Ncp Agencies vs State of Kerala

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Court : Kerala

Decided On : Mar-01-2023

Judge : Honourable Mr. Justice Amit Rawal

Appeal No. : WP(C)/30932/2010

Appellant : Ncp Agencies

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL WEDNESDAY, THE 1ST DAY OF MARCH 2023 / 10TH PHALGUNA, 1944 WP(C) NO. 14937 OF 2009 PETITIONERS: 1 M/S.CHERUKULATHU AGENCIES KOTTIYAM, REPRESENTED BY ITS PROPRIETOR MR.THAMPI.N. 2 WARRIER'S HOSPITAL AND PANCHAKARMA CENTRE, PUTHIYAVILA P.O., VELANCHIRA, KAYAMKULAM, PIN 690531, REPRESENTED BY ITS MANAGING PARTNER DR.S.SAJIKUMAR. BY ADVS. SRI.E.K.NANDAKUMAR SRI.ANIL D. NAIR SRI.P.BENNY THOMAS SRI.A.K.JAYASANKAR NAMBIAR SRI.K.JOHN MATHAI RESPONDENTS: 1 STATE OF KERALA REPRESENTED BY THE SECRETARY TO GOVERNMENT, TAXES DEPARTMENT, GOVT.SECRETARIAT,

THIRUVANANTHAPURAM 695001.

2 THE COMMISSIONER OF COMMERCIAL TAXES THIRUVANANTHAPURAM 695033. 3 THE COMMERCIAL TAX OFFICER COMMERCIAL TAX OFFICE, CHATHANOOR. BY ADV.SMT.RESHMITHA RAMACHANDRAN, SPL. GOVERNMENT PLEADER, TAX THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 01.03.2023, ALONG WITH WP(C)NO.30932/2010, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: WP(C)Nos.14937/2009 & 30932/2010 2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL WEDNESDAY, THE 1ST DAY OF MARCH 2023 / 10TH PHALGUNA, 1944 WP(C) NO. 30932 OF 2010 PETITIONER: NCP AGENCIES SAKTHAN TOWERS, PALLIKULAM ROAD, THRISSUR,, REPRESENTED BY ITS MANAGING PARTNER, MR.T.V.GEORGE BY ADVS. SRI.E.K.NANDAKUMAR SRI.P.BENNY THOMAS SRI.P.GOPINATH SRI.A.K.JAYASANKAR NAMBIAR SRI.K.JOHN MATHAI SRI.KURYAN THOMAS RESPONDENTS: 1 STATE OF KERALA REPRESENTED BY THE SECRETARY TO GOVERNMENT, TAXES DEPARTMENT, GOVT.SECRETARIAT,THIRUVANANTHAPURAM-695001

2 THE COMMERCIAL TAX OFFICER FIRST CIRCLE, THRISSUR-680003 SMT.RESHMITHA RAMACHANDRAN, SPL. GOVERNMENT PLEADER, TAX THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 01.03.2023, ALONG WITH WP(C).14937/2009, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: WP(C)Nos.14937/2009 & 30932/2010 3

JUDGMENT

[WP(C) Nos.14937/2009, 30932/2010] This order of mine shall dispose of two writ petitions. The assessment order dated 27.04.2009, Ext.P6, of the competent authority under the erstwhile Kerala Value Added Tax Act and the Rules without availing the remedy of appeal is under challenge in W.P.(C)No.14937 of 2009.

2. The 1st petitioner is the dealer and the 2 nd petitioner is

the manufacturer of medicines and drugs. The 2 nd petitioner has already been registered under the provisions of the then Kerala VAT Act and had been availing the benefit of compounding scheme as provided in the Act. The 2 nd petitioner had been manufacturing products other than ayurvedic medicines and as per the provisions of Section 8(e) of the KVAT Act, 2003, availed the benefit of compounding and as per Rule 10(1)(k), any dealer in case of obtaining of compounding by the manufacturer can seek exemption from payment of the tax.

3. In the present case, the product involved is an ayurvedic

cosmetic. The rate of tax for ayurvedic medicines was at 4%, whereas for cosmetics at 12.5%. The 2 nd petitioner, the manufacturer, preferred an application for permission for payment WP(C)Nos.14937/2009 & 30932/2010 4 of tax on compounded basis in Form ID for the assessment year 2006-2007, which was considered by the assessing authority and after finding the same to be in order, permission was granted to effect the payment of tax on compounded basis, on the premise that it was exigible to 4% of tax. Since petitioner No.1 could not in such circumstance claim the exemption was also liable to pay the tax and in this view of the matter, was served with a notice, which culminated to assessment order, Ext.P6, commanding the petitioner to pay the tax @ 12.5%.

4. Learned counsel appearing on behalf of the petitioners

submitted that the provisions of the KVAT Act were amended vide amendment dated 01.04.2011 by inserting 13th proviso under Section 6 whereby Ayurvedic cosmetics were exigible for tax @ 4% instead of 12.5%. Thus, it would be farcical exercise for the petitioners to avail the remedy of appeal, in view of the Division Bench judgment of this Court dated 31.03.2022 rendered in O.T.Revision No.84 of 2018 titled as State of Kerala v. Raphel T. Joseph, M/s.Renil Auto Garage, Kecheri, Thrissur, even when the manufacturer has availed the remedy of compounding, a dealer can always seek the re-assessment.

5. On the other hand, learned State Counsel submitted that

WP(C)Nos.14937/2009 & 30932/2010 5 though the petitioners have taken many pleas with regard to the non-payment of tax even @ 4%, but, in view of the fact that the manufacturer has already obtained the compounding, there would not be any aversion on behalf of the respondents for re- assessment, in view of the aforesaid Division Bench judgment of this Court.

6. Heard the learned counsel for the parties and appraised the paper books.

7. No doubt, the order of assessment, Ext.P6, as per the

provisions of the then KVAT Act is assailable by preferring an appeal on deposit of certain amount, but the fact remains that the legislature had caused an amendment under Section 6 of the Act by inserting 13th proviso with effect from 01.04.2011 to be applicable with retrospective effect from 01.04.2005 to 12.11.2009, which reads as under:

> Provided also that the tax payable on ayurvedic cosmetic products manufactured under a drug license granted under the Drugs and Cosmetic Cosmetics Act, 1940 (Central Act 23 of 1940) containing added medicaments having subsidiary therapeutic or prophylactic uses and those notified under clause (d) of sub-section (1) of section 6, for the period on and from the 1st day of April, 2005 to the 12th day of November, 2009 shall be at four per cent.

8. The assessment order was based upon the then

provisions of the Act, whereby the rate of sale tax on ayurvedic WP(C)Nos.14937/2009 & 30932/2010 6 medicines was at 12.5%. It is a matter of record that the 2 nd petitioner vide Ext.P1 has already obtained compounding and paid tax @ 4%. It is a fit case where the order of assessment is required to be re-visited at the level of the assessment officer, in view of the ratio decidendi culled out in paragraph Nos.11 and 11.1 of the judgment, which read as under:

> 11. For the above reasons and discussion, we are of the view that the principle laid down in A M Muhammed Ali case is not correct and in line

with the textual interpretation and scheme of incidence and levy of tax, an alternate mode of tax through compounded rate, deemed assessment, and power of reassessment. Therefore, we hold that the principle laid down in A M Muhammed Ali case does not represent the correct proposition of law. The powers under Sections 25, 56, and 66 are separate and independently conferred on different authorities to prevent loss of revenue. 11.1 Accordingly, we hold that the Assessing Officer has power and jurisdiction to initiate reassessment in cases under Section 25, where compounding rate is accepted on erroneous details, misrepresentation, fraud, inapplicable situations, and it is immaterial whether the initial order suffers from the vice of being non-est or not. The power to initiate reassessment or reopening of assessment is from the Revenue perspective. Upon setting in motion, the reopening or reassessment under Section 25, the dealer is neither denied nor deprived of the original reasons which constituted for opting for the compounded rate of tax for reiteration and request for withdrawing reassessment as unavailable to the Revenue. In cases where the dealer insists on continuing the assessment under Section 8 of the KVAT Act the Assessing Officer, like in any other disputed question of fact that may arise in an enquiry under Section 25, is obliged by law to enquire into the very basis of granting compounded rate, afford an opportunity, and while making the final reassessment order, decides the basic issues on hand.

9. Writ petition No.30932 of 2010 has been filed on

WP(C)Nos.14937/2009 & 30932/2010 7 behalf of a dealer, challenging the notices calling upon the petitioner to pay the tax @ 12.5% for the assessment year 2008-09.

10. This is also a case where the petitioner is at liberty to approach the competent authority for reduction of the demand raised in the notice for payment of the tax, in view of the findings rendered in the other matter.

11. The impugned orders in both the writ petitions are set

aside and the matters are directed to be re-visited, in view of the observations recorded herein above. Let this exercise be undertaken within a period of three months from the date of receipt of a certified copy of this judgment. The parties and their learned counsel are directed to appear before the Assessment Officer on 04.04.2023. Writ Petitions are disposed of as above. Sd/- AMIT RAWAL JUDGE csl WP(C)Nos.14937/2009 & 30932/2010 8 APPENDIX IN WP(C) NO.14937/2009 PETITIONERS' DOCUMENTS: EXT.P1 : COPY OF THE APPLICATION SUBMITTED BY THE 2ND PETITIONER FOR THE YEAR 2006-07 DATED 29.4.2006 EXT.P2 : COPY OF THE PERISSION GRANTED FOR THE YEAR 2006- 07 DATED 23.03.2007. EXT.P3 : COPY OF THE RETURNS FILED BY THE 1ST PETITIONER FOR THE YEAR 2006-07 DATED 28.04.2007 EXT.P4 : COPY OF THE NOTICE ISSUED TO THE 1ST PETITIONER DATED 20.2.2009 EXT.P5 : COPY OF THE REPLY FILED BY THE 1ST PETITIONER DATED 23.3.2009. EXT.P6 : COPY OF THE ORDER OF THE 3RD RESPONDENT DATED 27.4.2009 EXT.P7 : COPY OF THE DEMAND NOTICE DATED 28.4.2009 ISSUED BY THE 3RD RESPONDENT. EXT.P8 : COPY OF THE JUDGMENT IN WP(C) NO.5866/2009 DATED 24.02.2009 EXT.P9 : COPY OF THE ORDER IN WP(C) NO.8070/2009 DATED 13.3.2009 EXT.P10 : COPY OF THE CLARIFICATION DATED 29.4.2006 WP(C)Nos.14937/2009 & 30932/2010 9 APPENDIX IN WP(C) NO.30932/2010 PETITIONER'S DOCUMENTS: EXT.P1 : COPY OF THE INVOICE DATED 29.8.2008 ISSUED BY M/S.KAYS ENTERPRISES, PALAKKAD EXT.P1(a) : COPY OF THE INVOICE DATED 30.01.2009 ISSUED BY M/S.ELDER PHARMACEUTICALS LTD., KANNUR EXT.P1(b) : COPY OF THE INVOICE DATED 20.2.2009 ISSUED BY M/S.SRI BHAGAVATHY MADOM AYURVEDA NILETHANAM, THRISSUR EXT.P1(c) : COPY OF THE INVOICE DATED 28.2.2009 ISSUED BY M/S.SRI BHAGAVATHY MADOM AYURVEDA NILETHANAM, THRISSUR EXT.P1(d) : COPY OF THE INVOICE DATED 28.2.2009 ISSUED BY M/S.SRI BHAGAVATHY MADOM AYURVEDA NILETHANAM, THRISSUR EXT.P1(e) : COPY OF THE INVOICE DATED 28.2.2009 ISSUED BY M/S.SRI BHAGAVATHY MADOM AYURVEDA NILETHANAM, THRISSUR EXT.P1(f) : COPY OF THE INVOICE DATED 28.2.2009 ISSUED BY M/S.SRI BHAGAVATHY MADOM AYURVEDA NILETHANAM, THRISSUR EXT.P1(g) : COPY OF THE INVOICE DATED

23.3.2009 ISSUED BY M/S.SREEDHAREEYAM AYURVEDIC MEDICINES (P) LTD. THRISSUR. EXT.P1(h) : COPY OF THE INVOICE DATED 24.3.2009 ISSUED BY M/S.SITARAM AYURVEDA PHARMACY LTD., THRISSUR EXT.P1(i) : COPY OF THE INVOICE DATED 26.3.2009 ISSUED BY M/S.ANUJITH AGENCIES, ERNAKULAM, C&F AGENTS OF M/S.NOVARTIS INDIA LTD. EXT.P1(j) : COPY OF THE INVOICE DATED 28.2.2009 ISSUED BY M/S.JANATHA TRADING CO., THODUPUZHA EXT.P1(k) : COPY OF THE INVOICE DATED 28.2.2009 ISSUED BY M/S.JANATHA TRADING CO., THODUPUZHA EXT.P1(l) : COPY OF THE INVOICE DATED 31.12.2008 ISSUED BY M/S.GLORIA STORES, THRISSUR WP(C)Nos.14937/2009 & 30932/2010 10 EXT.P1(m) : COPY OF THE INVOICE DATED 31.12.2008 ISSUED BY M/S.GLORIA STORES, THRISSUR EXT.P1(n) : COPY OF THE INVOICE DATED 14.10.2008 ISSUED BY M/S.ASHTAVAIDYA HERBAL PHARMA, ETTUMANOOR EXT.P1(o) : COPY OF THE INVOICE DATED 27.3.2009 ISSUED BY M/S.ALPHA AYURVEDA PHARMACEUTICALS, PATHANAMTHITTA EXT.P1(p) : COPY OF THE INVOICE DATED 30.1.2009 ISSUED BY M/S.DABUR INDIA LTD., ALUVA. EXT.P1(q) : COPY OF THE INVOICE DATED 25.11.2008 ISSUED BY M/S.DABUR INDIA LTD., ALUVA. EXT.P1(r) : COPY OF THE INVOICE DATED 26.3.2009 ISSUED BY M/.S.LINE LINES, THRISSUR. EXT.P1(s) : COPY OF THE INVOICE DATED 18.12.2008 ISSUED BY M/S.CHAITHANYA MARKETERS,VADAKARA. EXT.P1(t) : COPY OF THE INVOICE DATED 11.3.2009 ISSUED BY M/S.DHATHRI AYURVEDA (P) LTD., ERNAKULAM EXT.P1(u) : COPY OF THE INVOICE DATED 25.3.2009 ISSUED BY M/S.DHATHRI AYURVEDA (P) LTD. ERNAKULAM EXT.P1(v) : COPY OF THE INVOICE DATED 24.2.2009 ISSUED BY M/S.GEO PAUL & CO.THRISSUR EXT.P1(w) : COPY OF THE INVOICE DATED 30.1.2009 ISSUED BY M/S.BRUKLYN PHARMA DISTRIBUTORS (P) LTD. KOCHI EXT.P1(x) : COPY OF THE INVOICE DATED 25.3.2009 ISSUED BY M/S.EMAMI LTD. THRISSUR EXT.P1(y) : COPY OF THE INVOICE DATED 18.3.2009 ISSUED BY M/S.INDIAN PHARMACY, THRISSUR EXT.P1(z) : COPY OF THE INVOICE DATED 18.3.2009 ISSUED BY M/S.INDIAN PHARMACY, THRISSUR EXT.P1(aa): COPY OF THE INVOICE DATED 31.1.2009 ISSUED BY M/S.K.P.NAMBOODIRIS AYURVEDICS, THRISSUR EXT.P1(ab): COPY OF THE INVOICE DATED

20.2.2009 ISSUED BY M/S.KANDAMKULATHI VAIDYASALA, THRISSUR WP(C)Nos.14937/2009 & 30932/2010 11 EXT.P1(ac): COPY OF THE INVOICE DATED 2.3.2009 ISSUED BY M/S.KANDAMKULATHI VAIDYASALA, THRISSUR EXT.P1(ad): COPY OF THE INVOICE DATED 17.3.2009 ISSUED BY M/S.MVM AYURVEDIC RESEARCH LAB, KOLLAM EXT.P1(ae): COPY OF THE INVOICE DATED 14.11.2008 ISSUED BY M/S.CHARTERED SERVICES, CHALAKKUDY EXT.P1(af): COPY OF THE INVOICE DATED 29.1.2009 ISSUED BY M/S.OZONE AYURVEDICS, KOCHI EXT.P1(ag): COPY OF THE INVOICE DATED 29.1.2009 ISSUED BY M/S.OZONE AYURVEDICS, KOCHI EXT.P1(ah): COPY OF THE INVOICE DATED 23.3.2009 ISSUED BY M/S.K.T.KURUVILLA SON, KOCHI EXT.P1(ai): COPY OF THE INVOICE DATED 29.1.2009 ISSUED BY M/S.PANKAJAKASTHURI HERBALS INDIA (P) LTD., THIRUVANANTHAPURAM EXT.P1(aj): COPY OF THE INVOICE DATED 29.1.2009 ISSUED BY M/S.PANKAJAKASTHURI HERBALS INDIA (P) LTD., THIRUVANANTHAPURAM EXT.P1(ak): COPY OF THE INVOICE DATED 15.1.2009 ISSUED BY M/S.PANKAJAKASTHURI HERBALS INDIA (P) LTD., THIRUVANANTHAPURAM EXT.P1(al): COPY OF THE INVOICE DATED 27.9.2008 ISSUED BY M/S.SOLAR ASSOCIATES, ALAPPUZHA EXT.P1(am): COPY OF THE INVOICE DATED 25.10.2008 ISSUED BY M/S.RETNAVILAS AYURVEDA OUSHADHA SALA (P) LTD. KOCHI EXT.P2 : COPY OF THE NOTICE DATED 21.8.2010 ISSUED BY THE 2ND RESPONDENT. EXT.P3 : COPY OF THE REPLY DATED 20.9.2010 FILED BEFORE THE 2ND RESPONDENT. EXT.P4 : COPY OF THE INTERIM ORDER DATED 20.1.2010 IN I.A.3639/2009 IN OT.APPL.NO.3/2010 EXT.P5 : COPY OF THE INTERIM ORDER DATED 2.7.2009 PASSED IN WP(C) NO.8070/2009