IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

MONDAY, THE 30TH NOVEMBER 2009 / 9TH AGRAHAYANA 1931

WA.No. 1565 of 2006(B)

AGAINST THE JUDGEMENT/ORDER IN WPC.15425/2006 Dated 18/07/2006
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APPELLANT(S): PETITIONERS:

ULTRA TECH CEMENT LTD.,
39/4013, OFFICE-A, K.G.OXFORD BUSINESS CENTRE,
SREEKANDATH ROAD, RAVIPURAM, KOCHI-682 016,
REPRESENTED BY ITS ACCOUNTS OFFICER,
SHRI M.V. SIVAKUMAR.

BY ADV. SRI.A.KUMAR

RESPONDENT(S): RESPONDENTS:
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1. THE STATE OF KERALA,
REP. BY THE SECRETARY, MINISTRY OF FINANCE,
GOVT.SECRETARIAT, THIRUVANANTHAPURAM.

2. THE ASSISTANT COMMISSIONER (ASSESSMENT),
SALES TAX, KVAT SPECIAL CIRCLE-II, ERNAKULAM.

3. THE ASSISTANT COMMISSIONER (AUDIT ASSMT)
COMMERCIAL TAXES DEPT., ERNAKULAM.

4. THE COMMISSIONER OF COMMERCIAL TAXES,
THIRUVANANTHAPURAM.

BY SPL.G.P. SRI. VINOD CHANDRAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD
ON 30/11/2009, ALONG WITH WA NO. 1566 OF 2006 AND CONNECTED CASES,
THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

C.R.

C .N. RAMACHANDRAN NAIR &
V.K. MOHANAN, JJ.

W.A. Nos. 1565, 1566,1567, 1572, &
1573 OF 2006 & W.P.C. Nos. 32010/06,
23152/2007, 8494 & 27050/2008

Dated this the 30th day of November, 2009

JUDGMENT

Ramachandran Nair, J.

The question raised in the connected Writ Petitions and Writ Appeals is whether the appellants/petitioners are entitled to exemption from tax payable under the Value Added Tax Act, 2003, hereinafter called the "Act", on the discount allowed by them after sales through credit notes issued to purchasers. Excepting one or two assessee-dealers who are engaged in sale of automobiles and spares, all other assessees are either manufacturers or wholesalers of cement. Admittedly assessees made sales, collected tax under the Act, and remitted the same along with monthly returns. However, according to them, depending upon the target achieved, and the prompt payments, assessees have later issued credit notes to dealers representing discount which appellants/petitioners are entitled to deduction in the

determination of taxable turnover and therefore the tax paid on the discount given should be refunded to them. The learned single Judge considered all the contentions in a detailed judgment but rejected the claim stating that the provisions of the Act and Rules and Form 8, which is the format of tax invoice prescribed under the Act and Rules do not provide for deduction of discount except cash discount separately shown in the tax invoice. It is against this judgment of the learned single Judge that Writ Appeals are filed by some of the assessees. However, when Writ Appeals are posted for hearing, pending Writ Petitions are also posted and we have heard senior counsel Sri. K.P. Kumar and other counsel appearing for the appellants/petitioners and Special Government Pleader appearing for the respondents.

2. Sales tax under the VAT regime came into force in the State with effect from 1.4.2005. The charging Section, namely, Section 6(1) of the Act provides for levy of tax on the taxable turnover. "Taxable turnover" under Section 2(l) means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed.

"Turnover" as defined under Section 2(lii) and clause (ii) of Explanation III to Section 2(lii) provides for exclusion of discount in the computation of turnover. The said clause of Explanation III providing for deduction of discount as originally contained in the statute is as follows:

> (ii) Any cash discount on the price allowed in respect of any sale where such cash discount is shown separately or any amount refunded in respect of articles returned by customers shall not be included in the turnover.

The above provision was substituted by the following clause by Act 39 of 2005 notified on 28.8.2005 with retrospective effect from 1.4.2005:

> (ii) Any discount on the price allowed in respect of any sale where such discount is shown separately in the tax invoice and the buyer pays only the amount reduced by such discount; or any amount refunded in respect of goods returned by customers shall not be included in the turnover.

The question raised in all these cases pertains to interpretation of the above provision. In the first place, senior counsel Sri. K.P. Kumar and other counsel appearing for the assessees contended that tax could be levied only on the sale price, and cash discount granted should not

constitute price at all and so much so it cannot be treated as forming part of turnover much less taxable turnover, irrespective of how and when such discount is granted. Alternatively they contended that discount allowed to their dealers through credit notes issued later was allowable under the original provision prior to it's amendment and disallowance is only on account of retrospective amendment made by Act 39 of 2005 which according to them is arbitrary and liable to be declared unconstitutional by this Court as violative of Articles 14, 19 (1)(g) and 301 of the Constitution of India. We therefore proceed to consider one after another of the contentions raised on behalf of the assessees.

3. Before proceeding to consider the case on merits, we have to consider the distinction between the scheme of tax on sale of goods both under the VAT regime and under the Sales Tax Act existing prior to that. Under the Sales Tax Act except few items, all other goods were taxable at the point of first sale in the State. Therefore tax was levied and collected only from the first seller. Contrary to this, the scheme under the VAT regime is that tax collected by the first seller is given as input tax credit to the second seller, and the tax paid by the second

seller is given as input tax credit to the third seller and ultimately the entire tax is borne by the ultimate consumer. In other words, tax paid on the value addition by series of dealers is ultimately passed on to the ultimate customer and dealers get reimbursement of the tax paid by them. Since Section 11(1) of the Act provides for input tax credit, the Government decided to prescribe procedure for grant of input tax credit. For this purpose, form of Tax Invoice itself is prescribed under Rule 58(10) of the VAT Rules, which makes it mandatory that every dealer shall compulsorily issue bill in the prescribed format. Form 8 prescribed under the said rule specifically requires the seller to show all the details including the value or price on which tax is collected, and the amount of tax collected with specific column for discount and free gift allowed. In other words, unlike under the provisions of the Sales Tax Act and Rules, Form 8 prescribed under the VAT Rules provides for specific deduction of discount and charge of tax is on the net value which is the taxable turnover. Even though counsel appearing for the assessees relied on several decisions of the Supreme Court and that of the High Courts on discount, particularly the decision in D.C. LAW v. ADVANI OERLIKON (P) LTD., 45 STC 32 (SC) we do not think

these decisions have any relevance for the purpose of deciding the assessees' claim for deduction under the VAT regime the features of which we have already found are different from the scheme available under the Sales Tax Act. We therefore proceed to consider the case with reference to the statutory provisions. The contention of the assessees that discount is allowable irrespective of time and manner in which the seller gives it to the purchaser does not find a place in the statute. On the other hand, provision of deduction of eligible discount is specifically covered by clause (ii) of Explanation III to defintion of "turnover". Going by the main clause in the definition, namely, turnover, it is clear that tax is on the actual sale price. Explanation specifically clarifies that any discount on the price allowed in respect of any sale if shown separately has to be excluded. Admittedly under the original provision and in the amended provision, eligibility for deduction of discount is only when it is allowed on the price and only if it is separately shown. The amendment made by Act 39 of 2005 to Explanation III to Section 2(l) was for inclusion of "tax invoice" and the requirement of purchaser paying only the sale price reduced by discount amount. The question to be considered is whether original

provision which did not contain these words conveys a different meaning or whether the amendment made is only clarification of the original provision. There is no dispute that Form 8 which is the tax invoice prescribed under Rule 58(10) provides for separate column for discount and the rule makes it mandatory for a selling dealer to compulsorily raise invoice in the prescribed form. So much so, in our view discount if separately shown as stated in the original Explanation means only discount shown separately in the tax invoice. Therefore even prior to clarification made by Act 39 of 2005, the requirement of showing discount separately in the original provision can only mean showing discount separately in the tax invoice. Another addition made in the amended provision for allowing discount is that sale price should be the mount reduced by discount amount granted. In our view, when discount is given from the sale price by the seller and tax is charged on the net price after excluding the discount, seller's claim is only sale price reduced by discount and no buyer can be called upon to pay discount amount after seller grants it as reduction in the tax invoice itself. Original provision did not contemplate buyer paying discount amount along with price or in other words, payment is always net of the

discount. Therefore in our view the additions made to Explanation III (ii) to Section 2(l) through amendment with retrospective effect do not convey any new meaning and content to the original provision to which only further clarification is made to avoid unnecessary controversy and litigation. Since we have already found that amendment has not brought out any new provision or condition for allowing discount and is only a meticulous clarification of the original provision, there is no need for going into constitutional validity of the amendment with retrospective effect which does not arise for consideration because, in our view, the provision which originally stood also did not entitle the assessees for claiming deduction of discount granted other than in the tax invoice. In other words the meaning and scope of provisions before and after amendment are that no dealer is entitled to deduction of discount unless it is separately shown in the tax invoice and the price collected is net of the discount.

4. Senior counsel appearing for the assessees relying on Entry 54 of List II of 7th Schedule to the Constitution contended that discount which does not form part of price cannot be brought to tax as the constitutional entry authorises only tax on sale of commodity which

means that tax should be on actual sale price. We do not think the contention is tenable because it is within the powers of the Legislature to prescribe terms and conditions for grant of deduction from sale price. In fact dealers are entitled to give discount at any time that is after raising tax invoice and after making sales through credit notes after the end of the month, quarterly, periodically or even after the end of the year. However, question to be considered is what discount qualifies for deduction from payment of tax. It is obvious from the statutory provisions discussed above that in order to qualify any discount for deduction whether it be trade discount, or cash discount, or any other form of discount, such discount should be shown in the tax invoice separately and the sale price along with tax thereon should be collected from the buyer without including the discount granted. Since conditions for deduction of discount from taxable turnover is mandatory, appellants/petitioners have no escape from liability to pay tax on the original sale price on which they have in fact collected sales tax and remitted the same. The present attempt to get refund of tax paid based on the discount allowed through credit notes in our view is not tenable and is not permissible under the Act.

For the forgoing reasons, we confirm the judgment of the learned single Judge upholding disallowance and demand of tax on discount given after sales through credit notes. However, since the Legislature itself has felt that discount provision calls for clarification, we feel penal provision should not be invoked against the appellants/petitioners, provided they accept disallowance, clear the arrears if any, with interest due thereon. We therefore direct the respondents to recall the orders in the case of such of the appellants/petitioners who concede liability in terms of the judgment and who remit balance tax if any along with applicable rate of interest within three weeks from the date of receipt of a copy of this judgment.

(C.N.RAMACHANDRAN NAIR)
Judge.

(V.K. MOHANAN)
Judge.

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