

(2014) 11 KL CK 0205
In the High Court Of Kerala
Case No : W.P. (C). No. 11605 of 2009 (U)

Western India Cashew Company (P) Ltd.	APPELLANT
Vs	
Assistant Commissioner (Assessment)	RESPONDENT

Date of Decision : 11-11-2014

Acts Referred:

Citation : (2014) 11 KL CK 0205

Hon'ble Judges : A.K. Jayasankaran Nambiar, J

Bench : Single Bench

Advocate : Harisankar V. Menon, Meera V. Menon and Mahesh V. Menon, Advocate for the Appellant; K.T. Lilly, Government Pleader, Advocate for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.—The petitioner is a registered dealer under the Kerala General Sales Tax Act (hereinafter referred to as "the KGST Act") as well as the Central Sales Tax Act (hereinafter referred to as "the CST Act") and is engaged in the manufacture, sale and export of Cashew Kernels. The assessments of the petitioner under the KGST Act and CST Act for the assessment years 2002-2003, 2003-2004 and 2004-2005 were completed in the year 2006, and the tax that was found due and payable as per the assessment orders were also duly paid by the petitioner. While so, pursuant to an investigation that was conducted by the Sales Tax Department, instances were noticed where bogus "C" Forms and "F" Forms had been issued from outside the State and it was suspected that the sales effected by the petitioner, against "C" Forms obtained from outside the State as also the clearances effected to outside the State under the cover of "F" Forms issued from outside the State, were illegal insofar as there was a possibility that "C" Forms and "F" Forms, against which the petitioner effected clearance of his goods, were bogus. When steps were taken by the respondents, for reopening the concluded assessments against the assessee dealing in cashew kernels, where the discrepancies were noticed, the association of cashew processors in the State took up the matter with the State Government. The deliberations with the Government eventually

resulted in the Government coming out with a proposal, in the Budget Speech of 2007-2008, to waive the penalty and all amounts in excess of 4% and interest thereon, on transactions up to 31.03.2006, provided the dealers pay the amount in full before 30.06.2007. The Budget proposals were later given effect to by Ext. P4 Notification dated 07.07.2008, whereby the Government ordered that penalty, interest and all amounts in excess of 4% of tax thereon, on all inter-State transactions made by cashew dealers in Kerala up to 31.03.2006, stood waived. In Ext. P4, there was also a direction to the Commissioner of Commercial Taxes to issue suitable circulars/instructions to the assessing authorities in accordance with the decision of the Government. Ext. P5 dated 24.07.2008 is the Circular that was issued by the Commissioner of Commercial Taxes pursuant to the directions in Ext. P4 Notification. It is the case of the petitioner that despite the issuance of Ext. P4 Notification and Ext. P5 Circular, Ext. P8 series of pre-assessment notices and Ext. P9 series of notices proposing penalty were issued to the petitioner for the assessment years 2002-2003, 2003-2004 and 2004-2005 respectively. Although, the petitioner filed detailed replies to both the sets of notices through Ext. P10 series and Ext. P11 series, the reassessments were completed by Ext. P12 series of orders without considering the claim of the petitioner for the benefit of Ext. P4 Notification. Similarly Ext. P13 series of orders imposing penalty were also passed without adverting to the plea of the petitioner for extension of the benefit of Ext. P4 Notification. On receipt of the said orders, the petitioner approached the assessing authority seeking the reason as to why the assessment orders and penalty orders passed against him did not reflect a consideration of the petitioner's claim for the benefit of Ext. P4 Notification. The petitioner was then informed that by Ext. P16 Circular dated 05.09.2008, it had been made clear by the Commissioner of Commercial Taxes that persons who opted to avail the benefit of Ext. P4 Notification had to prefer their claim before 30.09.2008. The petitioner was informed that it was only on account of the fact that the claim by the petitioner, for the benefit of Ext. P4 Notification, was preferred subsequent to 30.09.2008 that his case was not considered for extension of the benefit of the Notification. The petitioner, thereafter, availed the benefit of the Amnesty Scheme that was available under Section 23B of the KGST Act and paid the amounts contemplated under that Scheme for the grant of Amnesty. Exts. P14 and P15 are the orders passed under the Amnesty Scheme dealing with payments effected for the assessment years 2002-2003, 2003-2004 and 2004-2005. In the writ petition, Exts. P12 series of assessment orders and Ext. P13 series of penalty orders are impugned to the extent they do not consider the claim of the petitioner for the benefits under Ext. P4 Notification of the Government. It is the contention of the petitioner that, notwithstanding the fact that he had availed the benefit of the Amnesty Scheme under Section 23B of the KGST Act, the Scheme under the said Section provides for continuation of proceedings even after opting for the Amnesty Scheme, and if any benefit is obtained by the petitioner by way of reduction of tax, penalty or interest amounts then he can still approach the Department for the grant of consequential benefits under the Amnesty Scheme.

2. A counter affidavit has been filed on behalf of the 1st respondent wherein Ext. P12 series of assessment orders and Ext. P13 series of penalty orders are sought to be justified on the contention that the petitioner had not claimed the benefit of Ext. P4 Notification within the period that was contemplated in Ext. P16 Circular that was issued by the Commissioner of Commercial Taxes. It is also pointed out that the petitioner had voluntarily chosen to avail the benefits under the Amnesty Scheme and has already enjoyed the benefits under that Scheme to the tune of Rs. 473.21 lakhs and hence he was not entitled to any further benefits under the Amnesty Scheme.

3. I have heard Sri. Harisankar V. Menon, the learned counsel appearing on behalf of the petitioner and Smt. K.T. Lilly, the learned Government Pleader appearing on behalf of the respondents.

4. On a consideration of the facts and circumstances of the case as also the submissions made across the Bar, I find that the challenge of the petitioner against Ext. P12 series of assessment orders and Ext. P13 series of penalty orders must necessarily succeed. Although in response to the notice issued to the petitioner proposing a reassessment for the assessment years 2002-2003, 2003-2004 and 2004-2005 as also the notices proposing a penalty for the said years, the petitioner had preferred replies clearly indicating the nature of the transactions with the consignees of the goods, and thereby indicating that the transactions were akin to those covered by Ext. P4 Notification of the Government, in Ext. P12 series of assessment orders and Ext. P13 series of penalty orders that were passed by the 1st respondent, the issue of grant of benefit in terms of Ext. P4 Notification was not specifically considered by the 1st respondent. No doubt, the learned Government Pleader would point out that the petitioner had not specifically claimed the benefit of Ext. P4 Notification in the replies furnished to the notices proposing reassessments and imposition of penalty. This, however, cannot be of any significance since, in my view, Ext. P4 Notification by the Government was issued pursuant to the proposals of the Government in its Budget Speech for the year 2007-2008. The Notification made it clear that the benefit was to be made available to all those dealers in cashew kernels who were affected by the peculiar problem resulting from the issue of bogus "F" Forms and "C" Forms from outside the State. Ext. P4 also contained a direction to the Commissioner of Commercial Taxes to issue suitable instructions to the field to take note of the contents of the Notification, while completing the assessments and passing orders with regard to penalty. When the fact of issuance of Ext. P4 Notification was known to the respondents, it was not open to the 1st respondent to not consider extending the benefit of the said Notification, while dealing with the assessment proceedings or penalty proceedings in respect of a dealer whose case was squarely covered by the said Notification. As a matter of fact, the existence of Ext. P4 Notification should have alerted the authority even before the issuance of Ext. P8 series of pre-assessment notices and Ext. P9 series of penalty notices and the said notices ought to have made proposals, if found necessary, only after excluding such amounts as were covered

by the issue dealt with in Ext. P4 Notification. That not having been done, Ext. P12 series of assessment orders and Ext. P13 series of penalty orders, to the extent they do not consider the case of the petitioner for the benefit of Ext. P4 Government order, must be held to be bad in law and liable to be set aside.

5. I must also deal with the contention of the learned Government Pleader that the petitioner did not claim the benefit of Ext. P4 Notification, prior to the cut-off date of 30.09.2008 specified in Ext. P16 circular dated 05.09.2008, that was issued by the Commissioner of Commercial Taxes. It is relevant to note that Exts. P8 series and P9 series of notices were issued to the petitioner only in December 2008. Prior to that, the assessments of the petitioner for the period from 2002-2003 to 2004-2005 had already been completed by accepting the returns of the petitioner. Thereafter, it was by an order dated 30.12.2008 of the Deputy Commissioner, Department of Commercial Taxes, Ernakulam that the earlier orders of assessments were set aside and remanded to the assessing authority for fresh disposal in accordance with law. In the proceedings before the Deputy Commissioner of Commercial Taxes, the petitioner had clearly pointed out the availability of benefit in terms of Ext. P4 Notification of the Government. Notwithstanding that, the Deputy Commissioner of Taxes set aside the assessment orders already passed in favour of the petitioner and directed the 1st respondent to pass fresh orders assessing the petitioner for the assessment years in question. In view of the fact that, prior to 30.09.2008, there was no occasion for the petitioner to claim the benefit of Ext. P4 Notification of the Government, it would be meaningless to suggest that the petitioner had to prefer his claim for the benefit of Ext. P4 Notification prior to 30.09.2008. I am of the view that in a situation like this, it was incumbent upon the respondents to take into account the terms of Ext. P4 Notification before taking any action to either set aside the completed assessments against the petitioner, or proceeding to issue notices for reassessment or imposition of penalty for the years in question. Thus in any view of the matter Ext. P12 series of assessment orders and Ext. P13 penalty orders cannot be legally sustained.

Resultantly, I quash Ext. P12 series of assessment orders and Ext. P13 series of penalty orders to the extent they do not consider the claim of the petitioner for the benefit of Ext. P4 Notification issued by the Government. The 1st respondent shall pass fresh orders of assessments for the assessment years 2002-2003, 2003-2004 and 2004-2005 under the CST Act by extending the benefit of Ext. P4 Notification to the petitioner. The 1st respondent shall thereafter consider whether or not it is necessary to proceed against the petitioner for imposition of any penalty. The 1st respondent shall pass fresh orders as directed within a period of three months from the date of receipt of a copy of this judgment after affording the petitioner an opportunity of being heard.

The writ petition is allowed as above.