wind Electrical Generator having a capacity of 750 KW for a total consideration of Rs.4,09,01,000/-.

2. The learned Senior Counsel for the petitioner submits that 'electricity' is not goods as per the definition of 'goods' provided in Section 2(xx) of the Kerala Value Added Tax Act, 2003 (for short, 'the KVAT Act'). It is submitted that though the petitioner had obtained registration under the KVAT Act and had installed the windmill in the year 2008-'09, since electricity was not a goods exingible to tax under the KVAT Act, a nil return had

been furnished by him and the closing stock inventory as on 31.3.2009 was also shown as 'nil' since the firm had no other business within the State of Kerala. However, by Ext.P19, a notice under Section 25(1) of the KVAT Act was issued to the petitioner on 25.2.2014 stating that on verification of the firm's annual return, it was revealed that they had conceded total and taxable turnover as 'nil' for the year in question. It was further found that the dealer received three consignments of windmill and tower on 24.3.2008 from Puduchery, but the closing stock inventory revealed that there was no closing stock of any goods as on 31.3.2009. It was, therefore, assumed that the goods which were brought into the State, that is, the parts of the windmill and the tower were sold during the year in question, which is exingible to tax at 4% under Entry No.107(17) of the IIIrd Schedule to the KVAT Act as 'Windmills and any special designated devices which runs on wind mills'. Hence, a best judgment assessment was proposed reckoning a total and taxable turnover of Rs.12,88,39,410/- and tax at 4% of the sale was proposed to be assessed. The petitioner was required to submit their reply within seven days and to avail the opportunity of personal hearing on 19.3.2014. It is contended that Ext.P19 was

served on the petitioner by registered post on 4.3.2014 and though attempts were made to file reply before the time granted, he could not do so. The proposals were finalized *ex parte* and Ext.P20 proceedings were issued, which are under challenge.

3. It is submitted that since the assessment was made without considering the relevant aspects and was on clear error of fact and law, a rectification application was filed before the 1st respondent under Section 66 of the Act as Ext.P21. The petitioner produced Ext.P15 letter of the KSEB with photographs of the windmill, balance sheets for the assessment years 2007-'08 to 2012-'13 as well as the authenticated copies of the part invoices for despatch under the cover of which the supplier had brought the windmill into the State which are produced as Ext.P22 to P24. However, Ext.P21 application was also rejected by Ext.P26 stating that since electrical energy is goods taxable at 0% as per Entry No.17 of the 1st Schedule, the petitioner ought to have declared the turnover out of sale of electrical energy in their returns. It is further stated that consignments brought into the State were covered by one invoice but loaded on separate vehicles and separate declarations in Form 8F were issued. It is, therefore, assumed that the petitioner had brought three

windmills and sold them in the State, which is stated to be the reason for the assessment.

4. The learned counsel for the petitioner submits that since the definition of 'goods' specifically excludes electricity, the contention that electrical energy is included under the 1st Schedule to the Act as exempted goods would not make any difference to the situation. It is submitted that by way of abundant caution, the said entry in the 1st Schedule was also challenged by the petitioner. It is contended that the petitioner had obtained registration under the KVAT Act only by way of abundant caution and that since there was no sale or purchase of goods within the State, such registration need not have been obtained by the petitioner in view of the specific language of Section 6. It is further contended that the materials produced along with Ext.P21 application for rectification and before this Court would clearly show that only one windmill had been transported into the State on the basis of Ext.P1 and that the invoices specifically referred to parts of the same windmill which had been assembled on site at Ramakkalmedu. Ext.P15 letter of the KSEB certifying that the windmill is still in working condition had also been produced along with Ext.P21 which ought to have

been considered. It is submitted that additional grounds had been raised in Ext.P26, which are outside the purview of Ext.P19 notice and Ext.P20 assessment order.

5. Reliance is also placed on a decision of this Court in **Shamon K.S. v. State of Kerala and others** [2015 (5) KHC 318] in support of the contention that even in case there is an error in the filing of the return by the petitioner by not showing his turnover from sale of electrical energy which is admittedly non-taxable under the KVAT Act, the procedures for rejection of returns with opportunity to file a fresh return or for producing documents and accounts to prove the correctness of the return within the time as provided under Sections 21, 22 and 24 are to be exhausted before proceeding to a best judgment assessment under Section 25 of the KVAT Act. It was held relying on the decision of a Division Bench of this Court in **Suzion Infrastructure Service Limited v. Commercial Tax Officer (W.C), Ernakulam** [2010 (3) KHC 299] that a reasonable opportunity is liable to be granted to the dealer to enable him to appear before the authority concerned and show cause against the proposal to complete the assessment on best judgment basis. It is further contended that since there is no real contention that there was

any escaped assessment to tax in the year or that the tax has been under assessed or has been assessed at a lower rate with regard to sale of electrical energy by the petitioner, there could be no proceedings under Section 25(1). With regard to the sale of the windmill, it is contended that the said contention has been found to be totally erroneous by the documents produced by the petitioner and that therefore, the assessment is liable to be set aside.

6. A counter affidavit has been placed on record by the 1st respondent. It is contended that the petitioner is a registered dealer having VAT and CST registration and the firm had obtained registration for electrical energy and obtained CST registration for windmill and its accessories. During the year 2008-'09, the dealer filed 'nil' return for the entire period with 'nil' closing stock as on 31.3.2009. Verification of the Commercial Tax Check Post declarations revealed that three interstate purchases had been effected, but the same were not reflected in the records and documents. It is stated that since the registration is for sale of electrical energy, the nil return filed was not in terms of the Act and the Rules and there is no provision to exclude total turnover from the returns and accounts

even if the goods are exempted from tax. It is further contended that the place of business of the petitioner was found closed and that he had filed nil returns in the later years as well. It is submitted that since electrical energy found a place in the Schedule to the KVAT Act, it was the duty and responsibility of the dealer to declare the turnover through monthly and annual returns as well as trading, profit and loss accounts and balance sheet.

7. It is stated in the counter affidavit that three invoices were treated on three separate invoices due to the following reasons :-

- "1) If the three of the above mentioned invoices were one and only the actual value, there was no need of issuing part bill as 4, 5 & 9. Only one bill would have been prepared and mentioned the fact in the invoice all such details that the consignment was only one and loaded in separate vehicles as it cannot be loaded in one vehicle. For which a declaration alone was essential.
- 2) Invoice No.009/Part-4, No.009/Part-5, 009/Part-9 can be considered only as separate invoices, otherwise no need to issue part bills. On the other hand, if they have part bills, the value of consignment under transport alone in a part bill would have been declared in the invoices (Part invoices). Being a common man without much knowledge about the technical nature of the commodity, consider the part invoices as separate over or the seller would have been

issued single invoice stating the factors. Even the Accountant General while conducting Audits considered the part invoices as separate ones. The argument that the other document along with the part invoice prove the factors is no consideration, because the document prescribed to be accompanied with the consignment vide Section 46 is either invoice or delivery note or certificate of ownership only. There is no reason to believe that the part bills (invoices) are one and the same."

It is, therefore, contended that it was on the assumption that the petitioner had brought in windmill and its parts using invoices to the State of Kerala but had not communicated the disposal of the goods purchased through documentary evidences that Ext.P20 assessment order was passed.

8. The 2nd respondent has also placed a counter affidavit on record stating that the Department of Revenue is not concerned with the nature of accrual of arrears which leads to Revenue Recovery proceedings. It is stated that once the amount is certified to be recoverable under the provisions of the Kerala Revenue Recovery Act, the Department is duty bound to realize it unless an intimidation of withdrawal is given by the Authority. It is also stated that since the requisitioning authority has furnished the details, no further enquiry is required before certifying the amount recoverable under the Act and the only power of the

District Collector is to certify whether the amount is recoverable under the provisions of the Act and the Rules.

9. Having considered the contentions advanced, I notice that Ext.P19 notice proceeds on the basis that the goods brought in by the petitioner on 24.3.2008 had been disposed of during the financial year 2008-'09 without disclosing the same to the Department. It is, therefore, presumed that the petitioner had brought in three different windmills and had effected sale of the same which has not been disclosed to the Department. It is on this basis that tax at the rate of 4% on the value of three windmills with cess and interest has been calculated by Ext.P20. The petitioner has produced material to show that what was brought into the State was one windmill in a knocked down condition in three separate vehicles and also to show that the said windmill is still operational and that electrical energy is being generated and supplied to the KSEB. The further contention appears to be that electrical energy being goods included in the 1st Schedule, for which, no tax is payable, the sale of electrical energy also ought to have been disclosed by the petitioner, who is a registered dealer under the KVAT Act, in his returns as turnover which has not been done in the instant case.

10. Having considered the contentions advanced, I notice that the definition of 'goods' under Section 2(xx) of the KVAT Act is as follows :-

"Goods" means, all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes live stock, all materials, commodities and articles and every kind of property (whether as goods or in some other form) involved in the execution of a works contract, and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Section 6, which is the charging section under the KVAT Act provides that every dealer whose total turnover for a year is not less than ten lakhs shall be liable to pay tax on his sales or purchases of goods as provided in the Act.

11. Section 25(1) of the KVAT Act as it stood at the relevant time reads as follows :-

25. Assessment of escaped turnover.-(1) Where for any reason the whole or any part of the turnover of business of a dealer has escaped assessment to tax in any year or return period or has been underassessed or has been assessed at a rate lower than the rate at which it is assessable or any deduction has been wrongly made therefrom, or where any input tax or special rebate credit has been wrongly availed of, the Assessing Authority may, at any time within five years from the last date of the year to which the return relates, proceed to determine, to the best of its judgment, the turnover which has escaped assessment to tax or

has been underassessed or has been assessed at a rate lower than the rate at which it is assessable or the deduction in respect of which has been wrongly made or input tax or special rebate credit that has been wrongly availed of and assess the tax payable on such turnover or disallow the input tax or special rebate credit wrongly availed of, after issuing a notice on the dealer and after making such enquiry as it may consider necessary :

Provided that before making an assessment under this subsection the dealer shall be given a reasonable opportunity of being heard.”

Therefore, even if the contention of the revenue that electrical energy is included in the 1st Schedule is accepted, there would be no element of escaped assessment since the inclusion of electricity is in the 1st Schedule and no tax is payable. Therefore, the charge against the petitioner could, at best, be one of filing of an incorrect return and not of suppression of taxable turnover or attempt to evade tax. In the above circumstances, the essential ingredient under Section 25(1) would not be available to sustain an order of assessment on best judgment as has been done in Ext.P20.

12. The remaining question is with regard to the sale, if any, of the windmill as such. From the materials produced by the petitioner, especially Exts.P15, P22 and P24, it is clear that what has been brought into the State of Kerala was one windmill in

knocked down condition in three separate vehicles as part of the same bill or invoice. The KSEB is on record stating that one windmill is still functional at Ramakkalmedu and that electrical energy is being generated and supplied to the KSEB from the same.

In the said factual situation, I am of the opinion that Ext.P20 order, which does not satisfy the ingredients of Section 25(1) of the KVAT Act is completely unsustainable. Exts.P19, P20 and P26 are, therefore, set aside. The writ petition is, accordingly, allowed.

**Sd/-
ANU SIVARAMAN
JUDGE**

APPENDIX OF WP(C) 21146/2014

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE PROCEEDINGS NO.AO 729/WPC/ANERT/07 DATED 20.06.2007 OF THE DIRECTOR OF AGENCY FOR NON-CONVENTIONAL ENERGY & RURAL TECHNOLOGY, TRIVANDRUM GRANTING TECHNICAL APPROVAL TO M/S VESTAS WIND TECHNOLOGY INDIA PVT. LTD, CHENNAI FOR ESTABLISHMENT OF WIND FARM AT RAMAKKALMEDU.
- Exhibit P2 TRUE COPY OF THE AGREEMENT DATED 28.12.2007 ENTERED INTO BETWEEN THE PETITIONER AND M/S.VESTAS WIND TECHNOLOGY INDIA PVT. LTD. FOR SUPPLY OF WIND ENERGY GENERATOR.
- EXHIBIT P3 TRUE COPY OF THE REGISTERED SALE DEED BEARING NO.38/08 DATED 07.01.2008 OF THE UDUMBANCHOLA SUB-REGISTRY IN FAVOUR OF THE PETITIONER.
- EXHIBIT P4 TRUE COPY OF THE PROCEEDINGS NO.AO 233/WPC/ANERT/08 DATED 07.03.2008 OF THE DIRECTOR OF AGENCY FOR NON-CONVENTIONAL ENERGY & RURAL TECHNOLOGY, TRIVANDRUM PERMITTING TRANSFER OF TECHNICAL APPROVAL ACCORDED TO M/S.VESTAS WIND TECHNOLOGY INDIA PVT. LTD. FOR INSTALLATION OF A WIND ENERGY GENERATOR TO THE PETITIONER.
- EXHIBIT P5 TRUE COPY OF THE CERTIFICATE OF REGISTRATION IN FORM NO.4 BEARING SERIAL NO.132235 DATED 18.02.2008 ISSUED BY THE 1ST RESPONDENT UNDER THE KERALA VALUE ADDED TAX RULES, 2005 TO THE PETITIONER.
- EXHIBIT P6 TRUE COPY OF THE CERTIFICATE OF REGISTRATION BEARING NO.32060637009 C DATED 18.02.2008 ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER UNDER THE CENTRAL SALES TAX (REGISTRATION AND TURNOVER RULES, 1957).
- EXHIBIT P7 TRUE COPY OF THE LETTER BEARING NO.KSERC/I/WIND ENERGY/2008 DATED 31.03.2008 ISSUED BY THE KERALA STATE ELECTRICITY REGULATORY COMMISSION COMMUNICATING APPROVAL OF POWER PURCHASE

AGREEMENTS ENTERED INTO WITH THE KERALA STATE
ELECTRICITY BOARD.

- EXHIBIT P8 TRUE COPY OF THE CERTIFICATE NO.SEC/ADV/335/2014 DATED 16.07.2014 ISSUED BY THE UNION BANK OF INDIA, SD ROAD BRANCH, SECUNDERABAD VOUCHING CREDIT FACILITIES AVAILED BY PETITIONER FOR THE WIND MILL PROJECT.
- EXHIBIT P9 TRUE COPY OF THE SPECIFICATION DATA SHEET DATED 15.12.2000 OF WIND MILL MODEL NO.NM 750/48 OF THE VESTAS WIND TECHNOLOGY INDIA PVT. LTD. (FORMERLY M/S.NEG MICON) .
- EXHIBIT P10 TRUE COPY OF THE INVOICE NO.3507 DATED 21.04.2008 ISSUED BY M/S.VESTAS WIND TECHNOLOGY INDIA PVT. LTD. TO THE PETITIONER AGAINST THE SUPPLY OF NM 48/750 WIND ELECTRIC GENERATOR.
- EXHIBIT P11 TRUE COPY OF THE INVOICE NO.3514 DATED 26.04.2008 ISSUED BY M/S.VESTAS WIND TECHNOLOGY INDIA PVT. LTD. TO THE PETITIONER TOWARDS ERECTION AND COMMISSIONING THE OFFICE OF NM 48/750 WIND ELECTRIC GENERATOR.
- EXHIBIT P12 TRUE COPY OF COMPILATION OF PHOTOGRAPHS OF THE PETITIONER'S WEG ERECTED AT SITE.
- EXHIBIT P13 TRUE COPY OF THE ORDER NO.B3-4324/2008/CEI DATED 25.04.2008 OF THE CHIEF ELECTRICAL INSPECTOR TO THE GOVERNMENT OF KERALA, TRIVANDRUM ISSUED TO THE PETITIONER SANCTIONING ENERGISATION OF THE WIND TURBINE GENERATOR.
- EXHIBIT P14 TRUE COPY OF THE LETTER NO.TCP/DB 11/WIND FARM PROJECTS/2008-0/111 DATED 16.05.2008 ISSUED BY THE DEPUTY CHIEF ENGINEER, TRANSMISSION CIRCLE, POOVANTHURUTHU, KOTTAYAM EVIDENCING COMMISSION AND INTER-CONNECTION OF THE PETITIONER'S WIND ELECTRIC GENERATOR TO THE KSEB POWER GRID.
- EXHIBIT P15 TRUE COPY OF THE LETTER NO.DB 14-15/WIND GENERATOR/DATED 21.04.2014 OF THE 3RD RESPONDENT VOUCHING THAT THE PETITIONER'S WIND ELECTRIC GENERATOR IS IN REGULAR OPERATION.

- EXHIBIT P16 TRUE COPY OF THE CHEQUE NO.360807 DATED 16.06.2014 FOR RS.4,10,996/- ISSUED BY THE KSEB TO THE PETITIONER.
- EXHIBIT P17 TRUE COPY OF THE REAL TIME GOOGLE EARTH SATELLITE IMAGERY DATED 02.03.2012 OF THE PETITIONER'S WEG.
- EXHIBIT P18 TRUE COPY OF THE TIME GOOGLE EARTH SATELLITE IMAGERY DATED 13.01.2014 OF THE PETITIONERS WEG.
- EXHIBIT P19 TRUE COPY OF THE NOTICE NO.32060637009/08-09 DATED 25.02.2014 ISSUED BY THE 1ST RESPONDENT UNDER SECTION 25(1) OF THE KERALA VALUE ADDED TAX ACT, 2003.
- EXHIBIT P20 TRUE COPY OF THE ORDER NO.32060637009/08-09 DATED 28.03.2014 PASSED BYTHE 1ST RESPONDENT UNDER SECTION 25(1) OF THE KERALA VALUE ADDED TAX ACT, 2003.
- EXHIBIT P21 TRUE COPY OF THE PETITION DATED 26.05.2014 SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT UNDER SECTION 66 OF THE KERALA VALUE ADDED TAX ACT, 2003 FOR RECTIFICATION.
- EXHIBIT P22 TRUE COPY OF THE INVOICE FOR DISPATCH NO.009 PART 4 DATED 24.03.2008 OF THE VESTAS WIND TECHNOLOGY INDIA PVT. LTD.
- EXHIBIT P23 TRUE COPY OF THE INVOICE FOR DISPATCH NO.009 PART 5 DATED 24.03.2008 OF THE VESTAS WIND TECHNOLOGY INDIA PVT. LTD.
- EXHIBIT P24 TRUE COPY OF THE INVOICE FOR DISPATCH NO.009 PART 6 DATED 24.03.2008 OF THE VESTAS WIND TECHNOLOGY INDIA PVT. LTD.
- EXHIBIT P25 TRUE COPY OF THE CLOSING STOCK INVENTORY IN FORM-53 OF THE KERALA VALUE ADDED TAX RULES, 2005 DATED 30.05.2009 FILED BY THE PETITIONER BEFORE THE 1ST RESPONDENT.
- EXHIBIT P26 TRUE COPY OF THE PROCEEDINGS NO.32060637009/08-09 DATED 3.06.2014 OF THE 1ST RESPONDENT UNDER

SECTION 66 OF THE KERALA VALUE ADDED TAX ACT,
2003.

EXHIBIT P27 TRUE COPY OF THE DEMAND NOTICE BEARING NO: TALUK
(A5) FILE NO.2014/1562/6/500 DATED 06.06.2014
ISSUED BY THE DEPUTY TAHSILDAR (RR), NEDUMKANDAM
UNDER SECTION 7 OF THE KERALA REVENUE RECOVERY
ACT, 1968.

EXHIBIT P28 TRUE COPY OF THE DEMAND NOTICE BEARING NO: TALUK
(A5) FILE NO.2014/1562/6/500 DATED 06.06.2014
ISSUED BY THE DEPUTY TAHSILDAR (RR), NEDUMKANDAM
UNDER SECTION 34 OF THE KERALA REVENUE RECOVERY
ACT, 1968.