IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN
&
THE HONOURABLE MR. JUSTICE ASHOK MENON

MONDAY, THE 5TH DAY OF MARCH 2018 / 14TH PHALGUNA, 1939

WA.No. 387 of 2018

AGAINST THE JUDGMENT IN WP(C) 12649/2017 DATED 13-11-2017

APPELLANT/RESPONDENT IN THE W.P.(C)

COMMERCIAL TAX OFFICER,
OFFICE OF THE COMMERCIAL TAX OFFICER, KVAT 4TH CIRCLE,
ERNAKULAM - 682 018.

BY GOVERNMENT PLEADER SRI C.E.UNNIKRISHANAN

RESPONDENT/PETITIONER IN THE W.P.(C):

M/S. MILANO ICE CREAM PRIVATE LIMITED,
SEVIKA HALL, NO. 39/4304(1), PALLIMUKKU, M.G. ROAD P.O.,
KOCHI -16, REPRESENTED BY ITS MANAGING DIRECTOR,
GIANCARLO SEGALINI.

BY ADV. SRI.JOSE JACOB

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 05-03-2018, ALONG WITH WA NO.516/2018 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.V.

C.R.

K. VINOD CHANDRAN & ASHOK MENON, JJ.

W.A. Nos.387 & 516 of 2018

Dated this the 5th day of March, 2018

JUDGMENT

K. Vinod Chandran, J.

The appeals are filed against the judgment of the learned Single Judge, affirming the right of the petitioner to pay tax under the compounding scheme. The respondent assessee is engaged in the manufacture and sale of ice-creams. The assessments were of the year 2015-2016 and 2016-2017. In April, 2015, the assessee made an application for compounding, which was not acted upon by the Assessing Officer, upon which the assessee commenced payment of tax on quarterly basis and continued for three quarters. In January, 2016 the

Assessing Officer issued a notice to the assessee threatening cancellation of the compounding and regular assessment. The notice was on the ground that there could be no compounding applied for, for ice-creams which is not a cooked food. Regular assessment was completed for the year as seen from Exhibit P16 produced in W.P.(C)No. 12649 of 2017.

2. While the said proceedings were pending, in the next year ie: 2016-2017, the assessee made a further application for compounding in April, 2016. This was also not responded to, upon which the assessee remitted tax as per the compounding scheme again for three quarters. In February, 2017 yet another notice for cancellation, as issued in the earlier year was issued. Regular assessment under Section 25 of the Kerala Value Added Tax Act, 2003 [for brevity, the KVAT Act] was completed for the

four quarters deviating from the compounding scheme. The assessment order for 2015-2016 is Ext.P16 and that for the first three quarters of 2016-2017 are seen from Exhibits P17, P18 and P19 produced in W.P.(C)No. 12649 of 2017. The order for the last quarter of 2016-2017 is found in W.P.(C)No.23157 of 2017.

3. The assessee challenged the aforesaid orders in the two writ petitions. The assessee contended that though specific permission was not granted on the compounding application and an order issued, the payment of quarterly tax, as per the scheme makes it a concluded contract and the Department cannot resile from it in the course of an year. The learned Single Judge allowed the claim of the assessee. The learned Single Judge by the impugned judgment, relied on ***Johnson & Johnson Ltd. V.***

Assistant Commissioner [2009 23 VST 274], to find that when an assessee opts for payment of tax on compounded basis, and discharges his liability as per the scheme and when such amounts are accepted by the department without demur, then the department cannot subsequently turn around and subject the assessee to regular assessment under the provisions of the Act. The learned Single Judge held that it would be unconscionable for the department to now take a stand that the petitioner should pay tax on regular basis under Section 6 of the KVAT Act and set aside the assessment orders. The learned Single Judge also deprecated the manner in which the Commercial Taxes Department in the State was functioning.

4. We fully agree with the learned Single Judge's finding in so far as the functioning or the

lack of it, of the Commercial Taxes Department. At the first instance a compounding application was not responded to and after three quarters a notice was issued threatening cancellation. In the very next year the assessee again applied for compounding and the Assessing Officer sat over it without finalizing the earlier notice for cancellation and without rejecting the application for that subsequent year and even permitting remittance of quarterly tax under the scheme. The learned Special Government Pleader (Taxes), who argued the appeals on behalf of the State would point out that there were two Officers in the two assessment years. We are not convinced that this would be an explanation for the laches of the Officers in not having looked at the applications in time. In any event we are more concerned with

the merits of the matter. The lethargy of the department,however,cannot absolve the assessee from the natural consequences flowing from the Act.

5. The learned Special Government Pleader would place before us a decision of the Division Bench of this Court reported in ***Caravan Softies v. State of Kerala [(2006) 148 STC 393 (Ker)]*** and a Full Bench decision of the Gwalior Bench of the High Court of Madhya Pradesh in ***Commissioner of Sales Tax, M.P. V. Gyanmal Kesharichand [1984 (55) STC 140]*** to urge the position that ice-cream is not a cooked food. We notice that the consideration therein made, was of in *pari materia* entries under the Schedule to the KGST Act.

6. We find appealing, the argument of the learned Special Government Pleader, based on the entries in the schedule. Cooked food is available

in Third Schedule taxable at 4% under entry 30A, which is extracted here under:

> *"Cooked food other than those served to any airline service company or institution or shipping company for serving in aircraft, ship or steamer or served in aircraft, ship, steamer, bar attached hotels and star hotels."*

As against this, 'Ice-creams' specifically is included in the notified list of goods taxable @ 12.5% under entry 64(9):

> ***"64. Milk products including, condensed milk, ghee, butter, butter oil, ice creams, margarine, whether or not bottled, canned or packed.***
>
> *xxxxx xxxxx xxxxx*
>
> *(9) Ice cream."*

7. The learned counsel for the respondent also has a case that ice-creams would be covered under sweets, since sweets are also included in the provision for compounding under section 8. The learned counsel for the respondent further refers

to “food” as found in the notified list at Entry 42 and submits that cooked food would take in the foods referred to therein. It has to be taken that what is permissible for compounding as cooked food under Section 8 includes all generic items falling within that term. We are not able to countenance such an argument, especially since ice-creams are found in a different entry in the notified goods taxable at 14.5%.

8. We are not looking at whether “ice-cream” as generally understood can be termed a “cooked food” a “food” or a “sweet”. It may in general terms be any or all of these, but we are concerned with the specific entries in a taxing statute for purposes of taxation. The common parlance test has no relevance when there is a specific entry. ***Ponds India Limited v. Commissioner of Trade Tax – (2008)***

15 VST 256 (SC) held that "*Different tests are laid down for interpretation of an entry in taxing statue namely dictionary meaning, technical meaning, users point of view, popular meaning etc*" (sic-para:43). It cannot normally be used for the purpose of interpreting a taxing statute or classification of a product viz-a-viz an entry in statute. Though common parlance can be an aid to interpretation; whether that is required is the discretion of the Court looking at the language employed in the Statute. The Hon'ble Supreme Court held that a dictionary meaning would not be relevant when there is a definition in the Statute itself. "Ice-creams" having been specifically referred to under the notified goods, there can be no general meanings applied to permit a particular scheme applicable to a different entry. When "ice-

cream" "cooked food" and "food" are separately included in the schedules and notifications prescribing the rates of taxation, we cannot understand the legislature having an intention to include all cooked foods, in common parlance, under the compounding scheme.

9. When ice-cream is treated as a separate commodity included in the notified goods taxable at 14.5% there could not have been a compounding application filed by the petitioner, taking ice-creams to be coming within the definition of cooked-food. Even if an order permitting such compounding was passed, it could have been *suo motu* revised under Section 56 of the KVAT Act. The limitation for such revision is also not crossed. In such circumstances, the assessee cannot claim that the contract entered into between the

Department and the assessee is now concluded and none can resile from it. The order permitting compounding, is revisable under Section 56, in circumstances where the compounding scheme itself is not applicable to the dealer and the order was issued erroneously. This will not amount to resiling from the contract, but would be a permissible exercise for reason of prejudice occasioned to the Revenue. Ice-cream, as is seen from KVAT Act, is treated differently from cooked food and is taxable at a higher rate and included in the notified goods. There could not have been an application for compounding filed and in such circumstances, we are of the opinion that the learned Single Judge ought not to have set aside the assessment.

10. Ideally the Department ought to have taken

up the matter under Section 56, but they were disabled in so doing for reason of the absence of an order permitting compounding. When there is deemed permission then there is a deemed order too, which can be revised. It is trite that when there is a deeming provision contemplating or imagining a putative state of affairs to exist, then the imagination cannot be allowed to boggle at the logical consequences of such putative state of affairs. When there is deemed to be an order; in the circumstance of an application for compounding not being responded to and the assessee permitted to make remittances under the scheme, then it cannot be found to be non-existent for the purposes of a *suo motu* revision. We would have send it back for such consideration but for the hidden prejudice caused to the assessee by reason of the statutory

consequences visiting the assessee for reason of the purchase details not being uploaded; in the given circumstance.

11. Considering the controversy and also keeping in mind the hardship as projected by the learned Counsel for the assessee, we deem it proper to dispose of the appeal with the following directions, while vacating the orders of the learned Single Judge interfering with the cancellation of compounding and the regular assessment made.

12. While permitting the cancellation of the compounding, deemed to have been permitted, we all the same set aside the assessments for fresh assessment for the following reasons. We notice that a penalty has been imposed along with the regular assessment made, which is not possible. The

assessee made a bonafide attempt to be included under the compounding scheme on the reasonable presumption that “ice-creams” would also be “cooked food”. A vigilant officer could have rejected the application. The department was not vigilant but was also lethargic in so far as permitting the assessee to make remittances under the scheme for the subsequent year also when already notice was issued for cancellation of the compounding in the previous year. There can be no contumacious conduct found on the part of the asessee.

13. Further under the regular assessment the assessee would have uploaded the purchases and would also have been entitled to input tax credit, which now the aseessee is unable to claim. Hence the assessing officer would issue fresh notice for assessment, and the assessee would be entitled to

produce the purchase invoices for the two years, which shall be taken into account and the input tax credit allowed to the extent proved by invoices. We make it clear that this shall be done *dehors* the assessee having not uploaded the purchase invoices and no technical glitches can be claimed by the department to deny such credit. The tax paid under Section 8 has to be given credit and interest on the tax demanded on assessment shall run only from one month from the date of the finalisation of the assessment. There shall also be no penalty levied. The above appeals are disposed of. No Costs.

Sd/-
K. VINOD CHANDRAN,
JUDGE.

Sd/-
ASHOK MENON,
JUDGE.

//True Copy//

P.A. To Judge

sp/09/03/18