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IN THE HIGH COURT OF KARNATAKA AT
BANGALORE

DATED THIS THE 17TH DAY OF JANUARY 2011

BEFORE

THE HON'BLE MR.JUSTICE HULUVADI.G.RAMESH

WRIT PETITION NOS.13172-173 OF 2010 C/W 13376 OF
2010 & 13843-851 OF 2010(T-RES)

IN W.P.NOS.13172-173/2010:

BETWEEN:

M/s. H.H.Cement Products,
Near Navadurga Garage,
N.H.48, Kannur,
Mangalore-575007.
Represented by its Partner
Sri.Mahammad Afiz
S/o U Abbas,
Aged about 38 years.

..PETITIONER

(By Smt.Vani.H, Adv.)

AND:

1. The Assistant Commissioner of
(Headquarters)-VAT Division,
Mangalore.
2. The Commissioner of Commercial Taxes,
Vanijya Terige Karyalaya Building,
Gandhinagar,



Bangalore-560009.

3. State of Karnataka,
Department of Finance,
Represented by its Secretary,
Vidhana Soudha,
Bangalore-560001.

..RESPONDENTS

(By Sri.K.M.Shivayogiswamy, HCGP)

IN W.P.NOS.13376 & 13843-51/2010:

BETWEEN:

M/s. Peeci Industries,
No.S-5, Islamic Trust Complex,
Hampanahatte,
Mangalore-566001.
Represented by its partner
Sri.G.Hasheer,
S/o P.C.M.Kunhi,
Aged about 37 years.

..PETITIONER

(By Smt.Vani.H, Adv.)

AND:

1. The Assistant Commissioner of
Commercial Taxes,
(Enforcement)-1,
West Zone, Vanijya Terige Bhavan,
Maidan Road, Mangalore.
2. The Commissioner of Commercial Taxes,
Vanijya Terige Karyalaya Building,
Gandhinagar,
Bangalore-560009.

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3. State of Karnataka,
Department of Finance,
Represented by its Secretary,
Vidhana Soudha,
Ambedkar Veedhi,
Bangalore-560001.

..RESPONDENTS

(By Sri.K.M.Shivayogiswamy, HCGP)

These Writ Petitions are filed under Articles 226 and 227 of the Constitution of India praying to quash the clarification dtd.8.9.2006 issued by the R2 vide Annex-A and consequently declare the phrase 'all kinds of bricks' occurring in entry 2 of schedule III to the Act as exhaustive, in so far as the petitioner is concerned.

These Writ Petitions coming on for preliminary hearing in 'B' Group this day, the Court made the following:

ORDER

The petitioners in these petitions have sought for issuing a writ of certiorari to quash the clarification No.CLR CR.91/2006-2007 dated 8.9.2006 at Annexure 'A' issued by the 2nd respondent and to declare the phrase 'all kinds of bricks' occurring in Entry 2 of Schedule III to the Act as exhaustive, in so far as the petitioners are concerned and to quash the re-

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assessment orders at Annexures 'C' and 'D' for the assessment periods 2007-2008 and 2008-2009 respectively in W.P.No.13172-73/2010 and Annexure G for the assessment period 2009-2010 in W.P.Nos.13376 & 13843-51/2010 issued by the 1st respondent and, to issue writ of mandamus directing the respondents to treat the paving bricks manufactured and sold by the petitioners as bricks falling within the phrase 'of all kinds of bricks' occurring in entry 2 of the III schedule to the Act as claimed by the petitioner at Annexure 'B' and 'E' respectively and, for such other orders.

2. According to the petitioners, they are registered dealers and also manufacturers of paving bricks, design tiles and cement bricks in many shapes, multi colours and styles depending upon the demand by the customers by using cement, sand, jelly and grits. These paving bricks are used for floor, ground, footpath, garden and car parking areas generally and they have been sold to the dealers by raising necessary sale invoice. As per Section 35 of the Karnataka Value Added Tax, Act

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2003, petitioner has been filing the returns by collecting 4% VAT and remitting the same to the credit of the State. Entry 2 of the III schedule reads thus:

“All kinds of bricks” including fly ash bricks; refractory bricks and the like; asfaltic roofing sheet; earthen tiles”

‘All kinds of bricks’ in the above said entry is an exhaustive entry and include several kinds of bricks though not specified in the entry individually. As such, petitioners have treated the paving bricks as falling within entry 2 of the III schedule and has been collecting the VAT at 4% and remitting the same to the Government. By order dated 8.9.2006, the 2nd respondent had issued a clarification No.CLR.CR 91/2006-2007 wherein it was clarified that, only the bricks of size 8’x8’x16’ and 4’x8’x16’ are covered under entry 2 of III schedule liable for tax at 4% and, any other size blocks are taxable @ 12.5% under S.4(1)(b) of the KVAT Act. The same is under challenge in these petitions.

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3. Heard.

4. According to the petitioners, entry 2 of the III schedule is exhaustive and includes all kinds of bricks. There is no need for the 2nd respondent to re-interpret by exercising power of sub-delegation as per Annexure 'A' by issuing clarification. The respondent-authority having inspected the business premises on 21.5.2010 and on 5.3.2010 respectively, having verified the books of accounts, issued a proposition notice under Section 39(1) of the Value Added Tax Act calling upon the petitioners to show cause as to why the turn over relating to sale of paving bricks, hollow blocks and interlock paving bricks should not be treated as taxable at 12.5%, against which, petitioner in W.P.No.13172-73/2010 has filed a detailed reply on 4.3.2010 contending that paving bricks are recognised as bricks only both in terms of the phraseology used in the entry and in common parlance. On various grounds, the petitioners have challenged the said clarification issued by the commissioner as *ultra vires* and to treat the paving tiles as bricks

and the clarification issued is violative of the power under Entry 2 of schedule III and by no stretch of imagination it falls under residuary power to define it in a different manner other than what is provided under schedule III. The petitioners have also sought for quashing of Annexure C, D and G respectively, the re-assessment orders made for the years 2007-2008, 2008-2009 and 2009-2010 respectively.

5. According to the learned Government Pleader, Annexure 'A' is only a clarification issued by the Commissioner in respect of different cement hollow bricks and not with regard to the paving bricks. As such, the question of quashing Annexure A does not arise. It is further submitted that the re-assessment made is rather appealable and it is for the petitioners to appeal before the appellate authority.

6. In the case on hand, the specific issue is with reference to collection of tax at 12.5% on the paving tiles on the ground that it comes within the purview of residuary powers, wherein

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the assessment orders made specifically refers to the circular of the Commissioner. Although, the Commissioner has referred to only hollow bricks and though there is no reference to paving tiles or bricks, however, what is being noticed as per Annexure A, the circular issued by the Commissioner dated 8.9.2006 on the application filed by M/s.Shilpa Concrete Products, Marathahalli wherein a clarification was sought regarding the rate of tax applicable on cement hollow bricks, wherein referring to Section 59(4) of the Karnataka Value Added Tax Act 2003, it is stated that it empowers the Commissioner of Commercial Taxes to clarify the rate of tax payable under the Act if he considers it necessary or expedient to do so for the purposes of maintaining uniformity in the work of assessments and collection of revenue and it is stated that having examined, it is found that the clarification requested by the applicant is within the scope of the aforesaid provision and it is necessary that the clarification be issued for the purpose of maintaining uniformity in the work of assessments and collection of revenue.



7. At clarification-1 issued it was with reference to cement hollow or solid blocks of the size mentioned therein and at clarification-2 it is stated that, cement hollow or solid blocks of any other size are taxable at 12.5% vat under Section 4(1)(b) of the Karnataka Value Added Tax Act, 2003. Might be that in the usual course against the mistake crept in or erroneous assessment made, the orders are normally being challenged before the appellate authority as exhaustive remedy is provided under the Act. In the case on hand, the re-assessment authority, in order to arrive at a conclusion, has referred to clarification-2 of the order of the Commissioner dated 8.9.2006 at Annexure 'A'. Entry 2 of the III schedule which is exhaustive, provides for all types of tiles/bricks. Here the pavement tiles appear to be one of the species of the kinds of bricks which are said to be used for laying on the wall or on the ground though not for the roof.

8. At the outset, there is wrong interpretation by the re-assessment officer so as to attract the tax at higher rate by



treating the subject as residuary power although, specific entry is provided under schedule III - might be under over anxiety to show that he has imposed tax for the benefit of the state. The approach of the authority should be practical in nature. Without understanding the provisions as is provided under the schedule, the re-assessment officer has come to a wrong presumption to impose higher rate of tax, which is uncalled for. Although it is argued at the bar that the appellate remedy is an exhaustive remedy, the condition precedent to avail that remedy is to deposit 50% of the tax at the outset. Apart from that, in view of the submission made by the learned Government Pleader that Annexure A, the circular of the Commissioner does not cover the case on hand, such being the case, the question of asking the petitioners to go in appeal against the order of the assessing authority would not arise.

9. Pursuant to the circular issued by the Commissioner which is in the nature of a delegated legislation, normally even the appellate authority in most of the circumstances who are the



officers sub-ordinate to the Commissioner, though are supposed to act independently, may not vary in their appreciation and rather they stick on to the order being passed by the re-assessing authority thus, leading to waste of time much less putting the parties to hardship in not taking decisions at the earliest. Even a speedy remedy is a fundamental right. Wherever it is necessary, the Court should not shirk the responsibility to answer the issue raised at the earliest, if prima facie, it appears to be a wrongful act on the part of the assessing authority so as to save money and waste of time.

10. In the circumstances, while exercising the power under Article 226 of the Constitution, though alternative remedy is available to the petitioners, when it is apparent that the very impugned orders are abuse of statutory powers, then necessarily, instead of directing to approach the other alternative forum available, it could be treated as a straight action to advance the remedy. It is a fit case wherein the impugned orders of the assessment officer passed at Annexures



C, D and G respectively, directing the petitioners to pay 12.5% of VAT exercising the power under Section 4(1)(b) of the Karnataka Value Added Tax Act 2003, could be quashed and they are accordingly quashed. It is made clear that the clarification issued in the circumstances, by the commissioner at Annexure 'A' would not be made applicable to the tiles which are in the form of paving bricks and ~~they~~ are held to be covered under the exhaustive definition of all kinds of bricks/asphalt tiles. It is directed to collect the tax for the said assessment years only at 4% as provided under entry 2 of schedule III of the KVAT Act.

Writ Petitions are allowed accordingly.

Sd/-
JUDGE

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