

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

TUESDAY, THE 7TH DAY OF FEBRUARY 2017/18TH MAGHA, 1938

WP(C) .No. 40152 of 2016 (T)

PETITIONER(S) :

M/S VETTATHIL AGENCIES,
PONNAMVELY, PATTANAKKAD.P.O,
CHERTHALA, REPRESENTED BY ITS MANAGING PARTNER, SHAFI.

BY ADVS.SRI.K.SRIKUMAR (SR.)
SRI.K.J.CHERRI BABU
SRI.K.MANOJ CHANDRAN
SRI.P.R.AJITHKUMAR
SRI.S.A.MANSOOR (PATTANAM)
KUM.ANAGHA LAKSHMY RAMAN

RESPONDENT(S) :

1. THE COMMERCIAL TAX OFFICER,
DEPARTMENT OF COMMERCIAL TAXES, CHERTHALA-688524.
2. THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES,
DEPARTMENT OF COMMERCIAL TAXES, ALAPPUZHA-688001.
3. THE COMMISSIONER OF COMMERCIAL TAXES,
DEPARTMENT OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM-695001.
4. THE ACCOUNTANT GENERAL,
OFFICE OF THE ACCOUNTANT GENERAL, M.G. ROAD,
THIRUVANANTHAPURAM-695001.

BY SR GOVERNMENT PLEADER SRI.C.K.GOVIND

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
07-02-2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER(S) ' EXHIBITS

EXHIBIT P1 TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2009-2010 DATED 30.09.2015

EXHIBIT P2 TRUE COPY OF THE ASSESSMENT ORDER FOR THE YEAR 2010-2011 DATED 30-08-2014

EXHIBIT P2(A) TRUE COPY OF THE COMMON JUDGMENT DATED 02.12.2015 IIN W.P(C)NO.27088/2014

EXHIBIT P3 TRUE COPY OF THE NOTICE DATED 15.07.2016 ISSUED FOR THE YEAR 2009.2010

EXHIBIT P3(A) TRUE COPY OF THE NOTICE DATED 15.07.2016 ISSUED FOR THE YEAR 2010-2011

EXHIBIT P4 TRUE COPY OF THE REPLY DATED 01.08.2016 SUBMITTED FOR THE YEAR 2009-2010

EXHIBIT P5 TRUE COPY OF THE ASSESSMENT ORDER ISSUED FOR THE YEAR 2009-2010 DATED 10.11.2016

EXHIBIT P5(A) TRUE COPY OF THE ASSESSMENT ORDER ISSUED FOR THE YEAR 2010-2011 DATED 10.11.2016

EXHIBIT P6 TRUE COPY OF THE CERTIFICATES ISSUED BY THE SUPPLIERS

EXHIBIT P7 TRUE COPY OF THE INTERIM ORDER DATED 24.06.2016 IN W.P. (C)20049/2016.

RESPONDENT(S) ' EXHIBITS NIL

Rp

//TRUE COPY//

PS TO JUDGE

“C.R.”

A.M. SHAFFIQUE, J.

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W.P. (C) No. 40152 of 2016

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Dated this, the 7th day of February, 2017

J U D G M E N T

This writ petition is filed challenging Exts.P5 and P5(a) assessment orders under KVAT Act, 2003 for the assessment years 2009-10 and 2010-11 completed under Section 25(1) of the Act. Though the impugned orders are appealable, according to the petitioner, the matter requires adjudication by this Court on account of a legal issue involved in the matter.

2. Petitioner is engaged in the trading of cement who purchases cement from manufacturer's local depot and is sold to retailers within the State. According to the petitioner, the suppliers allowed discount under various schemes to buyers based on the purchases, which was a common practice in the trade. Such discounts are often allowed subsequently by way of credit notes and not at the time of raising the tax invoice. According to the petitioner, the turnover discount, target discount, additional discount, special discount etc are allowable deductions from sale price or purchase price as the case may be provided the value of goods paid by buyer

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is the amount less such discount.

3. The assessing authority had issued notice under 25(1) of the VAT Act observing that the sales turnover of goods is below the cost of purchase. Accordingly, assessments were finalised for the years 2009-10 and 2010-11. Petitioner filed WP(C) Nos. 27088/2014 and 34773/2015 before this Court. Writ petitions were allowed as per common judgment dated 2/12/2015. The matter was remitted back. According to the petitioner, further notices were issued for the very same years as Exts.P3 and P3(a). Petitioner filed reply stating that the proposal is against the specific guidelines prescribed by this Court. It was contended that the measure of tax prescribed under KVAT Act is on aggregate amount for which goods are sold. Tax can be levied only based on law stated in the statute and not on accounting principles. Exts.P5 and P5(a) are the orders passed pursuant to the same. According to the petitioner, the finding that the goods were sold at a price lower than the cost of purchase price and therefore Explanation VII to Section 2(lii) of KVAT Act, 2003 is applicable, is

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illegal. According to the petitioner, the notice itself is against law as contained in the 5th proviso to Section 11(3) which prohibits assessment on turnover when supplier had paid tax on such turnover and the proposal is made ignoring the certificates issued by the suppliers showing payment of tax on amount allowed in credit notices. Exts.P4 and P4(a) are the objections filed and according to the petitioner, it is ignoring the objections that the impugned orders are passed.

4. Learned counsel for the petitioner submits that the inclusion of discount received in credit notes in petitioner's taxable turnover and estimation of gross profit deviating from the gross profit without any basis and thereafter to levy tax on such amount is illegal. It is contended that the discount allowed on sale price is a normal rate practice which is an item specially excluded from sale price and purchase price by definition given in the statute. Levy of tax on discount received in credit note is further forbidden under Section 11(3) of the Act on satisfaction of certain conditions which according to the petitioner, they have fully

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complied. In other words, the contention is that the discount received in credit note falls outside the scope of levy contemplated under the KVAT Act. On these allegations petitioner while impugning Exts.P5 and P5(a) assessments orders sought for a declaration that the discount received by the petitioner from its suppliers through credit notes will not form part of the taxable turn over especially when the turnover of discount suffered tax in the hands of the seller and the action to levy tax on discount received through credit notes is without legal sanction.

5. Heard the learned senior counsel appearing for the petitioner and the learned special Government Pleader appearing on behalf of the State.

6. Perusal of Exts.P5 and P5(a) orders would show that in addition to various other contentions, the petitioner contended that the proposal to levy tax on discount was contrary to the directions in the judgment of this Court in WP(C) No. 27088/2014. The assessing authority considered the said contention and

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placing reliance upon the judgment in **Cement House v. State of Kerala** [2010 (1) 8 KTR 329 (Ker)] observed that in so far as the assessee sold the goods at a lower price than the purchase price, Explanation VII to Section 2(lii) of the KVAT Act is applicable in the case. Further the assessee had received discount subsequently which will form part of the taxable turnover.

7. The learned Government Pleader places reliance upon two judgments of this Court in **State of Kerala v. Syed Muhammed** (2016 (4) KLT 462) and **Tenny Devassy v. State of Kerala** decided on 13/7/2015 in O.T.Revision No.98/2012 wherein it has been held that any reimbursement of price received by a dealer is liable to be included in his turnover whereas the discount allowed to the customer and shown separately is liable to be excluded. It was held that the amount received by the assessee towards reimbursement of the balance price, though called reimbursement of discount, is a payment in reimbursement of balance of the price attracting Explanation VII to section 2(lii). In **Syed Muhammed** (supra), after relying upon

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Cement House (supra), it is held by this Court at paras 10, 14 and 15 as under:-

“10. In the case at hand, even though the respondent claims that the amounts that it had received from the suppliers were in the nature of a 'trade discount', in the uncontroverted and virtually admitted position that without receiving such discounts, the business of the respondent would have been in loss, would clearly indicate that the 'discounts' that the assessee had received are in the nature of reimbursements of the loss that it had suffered on account of it having had to sell the goods at a price lower than the purchase price. No evidence to the contrary was found attempted to be led by the assessee before any of the authorities except to make a claim that the discounts received by it are incentives in the usual course of business.”

“14.The legal position that the amounts that are obtained by an assessee, who has suffered loss in its trading by having had to sell the goods at a price lower than the purchase price, will require to be accounted for in the turnover, has already been approved by this Court in Cement House v. State of Kerala [(2010) 18 KTR 329 (Ker)]. The relevant portion of the judgment that states the law is as under:

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It is obvious from the above that the purpose of the Explanation is to levy tax on the actual sale price irrespective of whether it is received by the dealer at the time of sale of goods or from the purchaser itself. In other words, any amount received by a dealer by way of consideration for sale of goods whether it is received from the purchaser or not is assessable as turnover in respect of the goods sold. The question whether sale is at below the purchase price is a matter to be decided not based on purchase price accounted by the dealer or the amount shown in the invoice, but the actual purchase price which certainly involves freight and handling charges paid by the dealer for the goods purchased. In this case, the clear finding of the lower authorities including the Tribunal is that in some cases the sale price is below the purchase price seen in the purchase invoice. So far as other sale, in respect of which there is margin profit of 0.6 per cent, the finding of the lower authorities is that petitioner has not accounted freight charges and loading and unloading charges towards purchase cost and when the same is reckoned the sale price is less than the purchase price. In view of this finding, we

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have to hold that the main part of the condition in the Explanation that the sale is at below the purchase price stands established and therefore the contention of the petitioner is rejected. For attracting the above provision, a dealer should subsequent to the sale receive any amount from any person towards reimbursement of the balance of the price. Even though senior counsel appearing for the petitioner contended that the amount received by the petitioner in the form of credit notes is not balance of the price for the goods sold by the petitioner, the authorities below gave a clear finding that the credit notes received is for the goods sold by the petitioner which were purchased from the same manufacturer who issued the credit notes.

xxxx xxxx xxx.”

15. The finding of the authorities that the assessee would suffer loss if the discounts are not taken into account remains uncontroverted and is virtually admitted and we see no reason to disturb any such finding of facts, especially in a revision of this nature. This fact having been established beyond doubt, the Assessing officer and the First appellate authority were justified and right in applying the provisions of Explanation VII to S.2(lii) of the Act and in holding that the amounts received by the assessee, though called discounts

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are also to be reckoned as part of the turnover. We find no infirmity in the same.”

8. On the other hand, learned counsel for the petitioner places reliance upon the 5th proviso to Section 11(3) to indicate that the discount received can at no stretch of imagination be part of taxable turnover. 5th Proviso to Section 11(3) reads as under:-

“Provided also that input tax credit shall not be available in respect of the tax paid on the turnover subsequently allowed as discount, and shall be disallowed where it is found that the dealer has claimed input tax credit under this section on such turnover or of such goods used in the manufacture of goods sent outside. But the amount covered under credit notes issued by a supplier that do not affect the input tax credit already availed of or on account of reimbursement of any expenses incurred by the dealer shall not be reckoned for the purpose of assessment under this Act.”

9. He also places reliance upon the judgment in WP(C) No. 27088/14 and connected cases wherein a learned Single Judge of this Court had occasion to consider the question with

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regard to availment of input tax credit by dealers in regard to the tax paid by them at the time of purchase of goods from their suppliers. An incidental question had also arisen for consideration as to whether the amount offered by way of discount through credit notes issued by the supplier of the goods at a point in time subsequent to the sale of goods to the petitioners can be added as sales turnover of the petitioners by invoking provisions of Explanation VII to the definition of turnover under Section 2(lii) of the KVAT Act. The learned Single Judge observed that issues in the writ petitions have to be considered in the light of Section 11 of the KVAT Act read with Section 2(lii). It was thereafter held that three factual situations may arise and the course of action to be adopted by the assessing authority would vary based on the provisions of the Act. Para 9, 10 and 11 of the judgment are relevant, which reads as under:-

“9. Firstly, there cannot be an insistence on an automatic reversal of input tax credit availed by the petitioners, proportionate to the discount subsequently received by them from their

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suppliers. The assessing authority would have to first ascertain the sale price of the product in the hands of the petitioners, and determine the output tax paid by the petitioners. If, thereafter, it is found that the output tax paid by the petitioner is less than the input tax that he has taken credit of, then the appropriate course of action would be to direct the petitioners to restrict the input tax credit to the extent provided in the second proviso to Section 11(3) of the KVAT Act.

10. Secondly, if the discount amounts received by the petitioners from their suppliers, can be demonstrated to be amounts received by them towards balance of the sale price of the goods, then the sales turnover of the petitioners can be enhanced to that extent alone and the output tax payable by the petitioner computed accordingly. Against this output tax found to be payable by the petitioners, the input tax availed by them would have to be set off to the extent possible. In this event, the assessing authorities would be acting in accordance with Explanation VII to Section 2 (lii) to determine the output tax payable by the petitioner on the enhanced sales turn over.

11. Thirdly, if it is found that the petitioners' sale price in respect of the product, is less than his purchase price, but it cannot be demonstrated that the discount subsequently received by the

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petitioners is an amount received towards the balance of the sale price, then, so long as the supplier of goods to the petitioners has paid his output tax, on the price inclusive of the discount that was subsequently offered to the petitioners, the input tax credit availed by the petitioners cannot be varied, taking note of the provisions of the 5th proviso to Section 11(3) of the KVAT Act.”

However, the matter was remitted back to the assessing authority for fresh consideration in the light of the observations made in the judgment.

10. The main argument raised by the learned senior counsel for the petitioner is that the scope and effect of the 5th proviso to Section 11(3) was not considered in the earlier Division Bench judgments and therefore the matter requires a fresh consideration. The learned Government Pleader on the other hand submits that the 5th proviso to Section 11(3) has no relevance to the factual aspects involved in the matter especially in the light of two Division Bench judgments which covers the field. Further the judgment in WP(C) No. 27088/14 and connected cases has no bearing to the factual aspects involved in the matter.

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11. The short question therefore to be considered is whether 5th proviso to Section 11(3) have any bearing on the factual issues arising in the case.

12. Section 11 relates to providing input tax credit to a registered dealer. Section 11(1) reads as under:-

“11. Input Tax Credit (1) Subject to the other provisions of this Section, any registered dealer, liable to tax under sub-section (1) of section 6, shall be eligible for input tax credit.”

13. Sub section (2) of section 11 relates to the manner and procedure in which the eligibility of input tax credit is allowed. Section 11(3) indicates that the input tax credit shall be allowed to a registered dealer in respect of a return period against the output tax payable by him for such period and the dealer shall pay to the Government the balance of the output tax in excess of the input tax credited in the manner prescribed. The 5th proviso which is the main provision relied upon by the learned counsel for the petitioner only indicates that the input tax credit shall not be available in respect of tax paid on the turnover subsequently

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allowed as discount, and shall be disallowed where it is found that the dealer has claimed input tax credit under this section on such turnover or of such goods used in the manufacture of goods sent outside. An amendment has been brought to the above proviso by the Finance Act, 2008, w.e.f. 1/04/2005 indicating that the amount covered under credit notes issued by a supplier that do not affect the input tax credit already availed of, or on account of reimbursement of any expenses incurred by the dealer shall not be reckoned for the purpose of assessment under the Act. The question would be whether the amendment brought to the 5th proviso to Section 11(3) has the effect of not including the credit notes issued by a supplier to the total turnover. Prior to amendment, there was no ambiguity to the above provision in so far as it was made clear that input tax credit shall not be available in respect of tax paid on the turnover subsequently allowed as discount. But it is relevant to note that though the statute had incorporated an amendment to proviso to Section 11(3) as per Finance Act, 2008, it has not touched on the issue regarding the

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turnover to be considered as far as the liability to pay tax is concerned. The amendment by the Finance Act, 2008 only clarifies the fact that the amount covered under credit notes issued by a supplier that do not affect the input tax credit already availed shall not be reckoned for the purpose of assessment under the Act. This provision according to me cannot be extended to the assessment of turnover for the purpose of payment of tax. Of course, it could be said that there is some ambiguity to the provision. But in so far as the liability to pay tax is on the turnover and discount given is part of the turnover, which is clearly indicated in **Cement House** (supra) and **Syed Muhammed** (supra), I do not think that a different view is possible to be taken in the matter.

14. Now coming to the judgment of the learned Single Judge in WP(C) No. 27088/2014 and connected cases, different eventualities had been mentioned and the factual circumstances will have to be considered on a case to case basis, to apply the said judgment. Even otherwise, as already held, the amendment

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to the 5th proviso to Section 11(3) has not changed the situation as far as liability to pay tax is concerned. Having regard to the aforesaid factual situation, I do not think that it is possible to take a different view from what has already been held and accordingly, the writ petition is dismissed. However, it is made clear that the petitioner is entitled to file an appropriate appeal before the competent appellate authority and the time during which this writ petition was pending before this Court shall stand excluded for the purpose of preferring the appeal. The recovery proceedings, if any, shall be kept in abeyance for three weeks to enable the petitioner to prefer appeal.

Sd/-

A.M. SHAFFIQUE, JUDGE

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PS TO JUDGE