

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

WEDNESDAY, THE 2ND DAY OF AUGUST 2023 / 11TH SRAVANA, 1945

WP(C) NO. 8773 OF 2016

PETITIONER/S:

M/S.PALLITHARA JEWELLERS, SUSHIL TOWERS, BANK
ROAD, KANNUR - 670 001, REPRESENTED BY ITS
MANAGING PARTNER PV LUKOSE.

BY ADVS.
SRI.S.ARUN RAJ
SMT.C.T.SUJA

RESPONDENT/S:

- 1 COMMERCIAL TAX OFFICER
1ST CIRCLE, KANNUR - 670 004.
- 2 DEPUTY COMMISSIONER
COMMERCIAL TAXES, KANNUR - 670 004.
- 3 STATE OF KERALA
REPRESENTED BY THE SECRETARY, TAXES DEPARTMENT,
GOVERNMENT SECRETARIATE, TRIVANDRUM - 695 001.

OTHER PRESENT:

SRI. V.K.SHAMSUDHEEN -GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 02.08.2023, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

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JUDGMENT

The writ petition is filed with the following prayers;

"i) To call for the records leading to the issuance of Exhibit P-4 notice dated 18-1-2016 issued u/s 25(1) by the 1st respondent for the year 2013-14 and to quash the same by issuing a writ of certiorari;

ii) To call for the records leading to the issuance of Exhibit P6 notice dated 18-02-2016 informing the cancellation of compounding for the year 2013-14 as per order dated 12-2-2016 of the 2nd respondent; Deputy Commissioner and to quash the same by issuing a writ of certiorari;

iii) to call for the records leading to the issuance of order No.B2-1016/16 dated 12-2-2016 by the 2nd respondent, the Deputy Commissioner, Commercial Taxes, Kannur (as mentioned in Exhibit P-6) and to quash the same by issuing a writ of Certiorari:"

2. Brief facts of the case are as follows;

The petitioner, a partnership firm, engaged in the manufacture and sale of gold jewellery under the name and style, "Pallithara Jewellers", is a registered dealer on the rolls of the first respondent. The petitioner opted for payment of tax at compounded rate as per Section

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8(f) of the Kerala Value Added Tax Act, 2003 (for short, "the KVAT Act") for the assessment year 2013-14 and was paying tax accordingly. Ext.P1 compounding application of the petitioner was accepted by the first respondent. The petitioner also filed annual return for the year 2013-14 along with the Trading, Profit & Loss A/c and the audit report in Form 13 along with Form 13A. While so, the petitioner was served with Ext.P4 notice proposing to reject the book of accounts and to assess the petitioner under Section 25 of the KVAT Act. On receipt of Ext.P4 notice dated 18.01.2016, the petitioner filed Ext.P5 reply dated 03.02.2016, stating that the compounding was already allowed and the tax is being paid at the compounded rate under Section 8 of the KVAT Act. Thereafter, the petitioner was served with Ext.P6 notice dated 18.02.2016, stating that the second respondent - Deputy Commissioner, Kannur - cancelled the compounding order. The petitioner

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was also asked to appear for a hearing on 25.02.2016 before the first respondent. It is aggrieved by Exts.P4 and P6, the petitioner has come up before this Court.

3. The first respondent filed a counter affidavit, wherein it is admitted that the petitioner filed Ext.P1 application before the assessing authority for payment of tax at the compounding rate for the year 2013-14. It is contended that on completion of the audit of accounts as prescribed under the KVAT Act, the petitioner filed audit report in Form No.13 and 13A, and on verification of the audit report, it was found that the petitioner has income under the head "other", which has to be assessed under the provisions of the KVAT Act and accordingly, Ext.P4 notice under Section 25(1) of the KVAT Act was issued to the petitioner. It is further contended that as per Ext.P6, the petitioner was intimated about the permission granted by the

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second respondent to cancel the compounding order for 2013-14 and the petitioner was also afforded a chance of hearing on 25.02.2016 and hence, there is no violation of natural justice in this case and the reason for the proposed cancellation of compounding order was clearly explained as per the pre-assessment notice dated 18.01.2016. It is further contended that even though an amount of Rs.1,39,82,082/- was shown as "other income" in the Trading, Profit & Loss A/c, this turnover was not reported in the self assessed returns filed by the petitioner and the assessing authority has good and sufficient reasons for cancellation of permission to pay tax at the compounding rate. According to the first respondent, the action of the assessing authority is strictly in accordance with the provisions under the KVAT Act.

4. Heard the learned counsel for the petitioner and the learned Government Pleader.

5. The learned counsel for the petitioner

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submits that the petitioner was permitted to pay tax at the compounded rate under Section 8(f) of the KVAT Act for the assessment year 2013-14 and was regularly paying tax at the compounded rate and it is thereafter that Ext.P4 notice was issued by the first respondent calling for the records for the reopening of assessment. It is further submitted that on receipt of Ext.P4 notice, the petitioner filed Ext.P5 reply, pointing out that the compounding application filed by them was allowed. However, immediately thereafter, the first respondent issued Ext.P6 notice, which reads as follows;

"Please take notice that your compounding order cancelled as per DC's order No.B2-1016/16 Dated.12.02.2016. You are directed to rectify the concerned return and books of accounts through the electronic media and upto date transactions. You are also given an opportunity of being heard on 25.02.2016 at 10 am at my office, Podikund, Kannur failing which the proposal will be given effect."

The learned counsel for the petitioner submits that at the time of issuance of Ext.P6 notice, the first respondent was under the impression

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that the compounding was already cancelled. The learned counsel points out that it is provided in Section 8(f)(iv) of the KVAT Act that no orders under the sub-clause shall be issued without giving the dealer an opportunity of being heard and without prior approval of the District Deputy Commissioner. It is further submitted that the petitioner was not issued with any order other than Ext.P6 notice and the first respondent was duty bound to issue notice as well as afford an opportunity of being heard to the petitioner before cancellation of the compounding order. It is further pointed out that before passing such orders, prior approval of the Deputy Commissioner also has to be obtained by the first respondent.

6. The learned Government Pleader, *per contra*, would submit that Ext.P6 notice was only a proposal for cancellation of the compounding order and not a cancellation order as stated by the petitioner. However, it is further submitted

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that if the assessing authority finds that there is valid and sufficient reasons to cancel the order, the assessing authority has to obtain prior permission from the Deputy Commissioner.

7. In this context, it is relevant to refer to Section 8(f)(iv) of the KVAT Act, which reads thus;

"(iv) The assessing authority, for valid and sufficient reasons, such as shifting of place of business, furnishing of false information, suppression of relevant information, failure of furnish such information demanded, may refuse permission to pay tax under this section and cancel the permission, if any, granted:

Provided that no orders under this sub-clause shall be issued without giving the dealer an opportunity of being heard and without prior approval of the District Deputy Commissioner."

So, it is very clear that as provided in Section 8(f)(iv) of the KVAT Act, no orders under this sub-clause shall be issued without giving the dealer an opportunity of being heard and without prior approval of the second respondent.

8. On a perusal of Ext.P6, it is seen that even before issuing notice to the petitioner

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proposing to cancel the compounding order, the second respondent cancelled the compounding order as per order No.B2-1016/16 dated 12.02.2016, which is *per se* illegal. As per proviso to Section 8(f)(iv) of the KVAT Act, the first respondent assessing authority has to obtain prior approval of the Deputy Commissioner before passing any such order of cancellation of compounding order. Here, the first respondent has stated in Ext.P6 notice that the compounding order has already been cancelled by the second respondent on 12.02.2016. Further, in Ext.P6 notice, the petitioner was directed to rectify the concerned return and books of accounts through the electronic media and up to date transactions and was given an opportunity of hearing, failing which the proposal would be given effect.

9. Going through the entire records produced in this case, it is seen that the petitioner was

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not afforded an opportunity of being heard before a decision for cancellation of the compound order was obtained from the second respondent. Though it was contended by the learned Government Pleader that Ext.P6 notice was only a proposal for cancellation of the compounding order and not a cancellation order, it is very clearly stated in Ext.P6 notice that the compounding order was cancelled by the second respondent, which is *per se* illegal.

10. Hence, on a consideration of the entire facts and circumstances, I am of the opinion that Ext.P6 is liable to be set aside. Similarly, the order of the second respondent referred to in Ext.P6, viz., Order No.B2-1016/16 dated 12.02.2016, is also liable to be set aside.

In the result, the writ petition is disposed of, as follows;

- a) Ext.P6 notice issued by the second respondent is set aside.

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- b) Order No.B2-1016/16 dated 12.02.2016 of the second respondent, referred to in Ext.P6 notice, is set aside.
- c) The first respondent is directed to issue fresh notice to the petitioner on the proposal for cancellation of the compounding order, within a period of one month from the date of receipt of a certified copy of this judgment, to file its objections, if any.
- d) The petitioner is directed to file objection, if any, to Ext.P4 notice and the fresh notice, if any, issued by the first respondent as directed above, on the proposal for cancellation of the compounding order, within a period of one month thereafter.
- e) The first respondent shall pass final orders in the matter after advertizing to the objections, if any, filed by the petitioner and after affording an opportunity of being heard to the petitioner.

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The petitioner shall produce a certified copy of this judgment along with the writ petition before the first respondent for compliance.

Sd/-

SHOBA ANNAMMA EAPEN

JUDGE

bka/-

APPENDIX OF WP(C) 8773/2016

PETITIONER EXHIBITS

P1 - TRUE COPY OF THE COMPOUNDING APPLICATION FILED BY THE PETITIONER FIRM UNDER SECTION 8(F) OF THE KVAT ACT FOR THE AY 2013-14.

P2 - TRUE COPY OF THE TRADING AND PROFIT AND LOSS ACCOUNT FOR THE YEAR 2013-14.

P3 - TRUE COPY OF THE AUDIT REPORT INFORM 13 ALONG WITH FORM 13 A FOR THE YEAR 2013-14.

P4 - TRUE COPY OF THE NOTICE DT. 18.1.2016 ISSUED U/S 25(1) OF THE KVAT ACT TO THE PETITIONER BY THE 1ST RESPONDENT FOR THE YEAR 2013-14.

P5 - TRUE COPY OF THE REPLY/OBJECTION DT. 03.2.2016 SUBMITTED TO THE 1ST RESPONDENT BY THE PETITIONER.

P6 - TRUE COPY OF THE LETTER DT. 18.2.2016 ISSUED BY THE 1ST RESPONDENT TO THE PETITIONER.

P7 - TRUE COPY OF THE LETTER DT. 24.2.2016 SUBMITTED TO THE 1ST RESPONDENT BY THE PETITIONER.