IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 13TH DAY OF APRIL 2018 / 23RD CHAITHRA, 1940

WP(C).No. 10173 of 2018

PETITIONER(S)

KERALA STATE BEVERAGES (MANUFACTURING & MARKETING) CORPORATION LTD.,
SASTHAKRIPA OFFICE COMPLEX, P.B.NO.2263, SASTHAMANGALAM,
THIRUVANANTHAPURAM-695010, REPRESENTED BY ITS
GENERAL MANAGER - FINANCE, SUNIL KUMAR S.

BY ADVS.SRI.ANIL D. NAIR
SRI.R.SREEJITH
SRI.P.JINISH PAUL
KUM.MEKHALA M.BENNY
SMT.MARY JOSSY
SRI.ACHYUT K PADMARAJ

RESPONDENT(S):

1. ASSISTANT COMMISSIONER OF INCOME TAX,
CIRCLE 1(1), THIRUVANANTHAPURAM-695001.

2. COMMISSIONER OF INCOME TAX (APPEALS),
THIRUVANANTHAPURAM-695001.

R BY SPL.GOVERNMENT PLEADER SMT.THUSHARA JAMES.
R BY SRI.CHRISTOPHER ABRAHAM, INCOME TAX DEPARTMENT

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13-04-2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 10173 of 2018 (V)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1- TRUE COPY OF NOTICE UNDER S.142 DATED 13/11/2017 ISSUED TO THE PETITIONER.

EXHIBIT P2- TRUE COPY OF THE REPLY DATED 04/10/2017, ISSUED BY THE PETITIONER.

EXHIBIT P2(A)- TRUE COPY OF THE REPLY DATED 23/11/2017, ISSUED BY THE PETITIONER.

EXHIBIT P2(B)- TRUE COPY OF THE REPLY DATED 22/12/2017, ISSUED BY THE PETITIONER.

EXHIBIT P2(C)- TRUE COPY OF THE REPLY DATED 22/12/2017, ISSUED BY THE PETITIONER.

EXHIBIT P3- TRUE COPY OF ORDER DATED 28/12/2017 ISSUED BY THE FIRST RESPONDENT.

EXHIBIT P4- TRUE COPY OF THE APPEAL MEMORANDUM FILED BEFORE THE SECOND RESPONDENT.

EXHIBIT P5- TRUE COPY OF THE STAY PETITION FILED BEFORE THE SECOND RESPONDENT.

EXHIBIT P6- TRUE COPY OF THE APPLICATION UNDER S.220(6) FILED BEFORE 1ST RESPONDENT.

EXHIBIT P7- TRUE COPY OF ORDER DATED 06/02/2018 ISSUED BY THE 1ST RESPONDENT.

EXHIBIT P8- TRUE COPY OF JUDGMENT DATED 08/02/2018 IN WP(C)NO.4277 OF 2018.

EXHIBIT P9- TRUE COPY OF COVERING LETTER DATED 21/03/2018 ENCLOSING THE ORDER OF THE SECOND RESPONDENT.

// TRUE COPY //

Sd/-
PS TO JUDGE

Kvs/-

P.B.SURESH KUMAR, J.

W.P.(C) No.10173 of 2018

Dated 13th April, 2018.

J U D G M E N T

Petitioner is an assessee under the Income Tax Act ('the Act') on the rolls of the first respondent. The self assessment made by the petitioner under the Act for the assessment year 2015-16 was revised under Section 143(3) of the Act by the assessing officer in terms of Ext.P3 order. Ext.P4 is the appeal preferred by the petitioner before the second respondent challenging Ext.P3 order and Ext.P5 is the stay petition preferred by the petitioner in Ext.P4 appeal. Ext.P5 stay petition has now been disposed of by the second respondent in terms of Ext.P9 order granting the petitioner the stay sought by them, on condition that they shall pay 20% of the outstanding demand in four equal monthly instalments. Petitioner is aggrieved by the condition imposed on them in terms of Ext.P9 order.

2. Heard the learned counsel for the petitioner as also the learned Standing Counsel for the respondents.

3. While completing the assessment of the petitioner for the relevant year, in terms of Ext.P3 order, the assessing officer disallowed the deductions made by the petitioner towards (I) Gallonage fee amounting to Rs.54,83,87,000/-, (ii) Licence fee amounting to Rs.5,75,000/-, (iii) Shop license fee amounting to Rs.199,71,00,000/- and (iv) Surcharge on sales tax amounting to Rs.551,61,01,115/-, on the ground that they are exclusive levies on the assessee by the State Government. The petitioner maintains that the aforesaid levies are not exclusive levies falling within the scope of Section 40(a)(iib) of the Act and therefore, the assessing officer was not justified in disallowing the deductions made on the aforesaid heads. It is on that basis, the petitioner has challenged Ext.P3 order in appeal. The question whether the levies referred to in Ext.P3 order are exclusive levies on the assessee by the State Government is a question to be considered by the appellate authority at the time of final disposal of the appeal. It is taking

the said view, the appellate authority granted a conditional stay to the petitioner. The question arises for consideration is whether the appellate authority is justified in imposing the said condition while granting the stay sought by the petitioner.

4. It is conceded by the petitioner in Ext.P2 objection preferred before the assessing officer to the notice issued to them under sub section (1) of Section 142 of the Act that they have the monopoly in the wholesale business of Indian Made Foreign Liquor and beer in the State and they are carrying on the said business on the strength of FL-9 license issued by the competent authority under the Foreign Liquor Rules. The deduction of Rs.5,75,000/- made by the petitioner which was disallowed in terms of Ext.P3 order is the licence fee levied exclusively on the petitioner by the State Government for the FL-9 licence issued to them in respect of 23 warehouses of the petitioner. Rule 15A of the Foreign Liquor Rules provides that Gallonage fee at such a rate as the Government may prescribe from time to time shall be paid by the FL-9 licensee

on the quantity of Indian made Foreign Liquor sold by such licensee. Ext.P2(c) reply also indicates that Gallonage fee of Rs.54,83,87,000/- deducted by the petitioner which was disallowed in terms of Ext.P3 order is the fee levied on the petitioner exclusively by the State Government under Rule 15A of the Foreign Liquor Rules on the quantity of Indian made Foreign Liquor sold by the petitioner on the strength of the FL-9 licence exclusively granted to them in terms of the provisions under the Foreign Liquor Rules. In so far as FL-9 license is issued in the State under the Foreign Liquor Rules, only to the petitioner, in view of the monopoly created in their favour by the State Government, it cannot be contended that the aforesaid levies are not exclusive levies on the petitioner by the State Government.

5. Coming to the remaining deductions which are disallowed in terms of Ext.P3 order, the specific case of the petitioner is that the same are levies applicable to others as well. For instance, as far as the shop rental is concerned, it is the case of the petitioner that retail sale of foreign liquour in

the State is not being carried on exclusively by the petitioner, but also by the Kerala State Co-operative Consumer Federation Limited also. Section 40(a) (iib) of the Act reads thus:

> “40.Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession”, -
>
> (a) in the case of any assessee -
>
> x x x x x x x x
>
> x x x x x x x x
>
> (iib) any amount--
>
> (A) paid by way of royalty, licence fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called, which is levied exclusively on; or
>
> (B) which is appropriated, directly or indirectly, from,
>
> a State Government undertaking by the State Government.
>
> Explanation.--For the purposes of this sub-clause, a State Government undertaking includes--
>
> (i) a corporation established by or under any Act of the State Government;

(ii) a company in which more than fifty per cent of the paid-up equity share capital is held by the State Government;

(iii) a company in which more than fifty per cent of the paid-up equity share capital is held by the entity referred to in clause (i) or clause (ii) (whether singly or taken together);

(iv) a company or corporation in which the State Government has the right to appoint the majority of the directors or to control the management or policy decisions, directly or indirectly, including by virtue of its shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

(v) an authority, a board or an institution or a body established or constituted by or under any Act of the State Government or owned or controlled by the State Government]"

A reading of Section 40(a)(iib) of the Act indicates that exclusivity in terms of the said provision is not to be determined with reference to the issue as to whether anybody else is also being levied the same fee or charge, but it has to be determined having regard to the object of the provision. Looking at the facts in the above perspective, I have no doubt in my mind that two views are possible in the matter and the appellate authority cannot therefore be found fault with for having imposed the impugned condition.

The writ petition, in the circumstances, is liable to be dismissed and I do so. However, having regard to the financial hardship pleaded by the petitioner, the time fixed for payment of 20% of the amount in terms of Ext.P9 order is enlarged for a further period of six weeks from today.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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