IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

THURSDAY ,THE 30TH DAY OF AUGUST 2018 / 8TH BHADRA, 1940

OT.Appeal.No. 2 of 2018

AGAINST THE ORDER NO.C3/22114/16/CT DATED 8.5.2018 OF THE COMMISSIONER, THIRUVANANTHAPURAM

APPELLANT:

**M/S. TALASH PLASTOPACKS,
SWARAJ PLYWOOD ROAD, P.O. PAPPINISSERI,
KANNUR-670561, REPRESENTED BY LABEEB PTP,
MANAGING PARTNER.**

**BY ADVS.
SRI.K.P.ABDUL AZEES
SMT.SHOBA ANNAMMA EAPEN
SMT.T.ARCHANA**

RESPONDENT:

**STATE OF KERALA
REPRESENTED BY DEPUTY COMMISSIONER (LAW),
COMMERCIAL TAXES, ERNAKULAM-682030.**

BY SR GOVT. PLEADER SRI MOHAMMED RAFIQ

THIS OTHER TAX APPEAL HAVING BEEN FINALLY HEARD ON 30.08.2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Vinod Chandran, J

The appeal is against Annexure F order passed under Section 94(7) of the Kerala Value Added Tax Act, 2003 (for short 'the KVAT Act'). The impugned order has interfered with the order of the Clarificatory Authority produced as Annexure E. The appellant is a manufacturer of containers, trays, bowls, cups and other packing materials made of plastic. The appellant had returned the turn over of cups at the rate of 20% and the containers at the rate of 5%. The Clarificatory Authority under Section 94 of the Act by Annexure E order found the contention of the appellant to be supported by the Entries under the Central Excise Tariff Act, 1985, as certified by the Assistant Commissioner of Central Excise and held that the plastic trays, containers, box and bowls come under Entry 174 of List A of Third schedule bearing HSN Code 3923 and are taxable at the rate of 5%.

2. Later, in a Local Audit Report (LAR), pursuant to audit of the receipts and refunds of the Commercial Tax Office-II, Kannur, the Office of the Accountant General pointed out a

major irregularity in the appellant having conceded the turn over of containers at the rate of 5%. The LAR found that the appellant had in their ER1 return before the Central Excise Authorities showed the plastic packing materials manufactured by them to be covered under HSN Code 3923.90.90 and thus the amendments made to the KVAT Act made all such packing materials manufactured by the appellant exigible to tax at the rate of 20%. The Commissioner under Section 94(7) initiated *suo motu* proceedings and issued a notice against the appellant pointing out the specific observations made in the LAR of the AG. The appellant was granted an opportunity, was heard and order passed as Annexure F, which is challenged by the appellant on grounds of lack of jurisdiction as also on the Entry under 174 of the Third Schedule-List A being very specific and inclusive of all packing materials, including plastic containers, trays and bowls manufactured by the appellant.

3. There are some preliminary objections raised by the appellant on the question of jurisdiction. The learned counsel appearing for the appellant would contend that the notice issued and the order passed is by the Commissioner of State Taxes under the Kerala Goods and Service Taxes Act, who

is not an authority notified under the KVAT Act. It is contended that the authorities under the KVAT Act were notified and the Commissioner of Commercial Taxes is the authority notified. There is also a further argument taken that Section 174 of the Kerala Goods and Services Act, 2017 repealed the KVAT Act from 01.07.2017 and with such repeal the notifications issued under the Act also would be set at naught. It is pointed out that there is no saving clause enabling the Commissioner notified under the KG & ST Act or under the KVAT Act to invoke the *suo motu* powers conferred under Section 94(7) of the KVAT Act; after its repeal.

4. We will first deal with the preliminary objections, since if we found favour with them, the merits need not be looked into. The order impugned is styled as one passed by the Commissioner of State Taxes under the Department of State Goods and Services Taxes which is only a bonafide mistake, according to us. By the time the Commissioner invoked the power under Section 94(7) of the KVAT Act there was a change in the name of the department itself for reason of the Goods and Services Tax Act having come into force. It is an admitted fact that the very same officer who

was notified under the GST Act as Commissioner of State Taxes was the person notified as Commissioner of Commercial Taxes under the KVAT Act. In fact the order has been signed in his capacity as Commissioner, without any reference to the nomenclature by which the taxes department is known. We also notice that under Section 174 of the Act though the KVAT Act has been repealed, it does not under sub-section 2(b) affect the previous operation of the repealed Acts or anything duly done or suffered thereunder. Any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Acts or orders under such repealed Acts are preserved under sub-section 2(b). The power conferred on the Commissioner of Commercial Taxes under Section 94(7) of the KVAT Act, and the notification under the Act so designating the Commissioner, is hence preserved, especially in continuance of any action taken prior to repeal. Despite the repeal of the KVAT Act, the right accrued on the appellant by way of the order passed under Section 94(2), by the Authority nominated under Section 94(1) stands undisturbed as also the obligation or liability visited on the appellant by reason only of continuation of the proceedings under Section 94(7). The invocation of the said *suo motu* powers under Section 94(7) cannot be wished away on the mere repeal of the KVAT Act.

5. The power of *suo motu* revision, conferred on the Commissioner, is a valuable right conferred on the State and its Department to interfere with any orders, prejudicial to the revenue, passed under Section 94(2), by an Authority constituted under Section 94(1). It is the appellant who invoked Section 94 and having obtained an order in their favour from the Authority nominated; they cannot argue for the consequential powers, that too the valuable visitorial jurisdiction, under the very same provision to be interdicted, for reason only of repeal of the enactment, especially when the rights, privileges, obligation or liability incurred under the repealed Act is continued by a statutory imprimatur in the new enactment, which repealed the earlier one. The rights and privileges spoken of is not restricted to the assessee or those accrued to the assessee alone and it is equally applicable to the State.

6. We also notice that the appellant had not raised any preliminary objection before the authority in so far as the lack of jurisdiction and the appellant themselves accepted that

though the notice was issued by the Commissioner of State Taxes, the authority was acting under the provisions of the KVAT Act which is enabled by a proper notification issued under the KVAT Act. We say this, not to confer a non existent authority, on the Commissioner and are quite concious that; power, if not specifically conferred cannot be assumed merely by acquiescence, as argued by the learned Counsel. The power exists as found by us, sourced from Section 174 of the K.G&S.T Act, 2017 and acquiescence is only in so far as not objecting to the Commissioner of State Taxes, of the new regime, having been shown in the notice as invoking the powers under the old regime. We hence negative the preliminary objection raised by the appellant on the question of jurisdiction.

7. Yet another contention raised by the learned Counsel for the appellant is that the authority under Section 94(2) having exercised powers conferred under the statute, there is no scope for the audit party or the Accountant General to interfere with the same. The Commissioner ought not to have invoked *suo motu* powers under Section 94(7) on the basis of the alleged irregularities pointed out in the LAR, is the argument. The Commissioner, according to the appellant, was

led by the assumptions made in the LAR, which are legally incorrect and cannot at all regulate the invocation of the *suo motu* powers conferred under Section 94(7).

8. We do not think that the Commissioner was at all influenced by the LAR. However, there is nothing wrong in the Commissioner having invoked the powers on the basis of the irregularity noticed in the LAR. The Commissioner has also considered the issue independently and has not adopted the view of the audit party. In fact, the audit party was of the opinion that the tax should be levied at the rate of 20% as levied on items coming under Serial No.3 of the Table appended to Section 6(1)(a) of the KVAT Act. The Commissioner has found that the items, which were the subject matter of clarification, would not be covered under the said entry and would be taxable at the rate applicable for residuary items. We do not think that any contention raised on the Commissioner having acted on the dictates of the audit party, can be sustained. It was perfectly in order for the Commissioner to have noticed the objection raised by the audit party and invoked the *suo motu* powers and after hearing the parties found the taxation to be permissible under the

residuary entry. It is trite that the *suo motu* powers can be invoked by oneself or on an intimation of an irregularity, brought to the notice of the Authority, conferred with such powers, by any person concerned with the subject matter of the issue.

9. Now we come to the issue as to the rate of tax to be applied on containers, trays and bowls manufactured by the appellant and sold for the purpose of packing food articles and to be disposed of after use ie : after consumption of the food packed in such containers, trays and bowls as distinguished from cups. Essentially the contention raised by the learned counsel for the appellant is that Entry 174 of Third Schedule-List A under the KVAT Act, takes in packing materials of all kinds. The appellant has, in the returns filed under the Excise Act, declared before the excise authorities that the goods are covered under Tariff Entry Heading 3923 and sub heading 3923.90.90 (Others). Entry 174 of the Third Schedule of the KVAT Act takes in packing materials of all kinds and only excludes those covered under Sl.No.3 of clause (a) of sub section (1) of Section 6, to which periodic amendments were brought in. The legislature having

excluded only those which have been specifically brought under Section 6(1)(a) of the KVAT Act all other packing materials are deemed to be covered under Entry 174, is the plea. There is also an alternate contention taken that if the sub-entries under Entry 174, with HSN Code is taken and thus the subject goods of the appellant found to be specifically excluded by reason of the eight digit HSN numbers shown against such sub-entries, even then the appellant's goods will be covered under sub-entry 8 of Entry 174 which speaks of plastic tins, bags and covers of all sizes and varieties. It is specifically pointed out that there is no HSN Code assigned to such sub-entry.

10. We have to first notice the amendments brought in by the Finance Acts, in the various years, to understand as to which of the items are specifically excluded from the concessional rate of 5% under Entry 174 packing materials and imposed with tax at the higher rate of 20%:

> "By Finance Act 2012, (Annexure A) certain goods were specifically included under a table taxing them at the higher rate of 15%, 20% and 22.5%, which is higher than the rates available in the schedules to the Act. The specific inclusion under Sl.No.3 of the table was "Carry bags made of plastic which have a

self carrying feature, commonly known as vest type bags or any other feature to carry commodities excluding "D" punched bags" which were levied a tax @ 20%. In the Finance Act, 2013 as is evident from Annexure B, Sl.No.3 was substituted with "Carry bags made of plastic including polypropylene, which have a vest type self carrying feature to carry commodities". In addition to the said substitution there was a new item added as Sl.No.3A: "Disposable plates, cups and leaves, made of plastic" also taxed @ 20%. Finance Act 2015 made a further inclusion in Sl.No.3A, which read as: "styrofoam and styrofoam sheets".

Again in 2016 by Finance Act, Sl.No.3 was substituted and as of now Sl.No.3 and 3A reads as hereunder:

> *"3. all types of plastic carry bags including non-woven poly propylene bags.*
>
> *3A. disposable plates,tumblers, cups and leaves made of plastic including styrofoam and styrofoam sheets".*

In addition to the aforesaid amendments it is also relevant to notice the amendment made to Entry 174 under List A to Third Schedule which was as hereunder:

> "other than those specifically mentioned in serial No. (3) of clause 'a' of subsection 1 of section 6."

The contention seems to be that only those which have been specifically excluded by the amendment to Entry 174 could be taxed under Section 6 and all other articles under the HSN Heading is exempted as a packing material.

11. It is trite that the legislature of the State has the power to tax differently even those commodities coming under a particular Entry under the Customs or Excise Tariff Act. In this context the Rules of Interpretation as available under the KVAT Act assumes significance which have been noticed by the Commissioner in the impugned order and we find it appropriate to extract the following:

> "HSN Numbers are allotted in the Schedules either in four digits or in six digits or in eight digits. The four digit numbers indicate the heading in the HSN classification, six digit numbers indicate the sub-heading and the eight digit numbers indicate the specific commodity number. While interpreting the commodities in the Schedules, the following guidelines may be followed.
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> I. The commodities which are given four digit HSN Number shall include all those commodities coming under that heading of the HSN.
> II. The commodities which are given six digit HSN Number shall include all those commodities coming under that sub-heading of the HSN.
> III. The commodities which are given eight digit HSN

Number shall mean that commodity which bears that HSN Number.

IV. As an exception to the above rules, there are certain entries in the Schedules, which bear the eight digit numbers but the four digit heading numbers of such commodities are given for some other commodities mentioned elsewhere. In such cases, the four digit heading shall include only those commodities under that heading excluding that commodity for which the eight digit numbers are given. Similar cases are available in the case of six digit numbers also. In such cases the above principle shall apply *mutatis mutandis*.

V. Where the term 'other' is used in sub-entries or sub-sub entries, it should be construed by using the doctrine of *ejusdem generis* (When specific words are followed by general words, the general words should be interpreted as having the meaning identical to the meaning attributed to the specific words.)

12. Looking at the Customs Tariff Act under heading 3923 the following items are shown:

(1)	(2)	(3)	(4)	(5)
3923	ARTICLES FOR THE CONVEYANCE OR PACKING OF GOODS OF PLASTICS; STOPPERS, LIDS, CAPS AND OTHER CLOSURES, OF PLASTICS			
3923 10	*Boxes, cases, crates and similar articles*:			
3923 10 10	Plastic containers for audio or video cassettes, cassette tapes, floppy disk and similar articles.	kg.	10%	--
3923 10 20	Watch-box, jewellery box and similar containers of plastics	kg.	10%	--

3923 10 30	Insulated ware	kg.	10%	--
3923 10 40	Packing for accommodating connectors	kg.	10%	--
3923 10 90	Other	kg.	10%	--
	Sacks and bags (including cones):			
3923 21 00	Of polymers of ethylene	kg.	10%	--
3923 29	Of other plastics:			
3923 29 10	Of poly (vinyl chloride)	kg.	10%	--
3923 29 90	Other	kg.	10%	--
3923 30	*Carboys, bottles, flasks and similar articles:*			
3923 30 10	Insulated ware	kg.	10%	–
3923 30 90	Other	kg.	10%	--
3923 40 00	Spools, cops, bobbins and similar supports	kg.	10%	--
3923 50	*Stoppers, lids, caps and other closures:*			
3923 50 10	Caps and closures for bottles	kg.	10%	--
3923 50 90	Other	kg.	10%	–
3923 90	*Other :*			
3923 90 10	Insulated ware	kg.	10%	–
3923 90 20	Aseptic bags	kg.	10%	--
3923 90 90	Other	kg.	10%	--

13. As against this; in Entry 174 of the Third Schedule-List A of the KVAT Act, the main Heading is not accompanied or aligned with an HSN number. It has also to be observed that the specific goods which are placed before us for consideration being containers, trays and bowls made of plastic are not included either under Sl.No.3 or 3A of the table under

Section 6(1) of the KVAT Act. The specific articles dealt with here, ie: containers, trays and bowls as also cups; the latter of which are taxable at rates seen from the Table under Section 6(1)(a) of the KVAT Act can be included only under the eight digit heading: 3923.90.90: “Other” going by the above extracted Table under the Customs Tariff Act. It is hence relevant that the eight digit HSN Code of 3923.90.90 as found in the Customs Tariff Act is not specifically aligned or shown as against any of the sub-entries under Entry 174. Hence Entry 174 by its heading cannot be understood to have included all packing materials as has been included under heading 3923 of Customs Tariff Act for the simple reason that the heading is not aligned to the HSN Code in the KVAT Act.

14. In the teeth of such finding the exclusion made of Sl.No.3 of Clause (a) of subsection (1) of Section 6 under KVAT Act is not significant nor can there be a corollary drawn that except for the said exclusion, all packing materials will be included under Entry 174. The exclusion at best is, out of abundant caution since packing materials were taxed differently and the legislature intended that certain commodities be taxed at a higher rate; presumably to discourage its rampant use, along

with the vest type bags of plastic and certain other items. It cannot be assumed that except those excluded as being covered by Sl.No.3 of Section 6(1)(a) of the KVAT Act; all other packing materials would be included under Entry 174. In this context it is pertinent cups and tumblers of paper and plastic were taxable @ 5% as included in Entry 33 of Third schedule from which plastic cups were removed and placed under the Table in Section 6(1)(a). Hence there was no requirement for excluding them under Entry 174 of List A to Third Schedule.

15. The further contention of the appellant is that the containers, trays and bowls would come under sub entry 8 of Entry 174, as polythene (plastic tins, bags and covers of all sizes and varieties). The containers, trays and bowls made of plastic cannot be said to be either a tin, bag or cover. The plastic containers, trays and bowls having not been included in any of the entries and the specific eight digit HSN Code 3923.90.90 under the Customs Tariff Act also having not been included under Entry 174, it cannot be said that the containers, trays and bowls which fall under the Tariff Entry 3923 as against eight digit HSN Code 3923.90.90 is also included under Entry 174 of List A of Third Schedule under the KVAT Act. We reiterate that

the main heading under Entry 174 is not aligned to the four digit HSN Code and the eight digit HSN Code under 3923.90.90 is not aligned against any of the sub-entries under Entry 174.

16. We also find that the Commissioner has correctly found that the said goods do not come under either Sl.No.3 or 3A. We have extracted those goods which come under Sl.No.3 or 3A herein above, which do not include either of the goods now arising for our consideration in the appeal; being containers, trays and bowls. The said commodities do not also fall under Entry 174 packing materials and hence necessarily the same has to be taxed under the residuary entry of SRO 82/2006.

17. The learned Counsel for the appellant then submitted that the impugned order can have only prospective application going by the binding precedent in ***Sreedhareeyam Ayurvedic Medicines (P) Ltd. & Ors. State of Kerala & Ors*. [(2011) 19 KTR 561 (Ker.)**. We are convinced that the said judgment has no application to the above case as the provision exists now. Therein, there was an earlier clarification which was overruled by a later one and retrospectivity given to the later one. It is in such circumstance that the Division Bench of this Court found that the later clarification will not have prospective

effect. At that point, the 'authority' under Section 94 was the Commissioner, with no statutory remedy available from the clarificatory order. This provision was amended first specifying the 'authority' to be “three Deputy Commissioners” and then “three officers in the rank of Joint Commissioner or Deputy Commissioner” as nominated by the Commissioner. Sub-section (7) is a continuation of the proceedings under Section 94(2), which was inserted again by the Kerala Finance Act, 2009 which brought in the earlier referred change of 'Authority'. The impugned order in the above case being a continuation of the proceedings under Section 94, there can be no prospectivity declared for the same.

We hence do not find any reason to interfere with the impugned order in appeal. The O.T. Appeal is dismissed. Parties are left to suffer their costs.

Sd/-
K.VINOD CHANDRAN
Judge

Sd/-
MARY JOSEPH
Judge

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