IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 1ST DAY OF JULY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE HEMANT CHANDANGOUDAR

S.T.R.P. NO.433 OF 2017

BETWEEN:

M/S MANGALORE REFINERY AND
PETROCHEMICALS LIMITED.,
KUTHETOOR P.O., VIA KATIPALLA
MANGALORE-575030.

... PETITIONER

(BY SRI. RAVI RAGHAVAN, ADV.,)

AND:

THE STATE OF KARNATAKA
REPRESENTED BY THE COMMISSIONER
OF COMMERCIAL TAXES
GANDHINAGAR, BANGALORE-560009.

... RESPONDENT

(BY SRI. JEEVAN J. NEERALGI, AGA)

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THIS STRP IS FILED UNDER SECTION 65(1) OF THE KARNATAKA VALUE ADDED TAX ACT, 2003 AGAINST THE JUDGMENT DATED 24.5.2017 PASSED IN STA NO.3191 TO 3214/2013 ON THE FILE OF THE KARNATAKA APPELLATE TRIBUNAL AT BENGALURU, DISMISSING THE APPEAL AND UPHOLDING THE ORDER DATED 27.9.2013 PASSED IN KVAT/AP/183 TO 185/12-13 ON THE FILE OF THE JOINT COMMISSIONER OF COMMERCIAL TAXES (APPEALS), MYSORE DIVISION, MYSORE, DISMISSING THE APPEAL AND FILED

AGAINST THE ORDER DATED 25.2.2013 PASSED BY THE DEPUTY COMMISSIONER OF COMMERCIAL TAXES (AUDIT-I) DVO, MANGALORE FOR THE PERIOD OF AUGUST 2009, JANUARY 2010 AND MARCH 2010.

THIS STRP. COMING ON FOR FINAL HEARING, THIS DAY, **ALOK ARADHE J.,** DELIVERED THE FOLLOWING:

ORDER

This petition under Section 65(1) of the Karnataka Value Added Tax Act, 2003 (hereinafter referred to as 'the Act' for short), has been filed by the petitioner against the order dated 24.05.2017 passed by the Karnataka Appellate Tribunal. The petition was admitted on the following substantial questions of law by order dated 11.10.2018:

> *"(1) Whether on the facts and in the circumstances of this case, the KAT was right in holding that the conditions for availment of input tax credit in respect of capital goods under Section 12(2) of the KVAT Act?*
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> *(2) Whether on the facts and in the circumstances of this case, the KAT was right in holding that input tax credit in respect of capital goods cannot be availed before the commencement of commercial production as per Section 12(2) of the KVAT Act?*
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> *(3) Whether on the facts and in the circumstances of this case, the KAT was right in*

holding that the conditions as mentioned under Section 12(2) of the KVAT Act, i.e., sale of taxable goods or commencement of commercial production, must necessarily be related to the petitioner's expansion project under Phase III itself?

(4) Whether the KAT was right in holding that the penal provisions under Section 72 of the KVAT Act are mandatory and thereby upholding the levy of penalty against the petitioner in this case?"

2. Facts leading to filing of this revision petition briefly stated are that the petitioner is a dealer registered under the provisions of the Act and is engaged in the activity of manufacture and sale of petroleum products. The petitioner is a public sector company. The petitioner is also a registered dealer under the provisions of Central Sales Tax Act. The petitioner has commenced its operations in the year 1996 and has carried out the activities of expansion and modernization. The petitioner commenced the commercial production in the initial stage referred to as Phase I in the year 1995-96 with rated capacity of 3 MMTPA. Subsequently, the petitioner claimed additional investments

for expansion of its manufacturing unit under second stage referred to as Phase II by which the rated capacity was enhanced to 9 MMTPA. The commercial production for Phase II commenced in the year 1999-2000. The petitioner thereafter made further investments and began expansion of Phase III in the year 2009-10 by which capacity was enhanced to 15 MMTPA. The petitioner linked the existing units to the new units undertaken after Phase III expansion project to form a continuous process plant with uninterrupted operations. The commercial production of Phase III commenced in March 2012. The petitioner, during the expansion of Phase III facilities, procured capital goods for use in Phase III expansion from registered dealers within the State of Karnataka with applicable value added taxes and availed and utilized input tax credit on the purchasers in the same month of purchase against the tax liability of the same month arising out of sales made out of the existing Phase I and Phase II facilities which continued to generate revenue / turn over / tax liabilities.

3. The re-assessment proceedings were initiated against the petitioner for the period 2009-10 and books of accounts, returns, etc. were verified. Thereafter, the proposition notice dated 29.02.2012 was issued under Section 39(1) of the Act for the periods August 2009, January 2010 and March 2010 proposing to disallow the input tax credit availed on the capital goods for Phase III on the ground that credit cannot be availed prior to commencement of production. In response to the aforesaid notice, the petitioner supplied reply on 13.03.2012 in which *inter alia* it submitted that the petitioner was eligible to avail input tax credit as the petitioner was effecting sales of taxable goods during the impugned period and has satisfied the conditions laid under Section 12(2) of the Act. In terms of the proposition notice, the Assessing Authority passed an order of re-assessment dated 13.06.2012 by which the credit availed by the petitioner was disallowed. The petitioner paid the entire amount of input tax credit under dispute. Thereafter, the petitioner, for a period from March 2013 to March 2016, made payment under protest towards interest

liability. Thereafter, an order of rectification was passed on 25.06.2012.

4. The assessee thereupon filed an appeal before the Joint Commissioner of Commercial Taxes which was dismissed by an order dated 24.05.2017 *inter alia* holding that the petitioner purchased capital goods for expansion of Phase III and the eligibility to claim input tax credit under the Act is only after commencing of production or sale of goods from expansion Unit III of the petitioner. It was further held that the expression 'or' used in Section 12(2) of the Act is disjunctive and only relates to expansion unit of Phase III of the petitioner. Accordingly, it was held that the assessee has not fulfilled the conditions laid down under Section 12(2) of the Act and the appeal preferred by the petitioner was dismissed. In the aforesaid factual background, this appeal has been filed.

5. Learned counsel for the petitioner submitted that under Section 12(2) of the Act as soon as one of the conditions provided therein namely commencement of

commercial production, or sale of goods in the course of export of goods out of territory of India and once such conditions are fulfilled, the provisions of Section 12(2) of the Act is applicable and the petitioner is therefore, eligible under Section 12(1) of the Act to avail of the input tax credit. It is further submitted that Section 12(2) of the Act uses the expression 'or' which is disjunctive and on fulfillment of any of the conditions mentioned in Section 12(2) of the Act, the petitioner becomes eligible to avail of the input tax credit. It is further submitted that the interpretation put forth by the Tribunal on Section 12(2) of the Act is erroneous and is not tangible in law. It is also urged that in the facts and circumstances of the case, no penalty and interest can be levied on the petitioner as there is *mens rea* established by the revenue to demonstrate that there was no intention on the part of the petitioner to evade tax. It is also submitted that the petitioner is entitled to refund of interest and penalty which has been paid by it under protest. In support of aforesaid submission, reliance has been placed on the decisions in ***'COMMISSIONER, TRADE TAX Vs. RIX INDIA GRAMMODYOG SANSTHAN' (2010) 33 VST 9 (All),***

'M.S.FREIGHT CARRIER (INDIA) PVT. LTD. Vs. STATE OF TRIPURA' (2010) 31 VST 549 (Gau), 'JAIPRAKASH ASSOCIATES LTD. Vs. STATE OF ARUNACHAL PRADESH & ORS. (2009) 22 VST 310 (Gau) and ***'PRO AGRO SEEDS CO. LTD. Vs. STATE OF BIHAR' (2003) 132 STC 226.***

6. On the other hand, learned Additional Government Advocate for the respondent submits that the petitioner has availed of the incentive / exemptions in respect of Unit III under the incentive scheme of the State Government separately and Unit III for the purposes of Section 12(2) of the Act has to be treated as an independent unit and since the aforesaid unit had not commenced the commercial production, therefore, the petitioner is not eligible to avail of the input credit tax. It is further submitted that if the contention raised by the petitioner is accepted, it will amount to avail of the double benefit. It is further submitted that the order passed by the Tribunal does not warrant any interference in this petition.

7. We have considered the submissions made on both sides and have perused the record. It is well settled rule of statutory interpretation in relation to the taxing statute that the subject is not to be taxed unless the words of the taxing statute unambiguously impose tax on him. The proper course in construing revenue Acts is to give a fair and reasonable construction to their language without leaning to one side or the other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is not permissible. ***(See: Principles of Statutory Interpretation Justice G.P.Singh 14th edition Page 882)***. It is equally well settled legal proposition that the word 'or' is normally disjunctive and the word 'and' is normally conjunctive. It is well settled rule of statutory interpretation that where the provision is clear unambiguous, the word 'or' cannot be read as 'and' and the expression 'or' is disjunctive. ***(See: 'UNION OF INDIA Vs. IND-SWIFT LABORATORIES' (2011) 4 SCC 634).***

8. In the backdrop of aforesaid well settled rule of statutory interpretation with regard to taxing statute, we may advert to Section 12(1) and 12(2) of the Act and Rule 133 of the Karnataka Value Added Tax Rules, 2005 which are reproduced below for the facility of reference:

> *"12. Deduction of input tax in respect of Capital goods -*
>
> *(1) Deduction of input tax shall be allowed to the registered dealer in respect of the purchase of capital goods for use in the business of sale of any goods in the course of export out of the territory of India and in the case of any other dealer in respect of the purchase of capital goods wholly or partly for use in the business of taxable goods;*
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> *(2) Deduction of input tax under this Section shall be allowed only after commencement of commercial production, or sale of taxable goods or sale of any goods in the course of export out of the territory of the India by the registered dealer and shall be apportioned over a specified period, as may be prescribed."*

"133. Capital goods scheme - (1) Deduction of input tax under section 12 shall be subject to the following conditions:-

(a) No deduction of input tax shall be allowed where the use of capital goods relates wholly to the sale of exempt goods, other than when such goods are sold in the course of export out of the territory of India.

(b) Where there is a change in use of the capital goods from sale of exempt goods or non-taxable transactions to sale of taxable goods wholly or partially, within twelve months from the date of its purchase, the dealer shall be eligible for rebate on such capital goods.

(c) Where the use of capital goods relates, to both the sale of goods in the course of export out of the territory of India or sale of taxable and exempt goods and also to taxable goods that are disposed otherwise than by way of sale or non-taxable transactions, the non-deductible element of input tax shall be calculated on the basis of the formula specified under Rule 131.

(d) No deduction of input tax in respect of capital goods shall be allowed to a dealer registered under the Act where the taxable

turnover of the dealer is less than the limit specified in sub-section (2) of section 22 during the year in which the capital goods are purchased.

(e) The deduction shall be claimed by the dealer in his monthly return.

Provided that any balance of deduction of input tax in respect of capital goods purchased prior to the first day of April, 2006 and in respect of which input tax rebate has already been granted in Form VAT 175, shall be claimed by the dealer in his return for the month of April, 2006.

(2) Where there is a change in use of the capital goods, after taking deduction of input tax, and the dealer is no longer eligible for such input tax rebate, the dealer shall inform the jurisdictional Local VAT officer or VAT Sub-officer within ten days of such change in use.

(3) Where the capital goods are disposed of otherwise than by way of sale after, the date of the commencement of commercial production or the sale of taxable goods or the sale of any goods in the course of export out of the territory of India, the dealer shall [repay input tax deducted in respect of such capital goods and such amount repayable shall be] calculated on the prevailing

market value of such capital goods at the time of such disposal."

9. Thus, from perusal of Section 12(1) of the Act, it is evident that deduction of input tax shall be allowed to a registered dealer in respect of purchase of capital goods for use in the business of sale of any goods in the course of export out of the territory of India and in case of any other dealer in respect of purchase of capital goods wholly or partly for use in business of taxable goods. Similarly, Section 12(2) provides that deduction of input tax shall be allowed only after commencement of commercial production or sale of taxable goods or sale of any goods in course of export out of territory of India or registered dealer. Thus, the deduction of input tax has to be allowed on fulfillment of one of the conditions namely (1) after commencement of commercial production, (2) sale of taxable goods and (3) sale of any goods in the course of export out of the territory of India by the registered dealer.

Rule 133 of the Rules provides for deduction of input tax subject to the conditions mentioned therein. It is

pertinent to note that none of the conditions prescribed in Rule 133 provide that each unit of the petitioner has to be an independent unit to avail of the benefit of input tax.

10. In the instant case, the petitioner was effecting sale of taxable goods on payment of VAT / CST as applicable and was effecting sale of goods in the course of export out of the territory of India. Therefore, the petitioner had satisfied the conditions laid down in Section 12(2) of the Act namely sale of taxable goods / sale of goods in the course of export out of the territory of India and was eligible to avail of the credit under Section 12(2) of the Act. The finding recorded by the Joint Commissioner of Commercial Taxes as well as by the Tribunal that the petitioner, after expansion of Phase III, was eligible to claim input tax credit only after commencing of production or sale of goods from the expansion Unit III of the petitioner, cannot be sustained in the eye of law as the expression 'or' used in Section 12(2) of the Act is not conjunctive but is disjunctive. Since the petitioner had fulfilled the conditions prescribed in Section 12(2) of the Act, therefore, the petitioner was eligible to avail of the benefit of

input tax credit. There is no element of any *mens rea* that the petitioner had the intention to evade tax. The petitioner had paid taxes according to the information furnished in the return and therefore, it should not have been penalized subsequently after the assessment proceedings are finalized and the amount of tax is determined. It is well settled in law that penalty cannot be imposed merely because it is lawful to do so ***[See: 'HINDUSTAN STEEL P. LTD. Vs. STATE OF ORISSA' (1970) 25 STC 211 (SC)].*** Since we have held that the petitioner was entitled to benefit of input tax credit, therefore, the question of levy of penalty and interest does not apply. It is also pertinent to mention here that the petitioner has deposited the amount of interest and penalty under protest and therefore, the petitioner is entitled to refund of the aforesaid amount.

11. For the aforementioned reasons, the substantial questions of law are answered in favour of the petitioner and against the respondent.

12. In view of preceding analysis, the impugned order dated 24.05.2017 passed by the Tribunal and order dated 27.09.2013 passed by the Joint Commissioner of Commercial Taxes cannot be sustained in the eye of law and the same are accordingly quashed. The appellant is held entitled to refund of interest paid under protest.

In the result, the petition is allowed.

Sd/-
JUDGE

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JUDGE

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