IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY,THE 26TH DAY OF AUGUST 2016/4TH BHADRA, 1938

WP(C).No. 2159 of 2016 (T)

PETITIONER: -

HYGIENE SOLUTIONS,
48/2565C(1), MAMANGALAM-POTTAKUZHY ROAD,
NEAR KARUKAPPILLY JN., ELAMAKKARA,
KOCHI-26, REPRESENTED BY ITS PARTNER,
NOORUDIN.R.J.

BY ADV.SRI.R.MURALEEDHARAN (AROOR)

RESPONDENTS: -

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1. THE COMMERCIAL TAX OFFICER,
KVAT FIRST CIRCLE,
DEPARTMENT OF COMMERCIAL TAXES,
KALAMASSERY,COCHIN, PIN-682015.

2. THE INTELLIGENCE OFFICER(IB),
ERNAKULAM,
DEPARTMENT OF COMMERCIAL TAXES,
EDAPPALLY,KOCHI-24.

BY GOVERNMENT PLEADER SMT. LILLY K.T.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26-08-2016, ALONG WITH WPC. 24007/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 2159 of 2016 (T)

APPENDIX

PETITIONER'S EXHIBITS : -

EXHIBIT P1 : TRUE COPY OF THE NOTICE PROPOSING PENALTY UNDER SEC.67(1)OF THE KVAT ACT, ISSUED BY THE 2ND RESPONDENT, DATED 11.09.2015 FOR THE YEAR 2012-2013.

EXHIBIT P2 : TRUE COPY OF THE NOTICE PROPOSING PENALTY UNDER SEC.67 (1) OF THE KVAT ACT, ISSUED BY THE 2ND RESPONDENT, DATED 11.09.2015 FOR THE YEAR 2013-2014.

EXHIBIT P3 : TRUE COPY OF THE NOTICE PROPOSING PENALTY UNDER SEC.67 (1) OF THE KVAT ACT, ISSUED BY THE 2ND RESPONDENT, DATED 11.09.2015, FOR THE YEAR 2014-2015.

EXHIBIT P4 : TRUE COPY OF THE JUDGMENT IN W.P(C)30415/2015 DATED 07.10.2015.

EXHIBIT P5 : TRUE COPY OF THE COMMON OBJECTION FILED BY THE PETITIONER AGAINST EXT. P1 TO P-3 NOTICES, DATED 12.10.2015.

EXHIBIT P6 : TRUE COPY OF THE ORDER OF PENALTY PASSED BY THE 2ND RESPONDENT UNDER S.67(1) FOR THE YEAR 2012-2013, DATED 17.12.2015.

EXHIBIT P7 : TRUE COPY OF THE ORDER OF PENALTY PASSED BY THE 2ND RESPONDENT UNDER S.67(1) FOR THE YEAR 2013-2014, DATED 17.12.2015.

EXHIBIT P8 : TRUE COPY OF THE ORDER OF PENALTY PASSED BY THE 2ND RESPONDENT UNDER S.67(1) FOR THE YEAR 2014-2015, DATED 17.12.2015.

RESPONDENTS' EXHIBITS : - NIL.

// TRUE COPY //

P.A. TO JUDGE

DMR/-

A.M.SHAFFIQUE, J.

W.P (C) No. 2159 of 2016

&

W.P (C) No. 24007 of 2016

Dated this the 26th day of August, 2016

J U D G M E N T

In W.P. (C) No.2159/2016 petitioner challenges penalty orders issued by the competent authority for the assessment years 2012-13, 2013-14 & 2014-15. The main contention urged by the petitioner is that petitioner had claimed exemption from payment of tax on the turnover based on Form No.43 issued by the purchaser. However, penalty proceedings had been taken by issuance of notice under Section 67(1) of the KVAT Act *inter alia* observing that the commodity described in Form No.43 did not come within the purview of Section 6(7)(b) of the KVAT Act 2003. Though the petitioner preferred objection without considering the same penalty orders had been passed by which the petitioner had been called upon to pay double the amount of tax sought to be paid for the respective years. Without challenging the impugned orders by way of statutory revision, petitioner had approached this Court *inter alia* contending that the penalty proceedings had been taken without jurisdiction.

2. W.P. (C) No.24007/2016 has been filed challenging

notices issued under Section 25(1) for the assessment years 2012-13, 2013-14 and 2014-15 on the ground that the proposed assessment is based on the penalty orders issued which are the subject matter in W.P. © No.2159/2016. It is contended that when the very basis of penalty is liable to be set aside, there is no question of the Assessing Officer further proceeding under Section 25(1) after lapse of considerably long time. It is contended that the assessment had been finalized without any objection by the Assessing Authority. No steps had been taken under Section 22 of the KVAT Act and now after the penalty orders are issued, fresh notice had been issued under Section 25(1), which is without jurisdiction.

3. Learned counsel for the petitioner submits that the petitioner is a dealer in cleaning materials which is liable to be exempted under Section 6(7)(b) of the KVAT Act and even assuming that the products are taxable under the KVAT Act still penalty proceedings ought not have been taken against the petitioner as the petitioner acted on the basis of Form No.43 issued by the purchasers who are institutions within the Special Economic Zone.

4. On the other hand, the learned Government Pleader

on the basis of the counter affidavit submits that petitioner had not raised any invoice showing the tax payable whereas petitioner has raised invoices on the purchasers showing nil tax. It is based on the said invoice, the purchasers had issued Form No.43. Therefore, it is a clear case of evasion of tax which has been deliberate and there is justification on the part of the Intelligence Officer who have initiated proceedings under Section 67(1) of the Act and passed final orders. It is also stated that there is no legal bar for issuing a fresh notice under Section 25(1) of the KVAT Act on the basis of the material made available after investigation. In paragraph 9 of the counter affidavit it is stated as under:

> "In the VAT scenario self assessment is being taken place. The Assessing Authority has normally no means to physically verify the goods dealt with by the dealer. It is the duty of the Intelligence Wing to verify those aspects and initiate action, if any discrepancies are noticed. Hence the absence of action from the part of the Assessing Authority is not an obstacle for the Intelligence Wing to invoke Section 67(1) of the Act."

5. Learned counsel for the petitioner, however, submits that even assuming for the sake of argument that materials

are taxable, still penalty cannot be imposed as there is no deliberate act in evading tax and the petitioner only relied upon Form No.43 given by the purchasers. Reference is made to judgment of the Apex Court in E.I.D. Parry (I) Ltd. v. Assistant Commissioner of Commercial Taxes and Another (2000) 117 STC 457, Chakkiath Brothers (Mls.) v. Assistant Commissioner, Commercial Taxes, Ekm and Others [2014 (3) KHC 55], a Division Bench judgment of the Orissa High Court in Tilakraj Mediratta v. State of Orissa and Others (1992) 86 STC 453 and a Division Bench judgment of the Madras High Court in State of Tamil Nadu v. Madras Petro Chem. Ltd (1993) 89 STC 438.

6. The first question to be considered is whether the petitioner was entitled for any exemption in terms of the Statute. Section 6(7)(b) reads as under:

> "6(7)(b) Sale of any building materials, industrial inputs, plant and machinery including components, spares, tools and consumables in relation thereto to any developer or industrial unit or establishments situated in any Special Economic Zone in the State for setting up the unit or use in the manufacture of other goods shall, subject to such conditions or restrictions, as may be prescribed, be exempted

from tax."

7. Petitioner apparently is a dealer in cleaning material. Statute exempts certain items from being taxed. Contention of the petitioner is that cleaning material being a consumable supplied to an establishment in Special Economic Zone of the State, it is liable to be exempted. But, a close reading of the Statute would show that the consumable used by the developer or industrial unit or establishments situated in the Special Economic Zone should be for setting up of the unit or use in the manufacture of other goods. The cleaning material used for the purpose of cleaning the building and other facilities, furniture etc cannot be treated as a consumable used in relation to setting up of the unit or in the manufacture of other goods. Therefore, it is apparent from the Statute itself that the petitioner is not liable for any exemption. The Intelligence Officer had issued notice clearly indicating that the petitioner is not entitled for the exemption. The only ground taken by the petitioner is that Form No.43 has been submitted by the purchaser. It is stated in the impugned order at Exhibit P6 that even in Form No.43 submitted by the dealer it is clearly mentioned as house keeping materials and house

keeping consumables. Therefore, the Officer had no doubt about the fact that exemption will not apply. A different contention is not urged by the petitioner as well. Under such circumstances, I do not find anything wrong on the part of the Intelligence Officer to have taken further proceedings under the Statute.

8. Now the question is whether in the light of Form No.43 issued by the purchaser whether the petitioner can be imposed with penalty. Referring to the judgments cited by the petitioner would show that penalty was not directed to be imposed in such cases where there is any doubt regarding the liability to pay tax. That is not the situation here. This is an instance where a bare reading of Section 6(7)(b) would clearly indicate that the product supplied by the petitioner is liable to be taxed and no exemption can be claimed at all. That apart, as rightly contended by the learned Government Pleader, the petitioner did not raise any invoice showing the taxable component. If the petitioner had clearly indicated that it is taxable and the purchaser had issued Form No.43 it would have been a different situation. Therefore, this is an instance where the petitioner had acted deliberately in avoiding

payment of tax knowing fully well that there is an obligation to pay tax on the said consumables. Under such circumstances, I do not think that any error had been committed by the Intelligence Officer in imposing penalty on the petitioner.

9. The same is the situation as far as the proceedings under Section 25(1) is concerned. The Assessing Officer had occasioned to consider the penalty orders and issued fresh notice. There is no legal bar for the same. Therefore, it cannot be contended that there is any lack of jurisdiction on the part of the authorities in proceeding further.

Having regard to the aforesaid finding, I do not think that the petitioner has made out any case for interference at this stage. If aggrieved, the remedy of the petitioner is to challenge the penalty orders by approaching the revisional authority and it shall always be open for the petitioner to file appropriate objection to the notice under Section 25(1) of the Act. Reserving the above right, these writ petitions are dismissed.

A.M.SHAFFIQUE
JUDGE

DMR/-