**(2016) 02 KAR CK 0244**

**In the Karnataka High Court**

**Case No :** Writ Petition Nos. 32384-32395 of 2015 (T-RES)

R.K. Color Lab and Studio APPELLANT

Vs

State of Karnataka and Others RESPONDENT

**Date of Decision :** 18-02-2016

**Acts Referred:**

Karnataka Value Added Tax Act, 2003 — Section 38, Section 39(1), Section 69(1)

**Citation :** (2016) 02 KAR CK 0244

**Hon'ble Judges :** Anand Byrareddy, J.

**Bench :** Single Bench

**Advocate :** K. Arvind Kamath, Advocate, for the Appellant; S.V. Giri Kumar, Additional Government Advocate, for the Respondent

**Final Decision :** Disposed Off

## Judgement

Anand Byrareddy, J.—1. The petitions coming on for preliminary hearing, are considered for final disposal. The learned Government Advocate is directed to take notice.

2. The facts are, the petitioner is a firm engaged in the business of photo printing and processing along with providing allied services. The petitioner is a dealer registered under the Karnataka Sales Tax Act, 1957 (hereinafter referred to as ''the KST Act'', for brevity), Karnataka Tax on Entry of Goods Act, 1979 (hereinafter referred to as ''the KTEG Act'', for brevity) and Karnataka Value Added Tax Act, 2003 (hereinafter referred to as ''the KVAT Act'', for brevity).

The VI Schedule to the KST Act deals with ''works contracts'' that is chargeable to tax under the said Act. The activity of photo printing and processing is a service contract according to the petitioner, as the value of the goods used in such activities is negligible. This was questioned, which was settled by the Supreme Court in its earlier judgment in the case of Rainbow Colour Lab and Another vs. State of Madhya Pradesh and Others , 2000 (2) SCC 385. However, in a later judgment, namely ACC Limited vs. Commissioner of Customs , (2001) 4 SCC 593, the Supreme Court had expressed its doubts about the correctness of the law laid down in the case of Rainbow Colour Lab supra. The Commissioner of Commercial Taxes, taking cue from the said judgment, had issued a circular instructing the assessing authorities to proceed with the assessment as per Entry 25 which originally stood. This was challenged before this Court in a batch of writ petitions. This Court had allowed the petitions in the case of M/s. Golden Color Labs and Studio and Others vs. The Commissioner of Commercial Taxes ILR 2003 EAR 4883, holding that a provision once declared as unconstitutional, could not be brought to life by mere administrative instructions, unless it was re-enacted by the State Legislature.

3. Thereafter, the first respondent re-introduced Entry 25 in Schedule VI to the KST Act in 2004, in identical terms as it appeared earlier and that too with retrospective effect, with effect from 1.7.1989. The said amendment was challenged before this Court and by an order dated 19.08.2005, this Court had allowed the petition and declared the said amendment as unconstitutional. The said order was challenged before the Supreme Court. While granting leave, the Supreme Court had directed that there should be no coercive recovery proceedings for recovery of the assessments made under Entry 25.

The KVAT Act came into force on 1.4.2005. Entry No. 10 of the VI Schedule which is analogous to Entry 25 of the VI Schedule to the KST Act, deals with the works contract of photo printing and processing charges. Since Entry 25 of the VI Schedule to the KST Act, was declared as unconstitutional and as Entry 10 of the VI Schedule of the KVAT Act was analogous to it, the petitioner, like all other dealers in the State was claiming exemption in respect of the turnover of the photo printing and processing charges under the KVAT Act.

For the period 2007-08, the petitioner had filed returns under the KVAT Act claiming exemption in respect of the photo printing and processing charges. The returns were accepted and the petitioner was deemed to be assessed under Section 38 of the KVAT Act. However, the second respondent had initiated re-assessment proceedings under Section 39(1) of the KVAT Act, culminating in the passing of an order of reassessment dated 20.1.2014 by which the second respondent assessed and levied tax on the turnover of photo printing and processing. By the said order, the said respondent also levied penalty and interest on the said re-assessed turnover.

In the meantime, by an order dated 30.01.2015 in the matter between the State of Karnataka and Pro Lab & Others, the Supreme Court allowed the Special Leave Petition filed by the State and set aside the order of this Court and upheld the constitutional validity of Entry 25 of the VI Schedule to the KST Act. It also upheld the retrospective effect of Entry 25, thereby making it possible for the assessment and levy of tax from the year 1989.

Pursuant to the Pro Lab judgment, the second respondent had passed an order dated 24.2.2015 under Section 69(1) of the KVAT Act, by which the second respondent rectified the mistake of levying 12.5% instead of 4% as per Entry 9 of the VI Schedule. However, the second respondent is said to have levied tax at the rate of 4% on the total turnover without deducting labour and like charges and without setting off the entry tax paid by the petitioner for the relevant period. Moreover, the second respondent went on to levy tax and penalty, thus creating a huge liability, which according to the petitioner was illegal. Consequent to the said order dated 24.02.2015, the second respondent had issued a demand notice.

It is the petitioner''s case that there was no show cause notice before the Rectification order. Hence, though the petitioner is liable to pay on the value of the goods used in the works contract which the petitioner is ready to discharge, the petitioner is aggrieved on the rate at which it is levied, right from the time of the assessment period, which is oppressive and unreasonable. The petitioner has paid substantial amounts as Entry Tax during the relevant period and the second respondent has completely ignored the same. There is no set off given as against the VAT now demanded. The Supreme Court, it is pointed out, had made it clear that the State has power to levy tax only on the value of goods used in the works contract. However, as the second respondent has levied tax on 100% of the gross receipts of the petitioner towards photo printing and processing services for the assessment year 2007-08. Therefore, the petitioner is aggrieved by that as well.

The demand for interest it is claimed is illegal, as at that point of time, the petitioner was under the bona fide impression that since Entry 25 of the VI Schedule to the KST Act was struck down as being unconstitutional though the provision continued on the statute book, it was inoperative and therefore, had not paid taxes, which was legitimate on the part of the petitioner. But however, this is sought to be treated as a default on the part of the petitioner, which may not be correct. It is this and other contentions on which the petitioner seeks that the rectification order passed be set-aside, as there was no prior notice to the petitioner and the above circumstances and factors have not been taken into account in levying the tax and making the demand to the petitioner.

4. The learned Government Advocate would not deny that no notice was served before passing the rectification order.

5. Accordingly, the petitions are summarily allowed. The impugned order is quashed. However, the respondent is not precluded from issuing a fresh notice of rectification and to provide an opportunity to the petitioner to be heard and also be permitted to produce all such material on which he seeks exemptions and other benefits, which shall be taken into account before an order is passed, in accordance with law.