

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

WEDNESDAY, THE 5TH DAY OF OCTOBER 2016/13TH ASWINA, 1938

WP(C) .No. 10979 of 2014 (V)

PETITIONER(S) :

1. S.NAJEEM
SAJEER MANZIL, NAVAIKULAM,
THIRUVANANTHAPURAM 695 603.

2. S.SAJEEV
SAJEER MANZIL, NAVAIKULAM,
THIRUVANANTHAPURAM 695 603

BY ADV. SRI.S.ANIL KUMAR (TRIVANDRUM)

RESPONDENT(S) :

1. COMMERCIAL TAX OFFICER,
ANCHAL , KOLLAM DISTRICT 691 306.

2. THE INTELLIGENCE OFFICER (IB) ,
COMMERCIAL TAXES, ASRAMOM, KOLLAM 691 002.

* ADDITIONAL R3 IMPEADED

3. THE DEPUTY TAHSILDAR,
REVENUE RECOVERY, TALUK OFFICE, VARKALA,
THIRUVANANTHAPURAM DISTRICT - 695 141.

* ADDL. R3 IMPEADED AS PER ORDER DTD.7.1.2015 IN
IA.136/2015

BY GOVERNMENT PLEADER SRI.BOBBOY JOHN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 15-07-2016 ALONG WITH WPC.27736/2014 AND CONNECTED
CASES THE COURT ON 05-10-2016 DELIVERED THE FOLLOWING:

msv/

WP(C) .No. 10979 of 2014 (V)

APPENDIX

PETITIONER(S) ' EXHIBITS

EXHIBIT P1 COPY OF DISSOLUTION DEED DATED 2/7/2007

EXHIBIT P2 COPY OF ORDER DATED 31/5/2013 ISSUED BY THE
2ND RESPONDENT UNDER SECTION 67 OF THE KVAT ACT

EXHIBIT P2 (A) COPY OF ORDER DATED 11/11/2013 ISSUED BY THE
2ND RESPONDENT UNDER SECTION 66 OF THE KVAT ACT

EXHIBIT P3 COPY OF ORDER DATED 26/3/2014 ISSUED BY THE DEPUTY
COMMISSIONER (APPEALS), KOLLAM

EXHIBIT P4 COPY OF NOTICE DATED 21/2/2014 ISSUED BY THE
1ST RESPONDENT UNDER SECTION 25 OF THE ACT

EXHIBIT P5 COPY OF REPLY DATED 21/3/2014 ADDRESSED TO THE FIRST
RESPONDENT

EXHIBIT P6 COPY OF ASSESSMENT ORDER DATED 28/3/2014 ISSUED BY THE
1ST RESPONDENT UNDER SECTION 25 OF THE ACT

EXHIBIT P6 A: PHOTOCOPY OF THE ORDER DTD.7.4.2014 OF THE FIRST
RESPONDENT.

RESPONDENT(S) ' EXHIBITS

NIL

//TRUE COPY//

P.S.TO JUDGE

Msv/

A.M. SHAFFIQUE, J.

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W.P. (C) Nos. 10979, 27736, 28422/2014, 1489,
12066, 17769, 20497, 21123, 21230, 21285,
22481, 24864, 31360, 32836/2015, 1617, 3116,
11463, 12708, 12716, 12717, 12723, 12725 13183,
13959, 14350, 14355 14426, 14600, 16716, 17390,
17392, 17393, 17394, 17398, 17399, 17400, 17428,
17660, 18048, 18403, 18405, 19366, 19472, 19492,
19493, 20442, 20521, 20995, 21184, 21378, 22181,
22479, 23170, 23185, 23377 & 26723/2016

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Dated this, the 5th day of October, 2016

J U D G M E N T

These batch of cases concern a common issue and hence heard and decided together. The issue projected by the petitioners is regarding the period of limitation for invoking Section 25(1) or 25A of the Kerala Value Added Tax Act, 2003 (hereinafter referred as the Act), power exercised by the Deputy Commissioner under section 25B of the Act to extend the time for completing the assessment beyond the period specified under Section 25(1) and whether penalty proceedings could be taken against an assessee beyond the period specified under section 67(1) read with section 25(1) of the Act, or under section 45A read with section 19(1) of the Kerala General Sales Tax Act, 1963 (hereinafter referred as the KGST Act).

2. The cases on hand can be categorised under different

W.P(C) No.10979/2014 & conn.cases

-:2:-

groups for an easy analysis of the facts and disputed questions.

GROUP-A. These are cases wherein the contention urged is that the notice for assessment or assessment orders passed under section 25(1) are barred by limitation.

(1) In W.P.(C) No.10979/2014, Ext.P6 is the assessment order dated 28.3.2014, which is rectified as per Ext.P6A order. The notice under section 25(1) is issued on 28/3/2014 in respect of assessment year 2005-2006.

(2) In W.P.(C) No.27736/2014, Ext.P2 is the assessment order dated 31/7/2014. The notice under section 25(1) is issued on 14/7/2014 in respect of assessment year 2006-2007.

(3) In W.P.(C) No.1489/2015, Ext.P5 is the assessment order dated 19/8/2014. The notice under section 25(1) is issued on 30/4/2014 and 11/8/2014 in respect of assessment year 2008-2009.

(4) In W.P.(C) No.20497/2015, Exts.P3 and P4 are the assessment orders dated 21.1.2015. The notice under section 25 (1) is issued on 28/11/2014 in respect of assessment years 2007-2008 and 2008-2009.

(5) In WP(C) No. 21123/2015, Ext.P1 is the assessment order dated 18/5/2015. Notice under Section 25(1) has been issued on

W.P(C) No.10979/2014 & conn.cases

-:3:-

14/10/2014 and 6/5/2015.

(6) In W.P.(C) No.24864/2015, Ext.P3 is the assessment order dated 20.7.2015. The notice under section 25(1) is issued on 9/6/2015 in respect of assessment year 2009-2010.

(7) In W.P.(C) No.31360/2015, Ext.P1 is the assessment order dated 20.6.2015. The notice under section 25(1) is issued on 8/7/2014 in respect of assessment year 2006-2007.

(8) In W.P.(C) No.32836/2015, Exts.P3 and P3(a) are the assessment orders dated 27/9/2015 and 28/9/2015. The notice under section 25(1) is issued on 10/7/2015 in respect of assessment year 2008-2009 and 2009-2010.

(9) In WP(C) No. 1617/2016, Ext.P3 is the assessment order dated 30/11/2015. Ext.P1 is the pre-assessment notice issued on 7/10/2015 with reference to assessment year 2007-08.

(10) In WP(C) No. 11463/2016, Ext.P3 is the assessment order dated 29/2/2016 with reference to assessment year 2009-10. Notice under Section 25(1) was issued only on 10/8/2015 beyond the period of limitation. In this case, a counter affidavit has been filed wherein it is contended that reopening of the assessment was made based on a report of the Intelligence Officer stating that the offence was compounded by the assessee

W.P(C) No.10979/2014 & conn.cases

-:4:-

in lieu of the prosecution under Section 74 of the Act. It is stated that under Section 22(10) of the Act, the assessee ought to have filed a revised return including the escaped turnover when the offence was compounded under Section 74 of the Act. But the assessee did not file revised return under Section 22(10). Therefore, according to the respondent, the time for completion of the assessment has not expired.

(11) In WP(C) No. 13959/2016, Ext.P1 is the assessment order dated 29/3/2016 in respect of assessment year 2007-08. Pre-assessment notice was issued only on 3/3/2016.

(12) In W.P.(C) No.14350/2016, Ext.P2 is the assessment order dated 3/3/2016. The notice under section 25(1) is issued on 2/12/2015 in respect of assessment year 2008-2009.

(13) In WP(C) No. 14355/2016 petitioner challenges Ext.P4 order of assessment dated 15/3/2016 in respect of assessment year 2009-2010. The pre-assessment notice was issued on 5/2/2016.

(14) In WP(C) No. 14426/2016, Ext.P3 is the assessment order dated 19/3/2016 in respect of assessment year 2009-10. Pre-assessment notice was issued only on 14/01/2016.

(15) In WP(C) No.14600/2016, Ext.P5 is the assessment

W.P(C) No.10979/2014 & conn.cases

-:5:-

order dated 25/2/2016 in respect of assessment year 2007-08. The facts of the case would disclose that best judgment assessment was completed for the year 2007-08 on 31/12/2013. The petitioner preferred an appeal as KVAT Appeal No.1060/2014. In the meantime, on 18/10/2014, another pre-assessment notice for best judgment for the same assessment year was issued. Petitioner challenged the same by filing WP(C) No. 28422/2014. However, the respondent finalised the second best judgment assessment on 30/10/2014. The assessment order was challenged by amending WP(C) No. 28422/14 in which further proceedings were stayed. Petitioner was served with another notice dated 13/2/2015 under Section 25(1) of the Act proposing to reopen the assessment for the year 2007-08. While matters stood thus, on 5/2/2016, notice was issued under Section 95 proposing to finalise the best judgment assessment for the year 2007-08. Despite the objection raised by the petitioner regarding bar of limitation, Ext.P5 order had been passed.

(16) In WP(C) No. 16716/16, Ext.P3 is the assessment order dated 28/3/2016 in respect of assessment year 2007-08. Pre assessment notice is dated 27/1/2016.

(17) In WP(C) No. 17660/2016, Ext.P4 order is under

W.P(C) No.10979/2014 & conn.cases

-:6:-

challenge. Ext.P4 is in respect of assessment year 2008-2009 after issuing the assessment notice dated 10/7/2015.

(18) In WP(C) No. 18048/2016, Ext.P8 is the assessment order with reference to assessment year 2009-10. Ext.P8 is dated 28/3/2016. Notice under section 25(1) was issued on 21/1/2016.

(19) In WP(C) No. 19366/16, Ext.P2 is the assessment order dated 29/2/2016 with reference to assessment year 2009-10. Pre-assessment notice was issued under Section 25(1) on 25/9/2015.

(20) In WP(C) No. 20995/2016, petitioner challenges Ext.P4 notice dated 3/5/2016, issued under section 25(1) in respect of assessment year 2009-2010.

(21) In WP(C) No.21184/2016, petitioner challenges Ext.P1 notice dated 8/3/2016, issued under section 25(1) in respect of assessment year 2009-2010.

(22) In WP(C) No. 21378/2016, Ext.P2 is the assessment order dated 17/3/2016 in respect of assessment year 2009-10. Pre-assessment notice is dated 8/2/2016.

(23) In WP(C) No. 22479/2016, petitioner challenges pre-assessment notice issued under Section 25(1) on 14/6/2016 intending to reopen an assessment, which is of the year 2009-10.

W.P(C) No.10979/2014 & conn.cases

-:7:-

GROUP-B: These are cases in which notice for assessment or assessment orders are under challenge wherein the Deputy Commissioner has extended the time for completing assessment under section 25B of the Act.

(1) In WP(C) No. 28422/2014, Ext.P7 is the assessment order dated 30/10/2014. Notice under Section 25(1) is issued on 10/10/2014. It is stated that the Deputy Commissioner has extended the time to conduct enquiry as per order dated 20/3/2014. Ext.P3 is the order passed by the Deputy Commissioner by which the power is exercised under Section 25B of the Act. It is mentioned that the offence of attempted evasion of tax committed by the dealer during the assessment year in question was conducted by the Intelligence wing of the Department and penalty is imposed under Section 47 of the KVAT Act and the offence still exists in the account of the dealer. Therefore, time is required for completing the assessment and if hasty steps are taken, it would be harmful to the revenue as well as to the assessee. It is further observed that the enquiry based on the offence detected is still pending and it is not possible to be done before 31/3/2014. The assessment is with reference to the assessment year 2007-08.

W.P(C) No.10979/2014 & conn.cases

-:8:-

(2) In W.P.(C) No.17769/2015, Ext.P3 is the assessment order dated 21/3/2015. The notice under section 25(1) is issued on 2/3/2015 in respect of assessment year 2006-2007. It is stated that the Deputy Commisssioner has extended the time upto 31/3/2015 as per Ext.P4 dated 28.3.2014.

(3) In WP(C) No. 21230/2015, Ext.P2 is the order of assessment dated 20/5/2015. The date of issuance of the order is not clear. However, it is stated that notice was served on the dealer on 25/4/2015 in relation to assessment year 2007-08. Petitioner is served with Ext.P3 order dated 23/9/2014 by which it is stated that the Deputy Commissioner had extended the time invoking Section 25B of the Act. In Ext.P3, it is observed that the period for completing assessments had been extended upto 31st March, 2014 as per the proviso to Section 25(1) and on the request of the assessing authority, time is extended till 30/9/2015.

(4) In WP(C) No. 21285/2015, Ext.P1 is the order dated 29/9/2014 issued by the Deputy Commissioner under Section 25B of the Act extending the time for completing enquiry upto 30/9/2015. Exts.P2 and P3 are the assessment orders in respect of the assessment years 2007-08 and 2008-09. Orders were

W.P(C) No.10979/2014 & conn.cases

-:9:-

passed on 6/5/2015. Notices under section 25(1) were issued on 24/1/2015 with reference to Ext.P2 order and Ext.P3 order.

(5) In WP(C) No. 22481/2015, Ext.P3 is the assessment order dated 29/4/2015 in respect of assessment year 2006-07. Notice under Sec.25(1) was issued on 2/3/2015. The Deputy Commissioner had extended the time for completing the assessment as per order dated 28/3/2014 under Sec.25B of the Act.

(6) In WP(C) No. 20442/2016, Ext. P4 assessment order dated 12/5/2016 in respect of assessment year 2008-2009 is under challenge. It is stated that the Deputy Commissioner had issued Ext.P2 order dated 28/3/2016 extending the period to complete the assessment upto 31/3/2017. Petitioner has a contention that no specific reason had been stated in Ext.P2 order for extending the time to complete the assessment.

(7) In WP(C) No. 20521/2016, petitioner challenges Exhibit P3 and P4 orders passed by the Deputy Commissioner under section 25B extending the period of completion of proceedings under section 25 for a further period of one year from 31/3/2016, in respect of the assessment years 2009-10 and 2010-11 respectively. Exts. P1 and P2 are notices issued under section 25

W.P(C) No.10979/2014 & conn.cases

-:10:-

(1) pursuant to Exts.P3 and P4. No specific reason had been stated to extend the period of limitation.

(8) In WP(C) No. 22181/2016, Ext.P3 is the assessment order dated 31/3/2016 in respect of assessment year 2009-10. Pre-assessment notice has been issued on 18/1/2016. The officer refers to Deputy Commissioner's order dated 23/3/2016 issued under Section 25B by which time had been extended for completing the assessment for the year 2009-10 and 2010-11 for a further period of one year beyond 31/3/2016.

(9) In WP(C) No. 23377/2016, petitioner challenges Exts.P12, P13 and P14. Ext.P12 is an assessment order dated 29/6/2016 with reference to assessment year 2006-07. Pre-assessment notices had been issued on 4/4/2016, 21/4/2016 and 9/5/2016 which apparently were beyond the period of limitation. Ext.P13 is an order passed by the Deputy Commissioner extending the time for completing the assessment under Section 25B for the year 2006-07 for six months till 31/3/2015 and by Ext.P14, the period was extended upto 31/3/2016.

(10) In W.P.(C) No. 26723/2016, petitioner challenges Ext.P1 order dated 31/3/2016 issued by the Deputy Commissioner extending the period of completion of assessment for the years

W.P(C) No.10979/2014 & conn.cases

-:11:-

2005-2006 and 2006-2007 upto 31/3/2017 and Ext.P2 assessment order dated 15/7/2016. It is contended that the pre-assessment notice under section 25(1) was served on the assessee only on 6/6/2016.

GROUP-C: [W.P.(C) Nos. 12708, 12716, 12717, 12723, 12725, 17390, 17392, 17393, 17394, 17398, 17399, 17400, 17428, 18403, 18405, 19472, 19492, 19493, 23170 & 23185/2016].

These are cases in which orders are passed by the Deputy Commissioner under Section 25B of the KVAT Act. Petitioners challenge those orders *inter alia* contending that the power under section 25B cannot be exercised beyond the period of limitation. In some of the cases, the impugned orders are challenged in part only.

GROUP-D: In this case, penalty orders are under challenge.

In WP(C) No. 12066/2015, petitioner challenges Ext.P4 series of penalty orders issued by the Intelligence Officer, *inter alia* contending that the orders are barred by limitation. It is contended that section 67(1) prescribes definite outer time limit for finalisation of penalty proceedings. The time limit fixed originally was one year from the date of detection of offence, which has been enhanced to 3 years by Finance Act, 2009. The

W.P(C) No.10979/2014 & conn.cases

-:12:-

contention urged is that the impugned orders are passed solely relying on the communication received from the Customs Department. According to the petitioner, it is rather clear from Ext.P7 letter dated 5/9/2008 issued by the Commercial Tax Department to the Commissioner of Customs and also the impugned orders that the offence alleged for imposing penalty was detected by Commercial Taxes Department from the materials and information received from Additional Director, DRI Cochin and through his letter dated 25/4/2008. It is therefore argued that the one-year period got expired by the end of April 2009, months before the publication of Finance Act, 2009 on 28/7/2009 and even the limitation period of three years expired by 2011. The penalty orders had been issued on 5/12/2014 far beyond the period of limitation as provided under the statute. It is submitted that Exts. P4 and P4(A) penalty orders are issued in regard to assessment years 2003-2004 and 2004-2005 under section 45A of the KGST Act, where no time limit is prescribed for imposing penalty. The argument is that even if no time limit is specified, action is to be initiated within a reasonable period. Exts.P4(B) and P4(C) are penalty orders issued under section 67 (1) of the Act and it relates to the assessment years 2005-2006

W.P(C) No.10979/2014 & conn.cases

-:13:-

and 2006-2007. In regard to the penalty order passed under the KGST Act, it is contended that the scheme of limitation as prescribed under section 19(1) of the KGST Act would apply equally to an order of penalty as it applies to assessment for escaped turnover.

GROUP-E: There are cases in which order is passed under section 25A of the Act

(1) In W.P.(C) No.3116/2016, Ext.P3 is the assessment order dated 5.1.2016. The notice under section 25A is issued on 22.12.2015 in respect of assessment year 2008-2009. Though in the notice reference is made to section 25A, there is no reference to an audit report as contemplated under the said provision. It is contended that the proceedings are therefore taken under section 25, which is beyond the period of limitation specified under section 25(1). The Deputy Commissioner has extended the time for completion of assessment upto 31/3/2016 as per order dated 19/3/2015 in terms of section 25B, which according to the petitioner is beyond the period of limitation.

(2) In W.P.(C) No.13183/2016, Exts.P1 and P1(a) are under challenge. Ext.P1 is an order passed on 31/10/2015 in respect of assessment year 2008-2009. Proceedings were taken under

W.P(C) No.10979/2014 & conn.cases

-:14:-

section 8 read with 25A of the Act. Ext.P1(a) is the penalty order issued in respect of assessment year 2008-2009 by issuing notice on 14/10/2015. The contention is that both the orders have been initiated beyond the period prescribed under section 25(1) of the Act.

3. Section 25(1) reads as under:

"25. Assessment of escaped turnover.-(1)

Where for any reason the whole or any part of the turnover of business of a dealer has escaped assessment to tax in any year or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable or any deduction has been wrongly made there from, or where any input tax credit has been wrongly availed of, the assessing authority may, at any time within five years from the last date of the year to which the return relates, proceed to determine, to the best of its judgment, the turnover which has escaped assessment to tax or has been under assessed or has been assessed at a rate lower than the rate at which it is assessable or the deduction in respect of which has been wrongly made or input tax credit that has been wrongly availed of and assess the tax payable on such turnover or disallow the input tax credit wrongly availed of, after issuing a notice on the dealer and after making such enquiry as it may consider necessary:

Provided that before making an assessment under

W.P(C) No.10979/2014 & conn.cases

-:15:-

this sub-section the dealer shall be given a reasonable opportunity of being heard.

Provided further that where the escapement is due to the application of incorrect rate of tax, no assessment under this sub-section shall be made where the dealer files revised return and pays the tax which has escaped assessment along with interest under sub-section (5) of section 31 and thrice the interest as settlement fee."

Section 25(1) permits the assessing authority at any time within five years from the last date of the year to which the return relates, proceed to determine, to the best of its judgment, the turnover which has escaped assessment to tax or has been under assessed or has been assessed at a rate lower than the rate at which it is assessable or the deduction in respect of which has been wrongly made or input tax or special rebate credit has been wrongly availed, after issuing a notice on the dealer and after making such enquiry as it may consider necessary. Provisos to Section 25(1) has been inserted from time to time under the respective Finance Act's which reads as under:-

"Kerala Finance Act, 2010

In section 25(1), after the existing provisos, the following proviso was inserted-

"Provided also that the time limit for the completion of assessments for the year 2005-06,

W.P(C) No.10979/2014 & conn.cases

-:16:-

under this section shall be extended upto 31st March, 2011”.

Kerala Finance Act, 2011

In section 25(1), for the third proviso was substituted as under:

“Provided also that the time limit for the completion of assessments for the years 2005-06 and 2006-07 under this section shall be extended up to 31st March, 2012.”

Kerala Finance Act, 2012

In section 25(1), for the third proviso was substituted, as follows:-

“Provided also that the time limit for the completion of assessments for the years up to 2007-08 under this section shall be extended upto 31st March, 2013.”

Kerala Finance Act, 2013

In section 25(1), for the third proviso, the following proviso was substituted:

“Provided also that the assessments pending as on 31st March, 2013 under this section shall be completed on or before 31st March, 2014.”

Kerala Finance Act, 2015

In section 25(1), for the third proviso, the following proviso was substituted :

“Provided also that the period for the completion of assessments including those subjected to extension under section 25B which expires on 31st March, 2015, shall be extended up to 31st March, 2016.”

Provisos virtually extends the period for completing assessments under section 25(1), upto 31/3/2011 in respect of assessment

W.P(C) No.10979/2014 & conn.cases

-:17:-

year 2005-06, upto 31/3/2012, in respect of assessment years 2005-06 and 2006-07, upto 31/3/2013 in respect of assessment year 2007-08, which was extended to 31/3/2014 and upto 31/3/2016 for the completion of assessments including those subjected to extension under section 25B which expires on 31/3/2015. Section 25(5) indicates that in computing the period of limitation, for the purpose of the section, the time during which the proceedings for assessment remained stayed under the orders of a Civil Court or other competent authority shall be excluded.

4. Section 25B reads as under:

"25B. Extension of period of limitation for assessments in certain cases.-*Notwithstanding anything contained in section 24 or in section 25, in cases where any investigation or inquiry is pending under this Act or any other law or where any assessment cannot be completed within the period specified under the said sections, the Deputy Commissioner may, for good and sufficient reasons, extend the period of completion of the assessment beyond the period specified in those sections."*

Section 25B is a special power given to the Deputy Commissioner to extend the period of completion of assessment beyond the period specified in Sections 24 and 25 for good and sufficient reasons in cases where any investigation or inquiry is pending

W.P(C) No.10979/2014 & conn.cases

-:18:-

under the Act or any other law or where any assessment cannot be completed within the period specified under the said sections.

5. The main moot point raised by the petitioners with respect to the limitation as provided under Section 25(1) is that in order to invoke Section 25(1), a notice under the said provision has to be issued as provided under the first proviso and the assessment has to be completed within 5 years from the last date of the year to which the return relates, failing which the assessments made pursuant to the same are barred by limitation and even an order under section 25B issued after the period of limitation will not save the proceedings, unless a notice under section 25(1) is issued within the limitation period of five years.

6. In regard to the power to be exercised under Section 25B, it is stated that in none of the cases, petitioners were put to notice regarding the exercise of the power by the Deputy Commissioner and that apart, sufficient reason had not been stated to extend the period of limitation. The contention is that, being a statutory right available to the assesseees to have finalisation of their returns within a specified time, extending the period at the whims and fancies of the Department without hearing the assessee and without any enquiry, is arbitrary and

W.P(C) No.10979/2014 & conn.cases

-:19:-

hence extension of time under Section 25B shall not enable the Department to extend the period of limitation for issuance of notice and for completing the assessment.

7. The contention urged by the State is that, by way of successive amendments made to the Finance Act, provisos had been incorporated from time to time extending the period of limitation by one year which permits extension of period for completing the assessment. The contention is that when time is extended to complete the assessment, virtually it includes a right to issue notice under Section 25(1) as well. Further section 25B of the Act gives power to the Deputy Commissioner to extend the period of limitation on certain eventualities and once such a power is exercised, it is not open for judicial review.

8. Heard the learned counsel appearing for the petitioners and the learned Government Pleader appearing on behalf of the State and its authorities.

9. The main contention urged by the petitioners is with reference to judgment of the Apex Court in ***State of Punjab v. Shreyans Industries Ltd.***[(2016) 4 SCC 769] wherein the Apex Court while considering the provisions under the Punjab General Sales Tax Act, 1948, (hereinafter referred as the Punjab Act) held

W.P(C) No.10979/2014 & conn.cases

-:20:-

that in the context of the Punjab Act, it can be said that the extension of time for assessment has the effect of enlarging the period of limitation and once the period of limitation expires, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. A valuable right accrues in favour of the assessee when the period of limitation expires. If the Commissioner exercising power under Section 11 (10) of the Act is permitted to grant exemption even after the expiry of original period of limitation prescribed under the Act, it will give him right to exercise such a power at any time after the last date of assessment. It was therefore held that when the last date of assessment in respect of the assessment year expires, it vests with the assessee a valuable right which cannot be lightly taken away and Section 11(10) has to be interpreted in the manner which is equitable to both the parties and therefore the only way to interpret the said provision is by holding that the power to extend the time is to be exercised before expiry of the normal period of assessment. Therefore, the Apex Court ***Shreyans Industries Ltd.*** (supra) has come to a finding that once the period of assessment is over, it confers on the assessee a valuable right, which cannot be taken away after the said period

W.P(C) No.10979/2014 & conn.cases

-:21:-

of limitation.

10. Learned counsel appearing for the petitioners while placing reliance on **Shreyans Industries Ltd.** (supra) also relied upon the following judgments:-

(i) **Cholayil Private Limited v. Assistant Commissioner (Assessment)** {2015 (4) KLT 516(F.B)}.

The Full Bench in the above case held that section 25(1) of the VAT Act is in *pari materia* with section 19 of the KGST Act. The Full Bench was considering the question as to whether the judgment in **Tirur Medical Stores v. State of Kerala** (1978 KLT 415) was correctly decided by the Division Bench. It was held that though **Tirur Medical Stores** (supra) considered the use of the word “proceed to determine” under section 19 of the KGST Act, it is in *pari materia* with section 25(1) of the KVAT Act. Therefore, it was held that the proceedings for the determination of the escaped turnover must commence within the period stipulated and the word “assess” in that section is used in the wider sense as given to it by the Apex Court in **Sales Tax Officer, Special Circle, Ernakulam v. Sudarsanam Iyengar & Sons** [(1970) 25 STC 252 (SC)]. It was therefore held that **Tirur Medical Stores** (surpa) is a precedent for the principle

W.P(C) No.10979/2014 & conn.cases

-:22:-

that proceedings have to be initiated by the issuance of notice within the period prescribed in section 19 of the KGST Act. Further, the Division Bench proceeded to consider the scope of the 3rd proviso to sub section (1) of section 25 incorporated as per Kerala Finance Act, 2010 and later by Kerala Finance Act, 2011. It was held that the net effect of the introduction of the 3rd proviso to Sub section (1) of section 25 and the inclusion of section 25 within the canopy of section 25B is indicative of the fact that for all intents and purposes, the legislature fixed an outer time limit for completion of assessment proceedings under sub section (1) of section 25 at least in cases to which the provision in Section 25 (1) as amended by the Kerala Finance Act, 2010 and the later amendments sustaining that provision or conferring power of enlargement of time applies.

(ii) ***State of Kerala v. Abhilash T.Mathew*** (2013 (1) KLT S.N.119).

It was held that the prescription of period of limitation result in rights accrued to the assessee, by passage of the prescribed period, which cannot be disturbed without hearing the assessee. One of the questions considered was whether the Deputy Commissioner could exercise power under Section 17(7) of the

W.P(C) No.10979/2014 & conn.cases

-:23:-

KGST Act to extend the period of limitation. It was held that the assessments as evident from the substituted provisos should be pending respectively on the specified dates. Only the time for completing the assessments has been extended. It was held at para 9 as under:-

"9. The next question would be the alleged extension granted by the Deputy Commissioner under Section 17(7). Admittedly such exercise was done without notice to the assessee. Prescription of period of limitation result in rights accrued to the assessee, by passage of the prescribed period; which cannot be disturbed without hearing the assessee. In any event, looking at Section 17(7), there is nothing on record to show that any enquiry or investigation under the Act was pending against the assessee. This is necessary for the Deputy Commissioner to be clothed with the power of extension. The Legislature has carefully provided such authority with a rider; and that does not amount to extending the period of limitation at the sweet will of the Department. The Legislature definitely has the power to extend the period of limitation of assessments by granting successive leases of life as is demonstrated earlier or even to resurrect such assessments barred by limitation. But, this power and authority is conferred exclusively on the Legislature and Section 17(7) cannot be deemed to be a delegation; which, in any event, is not possible. In the circumstances,

W.P(C) No.10979/2014 & conn.cases

-:24:-

the 2nd question of law framed by us is also answered against the Revenue and in favour of the assessee."

(iii) ***Tirur Medical Stores. v. State of Kerala*** (1978 KLT 415).

This is a case which had been approved by the Full Bench in ***Cholayil Pvt. Ltd.*** (supra)

(iv) ***STO v. Sundaram Iyengar Sons*** [(1969) 2 SCC 396].

This judgment was passed in the light of the KGST Act in regard to the escaped assessment wherein the Apex Court considered as to what is the meaning of the words "proceed to assess and determine". Para 4 is relevant which reads as under:

"4. Rule 33 of the relevant rules is in these terms:

Rule 33(1) "If for any reason the whole or any part of the turnover of business of a dealer or licensee has escaped assessment to tax in any year or if the licence fee has escaped levy in any year, the assessing authority or licensing authority as the case may be, subject to the provisions of sub-rule (2) may at any time within three years next succeeding that to which the tax or licence fee relates determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable or levy the licence fee in such turnover after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary."

Now in view of the previous decisions the principle

W.P(C) No.10979/2014 & conn.cases

-:25:-

is firmly established that assessment proceedings under the Sales Tax Act must be held to be pending from the time the proceedings are initiated until they are terminated by a final order of assessment. The distinguishing feature on which emphasis has been laid by the counsel for the respondent is that the language employed in Rule 33 is such as to lead to only one conclusion that the final determination of the turnover which has escaped assessment and the assessment of the tax have to be done within three years. It is pointed out that in the other sales tax provisions which came up for consideration in the cases mentioned above the words employed were "proceed to assess" e.g., sub-sections (4) and (5) of Section 11 of the Punjab General Sales Tax Act. Our attention has been invited to the appropriate dictionary meaning of the word "determine" which is "to settle or decide—to come to a judicial decision" (Shorter Oxford English Dictionary). It is suggested that the word "determine" was employed in Rule 33 with a definite intention to set the limit within which the final order in the matter of assessment should be made, the limit being three years. We find it difficult to accept that in the context of sales tax legislation the use of the words "proceed to assess" and "determine" would lead to different consequences or result. In this connection the words which follow the word "determine" in Rule 33 must be accorded their due signification. The words "assess the tax payable" cannot be ignored and it is clearly meant that the assessment has to

W.P(C) No.10979/2014 & conn.cases

-:26:-

be made within the period prescribed. Assessment is a comprehensive word and can denote the entirety of proceedings which are taken with regard to it. It cannot and does not mean a final order of assessment alone unless there is something in the context of a particular provision which compels such a meaning being attributed to it. In our judgment despite the phraseology employed in Rule 33 the principle which has been laid in other cases relating to analogous provisions in sales tax statute must be followed as otherwise the purpose of a provision like Rule 33 can be completely defeated by taking certain collateral proceedings and obtaining a stay order as was done in the present case or by unduly delaying assessment proceedings beyond a period of three years."

(v) ***State of Punjab and Others v. Bhatinda District Coop. Milk P.Union Ltd.*** [(2007) 11 SCC 363].

In this case, the Apex Court held that the question of limitation being a jurisdictional question, writ petition was maintainable.

11. Now I shall refer to the judgments relied upon by the learned Government Pleader in support of their contentions.

(i) ***State of Kerala v. Dr.George Jacob*** (2010 (1) KLT S.N.23).

This is a Division Bench judgment of this Court in which the

W.P(C) No.10979/2014 & conn.cases

-:27:-

question considered was regarding limitation under Section 17(6) of the KGST Act. In order to extend the time limit for completion of assessment by another one year, an amendment was brought out making it effective from 31/3/2002 to 31/3/2003. It was held that the amendment applies to the assessment year 1998-99 and therefore the assessment completed before 31/3/2004 is well within time.

(ii) **Commissioner of Income Tax. V. T.O.Abraham & Co.** (2011(2) KLT SN 117).

The question considered was regarding the limitation for completing block assessment under section 158BE of the Income Tax Act, 1961.

(iii) **R.K.Upadhyaya v. Shanabhai P.Patel** [(1987) 3 SCC 96].

In this case, Apex Court considered the question whether service of notice under Section 148(1) of the Income Tax Act, 1961 is a condition precedent to confer jurisdiction on the Income Tax Officer. It was held that once a notice is issued within the period of limitation, jurisdiction becomes vested in the Income Tax Officer to proceed to reassess. It was held that issuance of notice within the period of limitation under Section 149(1) by itself was enough and the fact that the assessee had received the

W.P(C) No.10979/2014 & conn.cases

-:28:-

notice after the expiry of that period is not relevant.

(iv) ***Grindlays Bank Limited v. Income Tax Officer, Calcutta and Others*** [(1980) 2 SCC 191].

That was a case arising under the Income Tax Act, 1961 wherein the Apex Court held that when the assessment proceedings remained stayed for over two years by successive court orders, the said period could be excluded while computing the period of limitation and therefore the order of assessment cannot be stated to be time barred.

(v) ***Indian Aluminum Cables Ltd. v. Excise and Tax Officer*** [(1977) 1 SCC 120].

That was a case arising under the Punjab General Sales Tax Act, 1948, which provides for return to be filed for each quarter by the last day of the following month of the quarter and admitted sales tax as per the return has to be deposited. It was held that the expression “proceed to assess” in sub sections (5) and (6) of section 10 means taking some effective step towards proceeding to make the best judgment assessment in accordance with sub section which may be applicable.

(vi) ***Additional Commissioner v. Jyoti Traders*** [(1999) 2 SCC 77].

W.P(C) No.10979/2014 & conn.cases

-:29:-

In this case, the Apex Court considered the question whether an amendment with retrospective operation could be made to reopen assessments which had been completed earlier. The Apex Court held that at para 25 as under:-

"25. The two decisions in the cases of Ahmedabad Manufacturing & Calico Printing Co. Ltd. and Biswanath Jhunhunwalla are more closer to the issue involved in the present case before us. They laid down that it is the language of the provision that matters and when the meaning is clear, it has to be given full effect. In both these cases, this Court held that the proviso which amended the existing provision gave it retrospectivity. When the provision of law is explicit, it has to operate fully and there could not be any limits to its operation. This Court in Biswanath Jhunhunwalla case said that if the language expressly so states or clearly implies, retrospectivity must be given to the provision. Under Section 34 of the Income Tax Act, 1922, it is the service of the notice which is the sine qua non, an indispensable requisite, for the initiation of assessment or reassessment proceedings where income had escaped assessment. That is not so in the present case. Under sub-section (1) of Section 21 of the Act before its amendment, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer according to law. Sub-section (2) provided that except as otherwise

W.P(C) No.10979/2014 & conn.cases

-:30:-

provided in this section, no order for any assessment year shall be made after the expiry of 4 years from the end of such year. However, after the amendment, a proviso was added to sub-section (2) under which the Commissioner of Sales Tax authorises the assessing authority to make assessment or reassessment before the expiration of 8 years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion. The proviso came into force w.e.f. 19-2-1991. We do not think that sub-section (2) and the proviso added to it leave anyone in doubt that as on the date when the proviso came into force, the Commissioner of Sales Tax could authorise making of assessment or reassessment before the expiration of 8 years from the end of that particular assessment year. It is immaterial if a period for assessment or reassessment under sub-section (2) of Section 21 before the addition of the said proviso had expired. Here, it is the completion of assessment or reassessment under Section 21 which is to be done before the expiration of 8 years of that particular assessment year. Read as it is, these provisions would mean that the assessment for the year 1985-86 could be reopened up to 31-3-1994. Authorisation by the Commissioner of Sales Tax and completion of assessment or reassessment under sub-section (1) of Section 21 have to be completed within 8 years of the particular assessment year. Notice to the assessee follows the authorisation by the Commissioner of Sales

W.P(C) No.10979/2014 & conn.cases

-:31:-

Tax, its service on the assessee is not a condition precedent to reopen the assessment. It is not disputed that a fiscal statute can have retrospective operation. If we accept the interpretation given by the respondents, the proviso added to sub-section (2) of Section 21 of the Act becomes redundant. Commencement of the Act can be different than the operation of the Act though sometimes, both may be the same. The proviso now added to sub-section (2) of Section 21 of the Act does not put any embargo on the Commissioner of Sales Tax not to reopen the assessment if the period, as prescribed earlier, had expired before the proviso came into operation. One has to see the language of the provision. If it is clear, it has to be given its full effect. To reassure oneself, one may go into the intention of the legislature in enacting such provision. The date of commencement of the proviso to Section 21(2) of the Act does not control its retrospective operation. Earlier the assessment/reassessment could have been completed within four years of that particular assessment year and now by the amendment adding the proviso to Section 21(2) of the Act it is eight years. The only safeguard being that it is after the satisfaction of the Commissioner of Sales Tax. The proviso is operative from 19-2-1991 and a bare reading of the proviso shows that the operation of this proviso relates and encompasses back to the previous eight assessment years. We need not refer to the provisions of the Income Tax Act to interpret the proviso to Section 21(2) the

W.P(C) No.10979/2014 & conn.cases

-:32:-

language of which is clear and unambiguous and so is the intention of the legislature. We are, thus, of the view that the High Court was not right in quashing the sanction given by the Commissioner of Sales Tax and notices issued by the assessing authority in pursuance thereof.”

(vii) **Commissioner of Income Tax. Saurashtra Cement and Chem.Industries Ltd.** [(2016) 384 ITR 186 (SC)].

In this case, the question considered was whether the period during which draft assessment was forwarded to the Inspecting Assistant Commissioner till the date of receiving instructions from Inspecting Assistant Commissioner under Section 144B of the Income Tax Act were to be excluded from computing the time limit for assessment. It was held that when no such power had been exercised, the department was not entitled for the exclusion.

(viii) **VLS Finance Ltd. v. Commissioner of Income Tax** [(2016) 384 ITR 1 (SC)].

This case arises under the Income Tax Act in relation to the limitation provided under 158BE.

(ix) **Paul Varghese v. State of Kerala** [(2005) 13 KTR 29(Ker)].

This is also a case arising under Section 17(6) of the KGST Act. It was held at paras 6, 7 and 8 as under:-

W.P(C) No.10979/2014 & conn.cases

-:33:-

"6. The assessment in this case was legally made well before the period of limitation provided under the second proviso to Sec. 17(6) of the Act. The second proviso clearly provided the period of limitation for completion of the assessment for the year 1994-95 as 'on or before 31st March, 2000.' Unlike in the case of enlargement of the period of limitation generally made, in the present case, the legislature has specifically stated that the assessment relating to the year 1994-95 shall be completed on or before 31.3.2000. In view of this special provision regarding the completion of assessment for the year 1994-95 it is not the decision of the Supreme Court in Gadgil's case that is applicable to the present case, but the decisions of the Supreme Court in Commercial Tax Officer V M.S. Biswanath Jhunjhunwala (AIR 1997 SC 357) apply. The provisions prescribing the period of limitation are procedural in character and therefore the amendment operates retrospectively and consequently the second proviso to Sec.17(6) apply to the assessment year 1994-95. The Spl.Govt. pleader in support of the above proposition relied on the decision of the Supreme Court in Gurbachan Singh v. Satpal Singh and others (AIR 1990 SC 209). He also relied on the decision of the Madras High Court in N.K.C.Syed Mohemmed Ravooother v. The Deputy Commercial Tax Officer, Tirukoilur (1958 (9) STC 1), the decision of the Madhya Pradesh High Court in Kanhayyalal Shivsahay Sharma v. Deputy Commissioner of Sales Tax, M.P and others (1958 (9) STC 503), the decision of this

W.P(C) No.10979/2014 & conn.cases

-:34:-

Court in Ernakulam Radio Company v. State of Kerala (1966 (18) STC 445), the decision of the Andhra Pradesh High Court in The Guntur District Co-operative Marketing Society Ltd. v. The State of Andhra Pradesh and another (1967 (2) STC 476).

7. First we will deal with the question, regarding the limitation pleaded by the assessee. Section 17(6) of the Act as it stood at the relevant time, the relevant portion reads as follows:-

“(6) Any assessment under this Section shall be completed within a period of four years from the expiry of the year to which the assessment relates:

xxxx	xxxx	xxxx
xxxx	xxxx	xxxx

Provided further that all assessments pending as on the 1st day of April, 1993 shall be completed within a period of four years from the date of publication of the Kerala Finance Act, 1993.:”

The second proviso inserted by the Finance Act, 1999 (Act 23 of 1999) published in the KGX.No.1476 dt. 27.7.1999 with effect from 1.4.1999 reads thus:

“Provided further that the assessment relating to the year 1994-95 shall be completed on or before 31st March, 2000.”

The assessment for the year 1994-'95, as already noted, was completed as per Order dt.30.10.1999. Under the provisions of Sec.17(6), as it stood prior to its amendment by the Finance Act, 1999, the time limit for completion of the assessment for the year 1994-'95 was due to

W.P(C) No.10979/2014 & conn.cases

-:35:-

expire on 31.3.1999. Hence the assessment for the year 1994-95 made on 30.10.1999 is barred being beyond the period of limitation provided under Sec.17(6). However, by virtue of the second proviso added by the Finance Act, 1999 there was time for completion of the assessment for the year 1994-95 till 31.3.2000. Admittedly, the assessment for the year 1994-95 was completed well before 31.3.2000. Thus by virtue of the second proviso the assessment is well within time. The contention of the assessee, as already noted is that the second proviso added for extending the period of limitation for completion of the assessment for the year 1994-95 did not serve the purpose for the reason that the said proviso was inserted only with effect from 1.4.1999 when the time limit provided under Section 17(6) (unamended) had expired before the said date on 31.3.1999. It is the contention of the assessee that in a case where the assessment is already barred by limitation it cannot be saved by subsequent amendment enlarging the period of limitation thereafter. On the other hand the contention of the State, as already noted, is that the second proviso is inserted solely for the purpose of providing limitation for the completion of assessment for the year 1994-95 and therefore in the absence of a challenge to the said provision as ultravires or unconstitutional the said provision has to be given its full effect, which will clearly save the period of limitation provided under the unamended Sec.17(6) so far as the assessment year 1994-'95 is concerned.

W.P(C) No.10979/2014 & conn.cases

-:36:-

8. Let us now examine the correctness of the rival contentions. No doubt the second proviso was inserted only with effect from 1.4.1999 and the assessment under the then existing provisions got barred on 31.3.1999. It must be noted that the legislature was very well aware of the fact that as on the date the second proviso was inserted, i.e., on 27/7/1999 the time limit prescribed for the assessment was already over. From that it is clear that the legislative intention was to get over the period of limitation provided under the unamended Sec.17(6) so far as the assessment year 1994-95 is concerned. The second proviso has to be treated as retrospective in character to save the limitation provided under section 17(6) and to fix the period within which the assessment for the year 1994-95 has to be completed. Really it is not the question of retrospective operation at all. It only provides a special time limit for completion of the assessment for 1994-95. The Supreme Court in Gadgils case supra was not concerned with a situation as obtained in the present case. Thus it cannot be said that the assessment for the year 1994-95 was barred on 31.10.1999 when the assessment order was passed."

(x) **Commercial Tax Officer v. M/s.Biswanath Jhunjhunwala** (AIR 1997 Supreme Court 357).

This case is also in regard to limitation for exercising *suo motu* power under the Bengal Finance (Sales Tax) Act, and the

W.P(C) No.10979/2014 & conn.cases

-:37:-

Rules framed thereunder. In the said case, it was observed that by virtue of an amendment with retrospective effect, the period of limitation was extended. The Apex Court upheld the amendment and it was held at para 13 as under:-

“13. By reason of the said Notification, with effect from 1st November, 1971, Rule 18 (80) (5) (ii) has to be read as barring the Commissioner (or other authority to whom power in this behalf has been delegated by the Commissioner) from revising of his own motion any assessment made or order passed under the Act or the rules if the assessment has been made or the order has been passed more than six years previous to 1st November, 1971. Put conversely, with effect from 1st November, 1971, Rule 18 (80) (5) (ii) permits the Commissioner (or other authority) to revise of his own motion any assessment made or order passed under the Act or the rules provided the assessment has not been made or the order passed more than six years previously. This being the plain meaning, the said Notification must be given full effect. Full effect can be given only if the said Notification is read as being applicable not only to assessments which were incomplete but also to assessments which had reached finality by reason of the earlier prescribed period of four years having elapsed. Where language as unambiguous as this is employed, it must be assumed that the Legislature intended the amended provision to apply even to assessments

W.P(C) No.10979/2014 & conn.cases

-:38:-

that had so become final; if the intention was otherwise, the Legislature would have so stated."

(xi) **Commissioner of Trade Tax v. Lohia Machines Ltd.**

[(1999) 7 KTR 145 (SC)].

This was also a case where amendment was made to the UP Trade Tax Act enlarging the period of limitation. It was held at para 18 as under:-

"18. The two decisions in the cases of Ahmedabad Manufacturing and Calico Printing Co. Ltd. Vs. S.G.Mehta, Income-tax Officer [1963] 48 ITR 154 (SC) and Commercial Tax Officer Vs. Biswanath Jhunjhunwala (1966) 5 SCC 626 are more closer to the issue involved in the present case before us. They laid down that it is the language of the provision that matters and when meaning is clear, it has to be given full effect. In both these cases this Court held that the proviso which amended the existing provision gave it retrospectivity. When the provision of law is explicit, it has to operate fully and there could not be any limits to its operation. This Court in Biswanath Jhunjhunwala case (1996) 5 SCC 626 said that if the language expressly so states or clearly implies, retrospectivity must be given to the provision. Under section 34 of the Income-tax Act, 1922, it is the service of the notice which is sine qua non, an indispensable requisite, for the initiation of assessment or reassessment proceedings where income had escaped assessment. That is not so in the present case. Under sub-section (1) of section 21 of the Act

W.P(C) No.10979/2014 & conn.cases

-:39:-

before its amendment, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer according to law. Sub-section (2) provided that except as otherwise provided in this section no order for any assessment year shall be made after the expiry of 4 years from the end of such year. However, after the amendment, a proviso was added to sub-section (2) under which Commissioner of Sales Tax authorises the assessing authority to make assessment or reassessment after the expiration of 4 years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion. The proviso came into force with effect from February 19, 1991. We do not think that sub-section (2) and the proviso added to it leave anyone in doubt that as on the date when the proviso came into force, the Commissioner of Sales Tax could authorise making of assessment or reassessment after the expiration of 4 years from the end of that particular assessment year. It is immaterial if a period for assessment or reassessment under sub-section (2) of section 21 before the addition of the said proviso had expired. Here, it is the completion of assessment or reassessment under section 21 which is to be done before the expiration of 8 years of that particular assessment year. Read as it is, these provisions would mean that the assessment for the year 1985-86 could be reopened up to March, 31, 1994. Authorisation by the Commissioner of Sales Tax and completion of assessment or reassessment under sub-section (1) of section 21 have to be completed within 8 years of the

W.P(C) No.10979/2014 & conn.cases

-:40:-

particular assessment year. Notice to the assessee follows the authorisation by the Commissioner of Sales Tax, its service on the assessee is not a condition precedent to reopen the assessment. It is not disputed that a fiscal statute can have retrospective operation. If we accept the interpretation given by the respondents, the proviso added to sub-section (2) of section 21 of the Act becomes redundant. Commencement of Act can be different that the operation of the Act though sometimes both may be the same. Proviso now added to sub-section (2) of section 21 of the Act does not put any embargo on the Commissioner of Sales Tax not to reopen the assessment if period, as prescribed earlier, had expired before the proviso came into operation. One has to see the language of the provision. If it is clear, it has to be given its full effect. To reassure oneself, one may go into the intention of the Legislature in enacting such provision. The date of commencement of the proviso to section 21(2) of the Act does not control its retrospective operation. Earlier the assessment/reassessment could have been completed within four years of that particular assessment year and now by the amendment adding proviso to section 21(2) of the Act it is eight years. The only safeguard being that it is after satisfaction of the Commissioner of Sales Tax. The proviso is operative from February 19, 1991, and a bare reading of the proviso shows that the operation of this proviso relates and encompasses back to previous eight assessment years. We need not refer to the provisions of Income-tax Act to interpret proviso to section 21(2)

W.P(C) No.10979/2014 & conn.cases

-:41:-

language of which is clear and unambiguous and so is the intention of Legislature. We are, thus, of the view that High Court was not right in quashing the sanction given by the Commissioner of Sales Tax and notices issued by the assessing authority in pursuance thereto."

(xii) **Sureshlal v. State of Kerala** [(2013) 21 KTR 261 (Ker)].

In the above case, it was held by this Court at para 10 as under:-

"10. As far as Rules 35 and 24D(4) which we have referred to are concerned, it may be true that the officers ought to have been more diligent and should have rejected the return. Under the KVAT Act and the scheme, the law provides for self-assessment. But, at the same time, Rule 35 sets a time limit for rejecting the return and conveying the reasons. Also, provisions relating to e-filing contained in Section 24D(4) contemplated an active role for the officer, the whole purpose being the interest of the revenue is safe-guarded and money pours into the public coffers as it should promptly. But, this by itself will not obviate the duty of the assessee to file the return correctly. Obviously, ignorance of the law is no excuse. The amendment enhancing the rate of tax came into force by a public document. Petitioner has shown the rate of tax incorrectly, rendering the return an incorrect return. Therefore, we do not think that in the facts of this case we should interfere with the decision of the authority as confirmed by the two appellate

W.P(C) No.10979/2014 & conn.cases

-:42:-

authorities to impose penalty on the petitioner. But, we also feel that having regard to all circumstances, in particular, the provisions contained in Rules 24D (4) and 35 and also the admitted fact that the petitioner has paid the entire amount of tax with interest and settlement fee, the amount of penalty should be further reduced.”

This judgment is relied upon only to indicate that under the KVAT regime, the law provides for self assessment. There is a time limit for rejecting the return and conveying the reasons. The petitioner has shown the rate of tax incorrectly, which amounts to an incorrect return and therefore becomes liable for penalty.

(xiii) ***Commissioner of Income Tax, Patiala v. Shahzada Nand and Sons and Others*** [1966 (LX) ITR 392].

This case had arisen under the Income Tax Act, 1922. It was held that in a taxing statute, one has to look merely at what is stated and in a case of reasonable doubt, the construction most beneficial to the subject is to be adopted. However, the fundamental rule of construction is the same for all statutes, whether fiscal or otherwise. The underlined principle is that the meaning and intention of the statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is

W.P(C) No.10979/2014 & conn.cases

-:43:-

just or expedient. The expressed intention must guide the court. That was a case in which the Apex Court considered the amendments made by way of provisos to extend the period of limitation. The Apex Court considered whether legislature by making an amendment to the statute to overcome the period of limitation is justified in doing so. It was held thus:

"But the crucial question is, whether the Legislature by making the relevant amendments has succeeded to effectuate its intention. To state it differently, do the amended provisions carry out its intention ?

*Section 34(1)(a), as it now stands on the statute book, expressly states that in cases falling under clause(a) of sub-s. (1) notice can be served thereunder on an assessee at any time. The terms of s. 34(a) read with the second proviso, take in the concealed incomes of all the years commencing from the year ending on March 31, 1941. It does not exclude the incomes of the war years, but the said incomes are sought to be excluded on the principle of *generalia specialibus non derogant*. As we have pointed out earlier, the said doctrine embodies a rule of construction, but it has no universal application. To invoke it, the general and special provisions shall occupy the same field. In this case, both during the period between the amendments of 1954 and 1956 and thereafter they occupied different fields. By July 17, 1954, when sub-s.(1A) was introduced in s. 34, no proceedings under s. 34(1)(a) could be initiated except for the assessment year 1946-47 in respect of*

W.P(C) No.10979/2014 & conn.cases

-:44:-

the previous years that fell within the period beginning on September 1, 1939, and ending on March 31, 1946, for they were barred under the unamended section. Sub-section (1A), therefore, practically governed a situation that was not governed by the provisions of s. 34(1)(a). It was intended to catch escaped incomes of the war years which were out of the reach of s. 34(1)(a). It is not, therefore, appropriate to describe sub-s. (1A) as one carved out of sub-s. (1)(a) or to call it a species of which sub-s. (a)(1) is the genus. Sub-section (1A) operated where sub-s. (1)(a) practically ceased to function.

Now, coming to the period after the Finance Act, 1956, was passed, i.e., after April 1, 1956, a different situation arose. The extended period given under the second provision to subs.(1A) expired on March 31, 1956. Thereafter, Sub-s. (1A) ceased to be operative in the sense that no notice could thereafter be given thereunder. It worked itself out. The Legislature could have extended the period under the second proviso to sub-s. (1A), but it did not do so. It did not give a further lease of life to it; instead it removed the period of limitation under sub-s. (1)(a), as sub-s. (1A) had become practically defunct. The wide phraseology of sub-s. (1)(a) takes in all the escaped concealed incomes during all the years commencing from 1941 and confers a power of the Income-tax Officer to give notice thereunder in respect of the said incomes without any bar of limitation. There is, therefore, no conflict after April 1, 1956, between sub-s.(1)(a) and sub-s. (1A), as the latter ceased to be operative.

W.P(C) No.10979/2014 & conn.cases

-:45:-

There is another way of looking at the problem. Sub-section (1A) does not really prescribe any period of limitation. It enables the Income-tax Officer to take proceedings within a particular time, though period of limitation had expired. In this view, no question of carving out a species out of a genus arises. It conferred a special power on the Income-tax Officer and the said power expired on April 1, 1956.

There is yet another way of looking at the problem. The non-obstante clause in sub-s. (1A) indicates that it was enacted to operate notwithstanding that the period of 8 years had expired. The said sub-section served its purpose only when the period of 8 years governed a notice under sub-s. (1)(a). But when that bar of limitation was removed, sub-s. (1A) had become otiose.

Sub-section (1B), as amended by the Finance Act of 1956, also throws some light on the interpretation of s. 34. Before it was amended, an assessee to whom a notice had been issued under sub-s. (1)(a) could apply to the Central Board of Revenue for settlement of the amount of tax payable by him. After amendment, an assessee to whom a notice was given under sub-s.(1)(a) and under sub-s. (1A) for any of the years ending on March 31, 1941 to 1948 could apply for such a relief to the Central Board of Revenue. The years 1941 to 1948 are the war years. This sub-section, therefore, assumes that notice could be issued in respect of the war years under sub-s. (1)(a). The notice contemplated by sub-s. (1B) could only be a notice after the amendment of 1956, for such notice could not have been issued

W.P(C) No.10979/2014 & conn.cases

-:46:-

earlier under the sub-s. (1) (a) in respect of the said years. The notice under sub-s. (1A) obviously refers to the notice issued before the amendment of 1956 and pending disposal.

Sub-section (4) added by the Indian Income-tax (Amendment) Act, 1959, also reinforces the said construction. As indicated earlier, that sub-section was added to get over the legal objection that proceedings barred before 1956 were not revived under the 1956 Act. It is true that sub-s. (4) refers only to sub-s. (1)(a), but the sub-s. indicates that the Legislature assumed that proceedings after 1956 could only be taken under sub-s. (1)(a).

It was asked, with some plausibility, if the Legislature assumed that sub-s. (1A) ceased to be operative, why it was retained along with its proviso prescribing a period of limitation in the amended section. Though no new notices could be issued under that sub-section after April 1, 1956. notices already issued before that date were pending. They would be disposed of in the manner prescribed by the sub-s. (1A), (1B), (1C) and (1D) of s. 34. All the said sub-s. formed an integral code. The Legislature, presumably, intended to keep the said sub-sections whereunder proceedings had already been initiated and make available to the said proceedings the procedure prescribed under the said provisions. It may also be that sub-s. (1A) was kept in super-abundant caution. Whatever that may be, it cannot, in the circumstances mentioned by us, detract from the clear provisions of sub-s. (1)(a).

We have carefully gone through the judgments

W.P(C) No.10979/2014 & conn.cases

-:47:-

of the various High Courts, namely Bombay, Madhya Pradesh, Gujarat and Calcutta, cited at the Bar. We received considerable help from the reasonings contained in the said judgments. As we have in the course of the judgment dealt with the conflicting reasons given by the High Courts, we do not think it necessary to consider each of the four judgments in detail. For the reasons mentioned above, we agree with the conclusions arrived at by the Bombay and Calcutta High Courts in preference to those reached by the Madhya Pradesh and Gujarat High Courts.

In the result, the order of the High Court is set aside and the petition filed under Article 226 of the Constitution is dismissed. The appeals are allowed with costs one hearing fee."

(xiv) **S.Narayanappa v. Commissioner of Income Tax** [(1967) LXIII ITR 219].

This also had arisen under Income Tax Act, 1922. Question was whether there was jurisdiction to issue notice after the four year period specified under 34(1)(a). It was held that proceedings for assessment or reassessment start with the issue of notice and it is only after service of the notice that the assessee becomes a party to the proceedings.

(xv) **P.Munirathnam Chetty and P.Satyanarayana Chetty v. Income-Tax Officer** [(1975) 101 ITR 385].

This is a judgment of the Andhra Pradesh High Court

W.P(C) No.10979/2014 & conn.cases

-:48:-

wherein it was held that when the Income Tax Officer gives reasons for reopening the assessment, the Commissioner of Income Tax must be understood to have given a sanction after going through the said reasons. Therefore, notice is not vitiated merely because the Commissioner did not give reasons.

12. In ***Shreyans Industries Ltd.*** (supra), Apex Court was considering section 11 of the Punjab Act, which reads as under:-

“11. Assessment of tax.—(1) If the assessing authority is satisfied without requiring the presence of dealer or the production by him of any evidence that the returns furnished in respect of any period are correct and complete, he shall pass an order of assessment on the basis of such returns within a period of three years from the last date prescribed for furnishing the last return in respect of such period.

(2) If the assessing authority is not satisfied without requiring the presence of dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns.

(3) On the day specified in the notice or as soon afterwards as may be, the assessing authority shall,

W.P(C) No.10979/2014 & conn.cases

-:49:-

after hearing such evidence as the dealer may produce, and such other evidence as the assessing authority may require on specified points, pass an order of assessment within a period of three years from the last date prescribed for furnishing the last return in respect of any period.

(4) If a dealer having furnished returns in respect of a period, fails to comply with the terms of notice issued under sub-section (2), the assessing authority shall, within a period of three years from the 1st date prescribed for furnishing the last return in respect of such period, pass an order of assessment to the best of his judgment.

(5) If a dealer does not furnish returns in respect of any period by the last date prescribed the assessing authority shall within a period of five years from the last date prescribed for furnishing the return in respect of such period and after giving the dealer a reasonable opportunity of being heard, pass an order of assessment to the best of his judgment.

(6) If upon information which has come into his possession, the assessing authority is satisfied that any dealer has been liable to pay tax under this Act in respect of any period but has failed to apply for registration, the assessing authority shall, within five years after the expiry of such period, after giving the dealer a reasonable opportunity of being heard, proceed to assess, to the best of his judgment the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods and in case where such dealer has wilfully failed to apply for registration, the assessing

W.P(C) No.10979/2014 & conn.cases

-:50:-

authority may direct that the dealer shall pay by way of penalty, in addition to the amount so assessed, a sum not exceeding one-and-a-half times that amount.

(7) The amount of any tax, penalty or interest payable under this Act shall be paid by the dealer in the manner prescribed, by such date as may be specified in the notice issued by the assessing authority for the purpose and the date so specified shall not be less than fifteen days and not more than thirty days from the date of service of such notice:

Provided that the assessing authority may, with the prior approval of the Assistant Excise and Taxation Commissioner, in charge of the district extend the date of such payment or allow payment by instalments against an adequate security or bank guarantee.

(8) If the tax assessed under this Act or any instalment thereof is not paid by any dealer within the time specified thereof in the notice of assessment or in the order permitting payment in instalments, the Commissioner or any other person appointed to assist him under sub-section (1) of Section 3 may, after giving such dealer an opportunity of being heard, impose on him a penalty not exceeding in amount the sum due from him.

(9) Any assessment made under this section shall be without prejudice to any penalty imposed under this Act.

(10) The Commissioner, may for reasons to be recorded in writing, extend the period of three

W.P(C) No.10979/2014 & conn.cases

-:51:-

years, for passing the order of assessment for such further period as he may deem fit.

(11) Where the proceedings of the assessment are stayed by an order of any court, the period for which such stay remains in force, shall not count towards computing the period of three years specified under this section for passing the order of assessment.

(12) The assessing authority may, on his own motion, review any assessment order passed by him and such review shall be completed within a period of one year from the date of order under review."

(emphasis supplied)"

Section 11(1) imposes an obligation on the assessing officer to pass an order of assessment on the basis of returns within a period of three years. Even in respect of instances where the assessee is to be heard, on account of the assessing authority not being satisfied with the returns after hearing the assessee, the assessing authority shall pass an order of assessment within a period of three years from the last date prescribed for furnishing the last return in respect of any period. If the assessee fails to comply with notice issued under sub section (2), the assessing authority shall, within three years from the first date prescribed for furnishing the last return, pass an order to the best of his judgment. If the dealer does not file a return, the assessing authority shall complete the assessment within a period of five

W.P(C) No.10979/2014 & conn.cases

-:52:-

years from the last date prescribed for furnishing return and pass an order of assessment to the best of his judgment. Section 11(6) contemplates a penalty procedure. Where the assessing authority comes to a finding that any dealer who is liable to pay tax has failed to apply for registration, he shall, within five years from the date of expiry of prescribed period, after giving the dealer a reasonable opportunity of being heard, proceed to assess to the best of his judgment the amount of tax, if any, due from the dealer. Section 11(10) further gives a power to the Commissioner for reasons to be recorded in writing to extend the period of three years from the order of assessment for such period that he may deem fit. The provisions of the Punjab Act apparently indicate that when a return is filed by the assessee, the assessment is to be made within a period of three years from the last date prescribed for furnishing the return in respect of such period.

13. Now coming to the Scheme of KVAT Act, Chapter V deals with assessment, recovery of tax and penalty. Section 20(1) imposes an obligation on the part of every registered dealer and every dealer liable to be registered under the Act to submit to the assessing authority such return or returns before the dates and in such manner along with the documents as may be prescribed.

W.P(C) No.10979/2014 & conn.cases

-.53:-

Section 21 indicates that the return submitted under sub section (1) of section 20 in the prescribed manner and accompanied by the documents shall be deemed to have been completed on receipt of such return, subject to the provisions of Sections 22, 24 and 25. Section 22 deals with the procedure for rejection of the return in the event the return filed under Section 20(1) is not in the prescribed manner or not accompanied by the prescribed documents or with incorrect particulars, in which event, the assessee has an option to file a return curing the defects with all necessary particulars. If there is failure to file fresh return, the assessing authority is entitled to estimate the turnover of the return period and complete the assessment. Other procedural formalities had also been indicated in the said provision. Section 23 relates to the power given to the officers to conduct audit at the business place of any dealer. Section 24 relates to assessment to be made after the audit or if the dealer fails to make available any accounts or other records required by the audit officer. Section 25 deals with assessment of escaped turnover. This is a special power made available to the assessing officer to take further proceedings in the case of escaped turnover. If for any reason, the whole or any part of turnover of

W.P(C) No.10979/2014 & conn.cases

-:54:-

business of a dealer has escaped assessment to tax in any year or return period, and for any other reason specified under sub section (1), the assessing authority may “at any time within five years from the last date of the year to which the return relates” “proceed to determine” to the best of its judgment the turnover which has escaped assessment to tax or in respect of other eventualities where tax is not being paid. Therefore, the power given to the assessing officer is to determine at any time within five years from the last date of the year to which the return relates, whether the turnover has escaped assessment. Proviso to Section 25 (1) further makes it clear that before making an assessment under sub section (1), the dealer shall be given a reasonable opportunity of being heard.

14. Section 25B has been incorporated in the statute w.e.f. 01/04/2013 which gives power to the Deputy Commissioner to extend the period of completion of assessment beyond the period specified in Section 24 or 25 in cases where any investigation or inquiry is pending under the Act or any other law or where any assessment cannot be completed, within the period specified under the said sections. The other provisions may not have any relevance and I do not intend to deal with it.

W.P(C) No.10979/2014 & conn.cases

-:55:-

15. There is a marked difference between the Punjab Act and the KVAT Act in respect of assessment. As already indicated, every dealer, either registered or liable to be registered under the Act, is bound to file a return under Section 20 of the KVAT Act. The VAT regime had contemplated a self assessment which indicates that once the return had been submitted under Section 20(1) in the prescribed manner and accompanied by the prescribed documents, the assessment relating to the return period is deemed to have been completed on receipt of such return subject of course to the provisions of Sections 22, 24 and 25. Therefore, the very date of filing proper return on such date as may be prescribed is the date of assessment. However, the assessing authority has a right to reject the return, which procedure is contemplated under Section 22. No time limit is specified for rejecting a return in terms of Section 22(1). Section 25 is a special procedure for assessment in regard to escaped turnover.

16. Coming to the KGST Act, Chapter V deals with assessment, collection and penalty. As per Section 17, every registered dealer and every dealer liable to take out registration under the Act has to submit return or returns relating to his

W.P(C) No.10979/2014 & conn.cases

-:56:-

turnover in such manner and within such period as may be prescribed. Sub section (2) indicates that if the assessing authority is satisfied that any return submitted under sub section (1) is correct and complete, it shall assess the dealer on the basis thereof. Sub section (3) relates to a situation when no return is filed under sub section (1) within the prescribed period, or if the return submitted is incorrect or incomplete, the assessing authority shall, after making such enquiry as he deems fit, assess the dealer to the best of its judgment. Section 19 deals with assessment of escaped turnover, which is almost similar to Section 25 of KVAT Act. Section 19 of KGST Act reads as under :-

“19. Assessment of escaped turnover:- (1) Where for any reason the whole or any part of the turnover of business of a dealer has escaped assessment to tax in any year or has been under assessed or has been assessed at a rate lower than the rate at which it is assessable or any deduction has been wrongly made there from, the assessing authority may, at any time within five years from the expiry of the year to which the tax relates, proceed to determine to the best of its judgment the turnover which has escaped assessment to tax or has been under assessed or has been assessed at a rate lower than the rate at which it is assessable or the deduction that has been wrongly made and assess the tax payable on such turnover

W.P(C) No.10979/2014 & conn.cases

-:57:-

after issuing a notice on the dealer and after making such enquiry as it may consider necessary: Provided that before making an assessment under this sub-section the dealer shall be given a reasonable opportunity of being heard.

Provided further that the time limit mentioned in this sub-section shall not apply where the turnover which escaped assessment relates to any business done by such dealer as benamidar or through a benami or where it relates to dealer, who being liable to get himself registered under this Act and the rules made there under has failed to do so.

(2) In making an assessment under sub-section (1), the assessing authority may, if it is satisfied that the escape from assessment is due to willful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under sub-section (1) a penalty as provided in Section 45A:

Provided that no such penalty shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

Explanation:- Notwithstanding anything contained in the Indian Evidence Act, 1872, the burden of proving that the escape from assessment was not due to willful non-disclosure of assessable turnover by the dealer shall be on the dealer.

(3) The powers under sub-section (1) may be exercised by the assessing authority even though the original order of assessment, if any, passed in the matter, has been the subject matter of an

W.P(C) No.10979/2014 & conn.cases

-:58:-

appeal or revision.

(4) In computing the period of limitation for the purposes of this section, the time during which the proceedings for assessment remained stayed under the orders of a Civil court or other competent authority shall be excluded.”

17. Therefore, Sections 25 of KVAT Act and 19 of the KGST Act, which are concerned with, relate to an assessment being taken for escaped turnover. In other words, even after an assessment being completed in accordance with the statute, nothing prevents the assessing authority from making a fresh assessment in respect of escaped turnover. However, it has to be completed within five years from the last date of the year to which the return relates.

18. In ***Shreyans Industries Ltd.,*** (supra), Supreme Court held that while exercising power under Section 11(10) of the Punjab Act, the Commissioner has to give reasons in writing to exercise the power to extend the period of limitation and whether it is exercised for valid reason based on material consideration and that power is not abused by exercising it without any application of mind, or mala fide or on irrelevant considerations or for extraneous purposes. Such an order of extension of time is

W.P(C) No.10979/2014 & conn.cases

-:59:-

also open to judicial review, of course, within the confines of law on the basis of which judicial review is permissible. The Apex Court after considering the respective arguments held that extension of time for assessment has the effect of enlarging the period of limitation and therefore once the period of limitation expires, the immunity again being subject to assessment sets in and the right to get assessment extinguishes. Further, it is held that a valuable right accrues in favour of the assessee when the period of limitation expires and if the Commissioner is permitted to grant time even after the period of time as prescribed under the Act, it will give him right to exercise power at any time even much later after the last date of assessment.

19. In **Cholayil** (supra), the Full Bench held that section 25 (1) of the VAT Act is in *pari materia* with section 19 of the KGST Act. It was held that the use of the word “proceed to determine” under section 19 of the KGST Act is in *pari materia* with section 25 (1) of the KVAT Act. It was held that the proceedings for the determination of the escaped turnover must commence within the period stipulated and the word “assess” in that section is used in the wider sense as given to it by the Apex Court in **Sudarsanam Iyengar & Sons** [(1970) 25 STC 252 (SC)]. The Full Bench

W.P(C) No.10979/2014 & conn.cases

-:60:-

further held that the net effect of the introduction of the 3rd proviso to Sub section (1) of section 25 and the inclusion of section 25 within the canopy of section 25B is indicative of the fact that for all intents and purposes, the legislature fixed an outer time limit for completion of assessment proceedings under section 25(1). In **Abhilash T.Mathew** (supra), a Division Bench of this Court held that the prescription of period of limitation result in rights accrued to the assessee, by passage of the prescribed period, which cannot be disturbed without hearing the assessee. In regard to the power exercised by the Deputy Commissioner under Section 17(7) of the KGST Act to extend the period of limitation, it was held that the assessments as evident from the substituted provisos should be pending respectively on the specified dates. In **Sundaram Iyengar and Sons** [(1969) 2 SCC 396], the Apex Court considered as to what is the meaning of the words “proceed to assess and determine” and held that assessment is a comprehensive word and can denote the entirety of proceedings which are taken with regard to it. It cannot and does not mean a final order of assessment alone unless there is something in the context of a particular provision which compels such a meaning being attributed to it. In **Dr.George Jacob**

W.P(C) No.10979/2014 & conn.cases

-:61:-

(supra), the Division Bench held that time limit specified under the statute can be modified by amendment. In **Indian Aluminum Cables Ltd. v. Excise and Tax Officer** (supra), Apex Court held that the expression “proceed to assess” in sub sections (5) and (6) of section 10 means taking some effective step towards proceeding to make the best judgment assessment in accordance with sub section which may be applicable. In **Jyoti Traders** (supra), it was held by the Apex Court that an amendment with retrospective operation could be made to reopen assessments which had been completed earlier. In **Paul Varghese** (supra), a case arising under Section 17(6) of the KGST Act, it was held that second proviso has to be treated as retrospective in character to save the limitation provided under section 17(6) and to fix the period within which the assessment for the year 1994-95 has to be completed. In **M/s.Biswanath Jhunhunwala** (supra), the Apex Court upheld the amendment and it was held that, where the language is unambiguous, it must be assumed that the Legislature intended the amended provision to apply even to assessments that had become final; if the intention was otherwise, the Legislature would have so stated. In **Lohia Machines Ltd.** (supra), earlier the assessment/reassessment

W.P(C) No.10979/2014 & conn.cases

-:62:-

could have been completed within four years of that particular assessment year and now by the amendment adding proviso to section 21(2) of the Act, it is eight years. The only safeguard being that it is after satisfaction of the Commissioner of Sales Tax and a bare reading of the proviso shows that the operation of the proviso relates and encompasses back to previous eight assessment years. In **Sureshlal** (supra), it was held by this Court that under the KVAT Act and the scheme, the law provides for self-assessment.

20. In the light of the above legal position, I shall consider Group-A cases in which the question is whether the initiation of proceedings and completion of assessment is within 5 years from last date of the return period or that there is an automatic extension of time as per the third proviso inserted from time to time. Facts disclose that in all those cases notice has been issued under section 25(1) after 5 years. The question is whether the provisos will save the period of limitation. Power is vested with the assessing officer to take proceedings under Section 25(1), within five years from the last date of the year to which the return relates. The words “proceed to determine” under Section 25(1) is further qualified by the words “after issuing a notice on the dealer

W.P(C) No.10979/2014 & conn.cases

-:63:-

and after making such enquiry as it may consider necessary". Therefore, any step under Section 25(1) has to be taken only after issuing a notice on the dealer which apparently has to be done within five years from the last date of the year to which the return relates. The first proviso relates to a dealer being heard before making assessment under Section 25(1). The third proviso which was subsequently incorporated provides extended time for completion of assessments. It could only mean that time is extended only for completing assessment which have already been initiated after issuing notice under Section 25(1) within five years from the last date of the year to which the return relates. Therefore, the provisos which extend the period to complete the assessments, are only in respect of those assessments in which notices under the first proviso to Section 25(1) had been issued within the five year period as specified therein. As held in ***Shreyans Industries Ltd.***, a valuable right accrues in favour of the assessee when the period of limitation expires. Such a valuable right cannot be taken away by the third proviso, which only extends time for completing the assessment. In WP(C) No.11463/2016, there is a slight change in facts. A contention had been urged by the respondent stating that the assessee has not

W.P(C) No.10979/2014 & conn.cases

-:64:-

filed revised return. But it is relevant to note that the procedure prescribed under Section 22(10) is subject to Section 25(1) of the Act. Perusal of Ext.P1 notice would also indicate that proceedings had been taken under Section 25(1) when the assessee failed to file revised return under Section 22(10) of the KVAT Act and therefore the return already filed is treated as incorrect and the turnover involved had escaped assessment. Section 22(10) reads as under:-

"22(10) Where the proceedings referred to in the above sub-section are finalised under section 74 on payment of tax due along with the compounding fee, the dealer may thereafter file a revised return incorporating such turnover covered in such proceedings within a period of three months from the finalisation of such proceedings and on the receipt of such return by the assessing authority, the assessment for the return period or periods shall, subject to the provisions of sections 24 and 25, be deemed to have been completed:

Provided that where a pattern of suppression is detected the assessing authority shall proceed with best judgment assessment in accordance with the provisions of sections 24 and 25, as the case may be."

A bare reading of Section 22(10) by itself indicates that the said procedure is subject to Section 25. Therefore, even if there is non

W.P(C) No.10979/2014 & conn.cases

-:65:-

compliance of non filing of revised return in terms of Section 22 (10), there is no prohibition on the part of the officer in invoking Section 25(1). It cannot be stated that Section 25 could be invoked only after a revised return is filed under Section 22(10) of the KVAT Act. Therefore, when a procedure under Section 25(1) is invoked, it has to be within the period of limitation and no exclusion can be claimed by the department merely for the reason that the assessee had opted for compounding and a procedure under Section 22(10) is being followed. Hence, I am of the view that the assessment proceedings are barred by limitation.

21. Group-B relates to cases where notice and assessment orders under section 25(1) are issued on the basis of orders passed by the Deputy Commissioner under Section 25B. In all these cases, the power under section 25B is exercised after the five year period as specified under section 25(1). Section 25B starts with a *non obstante* clause, which takes into consideration a different situation for completing the assessment beyond the period specified under the Act in cases where any investigation or inquiry is pending under the Act or any other law or where any assessment cannot be completed within the period specified

W.P(C) No.10979/2014 & conn.cases

-:66:-

under sections 24 and 25. Section 25B has been incorporated in the statute to enable the Deputy Commissioner under certain circumstances to extend time for completing assessment. As held by the Apex Court in ***Shreyans Industries Ltd.*** (supra), such power has to be exercised by giving appropriate reasons and that too for extending the period for completing the assessment beyond the period specified in those sections. Being a *non obstante* clause, it has to be stated that the power of the Deputy Commissioner to extend the period of completion of assessment beyond the period specified under Section 25 cannot be curtailed in any manner. This power can be exercised at any time but before exercising such power, the Deputy Commissioner will have to satisfy the preconditions specified therein, which are as follows:-

- (i) It can be exercised only in cases where any investigation or inquiry is pending under the Act or any other law, or
- (ii) Where any assessment cannot be completed within the period specified under Sections 24 and 25.
- (iii) However, good and sufficient reasons have to be shown by the Deputy Commissioner.

W.P(C) No.10979/2014 & conn.cases

-:67:-

In none of the cases, a situation as warranted under clause (i) is mentioned, nor does the State have a case that time has been extended in such an eventuality. Time is extended to complete the assessments, which could not be completed under section 25. Under the taxation regime, any assessment starts from the procedure of filing a return and as per the KVAT Act, the return has to be filed within time as may be prescribed. The period of limitation starts from the last date of the year to which the return relates. When a return is filed under the KVAT regime, the assessment is deemed to be completed, if the return and documents are in order, unless it is modified in terms of Sections 22, 24 and 25. Therefore, the very filing of the return complete in all respects amounts to deemed assessment. Now coming to Section 25(1), it is an instance where already there is an assessment and what the statute permits is to issue a notice to the assessee after making such enquiry as it may consider necessary for making an assessment, proceed to determine to the best of his judgment, if there is escaped turnover. Therefore, assessment starts from the time when notice is issued under Section 25(1) of KVAT Act and it is completed when assessment orders are passed. Issuance of notice is the first stage of initiating

W.P(C) No.10979/2014 & conn.cases

-:68:-

the assessment proceedings, however assessment has to be completed within five years from the prescribed date. But in view of the *non obstante* clause under section 25B, the Deputy Commissioner has the power to extend the time for taking steps under Section 25(1) in an instance where an investigation or enquiry is pending under the KVAT Act or any other law, or in instances where the assessment cannot be completed. But in cases where power is exercised to extend the period for completing the assessment, does it mean that the said power can be exercised to extend the period of limitation for invoking section 25(1). The statute having consciously used the words "*or where any assessment cannot be completed within the period specified under the said sections, the Deputy Commissioner may, for good and sufficient reasons, extend the period of completion of the assessment beyond the period specified in those sections*", it has to be held that such a power can be exercised only to extend the time for completing the assessment and not for initiating a proceeding under section 25(1) by issuance of a notice. Further, while exercising power under section 25B, the Deputy Commissioner is bound to state reasons. In none of these cases, no specific reason has been stated to invoke section 25B.

W.P(C) No.10979/2014 & conn.cases

-:69:-

In the result, Group-B cases are to be allowed as in all such cases orders are passed under section 25B beyond the period specified under Section 25(1), which will not save the period of limitation.

22. Group-C concerns cases wherein challenge has been made to the orders passed by the Deputy Commissioner under Section 25B of the Act. The main contention urged by the petitioners is that time has been extended for completion of assessments, but, the orders had been passed after the period of limitation prescribed under Section 25(1). In some of the cases only part of the order is under challenge. In all the cases, orders had been passed under Section 25B by the Deputy Commissioner after the period of limitation prescribed under Section 25(1). The orders also indicate that time has been extended for completing the assessment. As already held, unless the procedure prescribed under Section 25(1) is commenced within the period of limitation, time cannot be extended for completing the assessment. Therefore, orders passed by the Deputy Commissioner beyond the five year period and that too for completing the assessment have no relevance in so far as no action had been taken by the assessing authority to issue notice to the assessee under Section 25(1) within the time limit provided under the statute. In the said

W.P(C) No.10979/2014 & conn.cases

-:70:-

circumstances, all the cases in Group-C are to be allowed to the extent of relief sought for quashing the impugned orders, which are issued beyond the period of limitation.

23. Group-D case relates to penalty orders issued under Section 45A of the KGST Act and Section 67(1) of the Act in respect of separate assessment years. The facts had already been stated earlier. Counter affidavit has been filed on behalf of the respondents wherein it is stated that the case originated from a confidential report from Directorate of Revenue Intelligence (DRI). An investigation was conducted against the firm by DRI, and it was revealed that the firm has been importing base oil and blended lubricants by misdeclaring the same as rubber processing oil. Based on such investigation, notice was issued demanding differential duty. Huge amount of tax evasion was also suspected. Based on the said information, the books of account of the assessee was called for. In the meantime it was informed that the case was pending adjudication before the Commissioner of Customs. On verification it was noticed that there was a sale suppression of ₹9,71,63,293/- for the period 2003-2004 to 2006-2007. Hence penalty proposal was issued for the respective years. It is contended that the investigation relating to the nature of

W.P(C) No.10979/2014 & conn.cases

-:71:-

offence committed by the dealer is a time-consuming process and it requires sufficient time to analyse the case. The matter was pending adjudication before the Central Government authorities which has a direct bearing on the violation under the provisions of KGST Act and KVAT Act.

24. The main contention urged by the petitioner is that the offence was detected when the Commercial Taxes Department had come to know about the action taken by DRI. From Ext.P7, it can as well be seen that the Commercial Tax Department was aware of the proceedings. Necessary action ought to have been taken within a specified time under the concerned enactments and atleast within a reasonable period, and it cannot be more than five years from the date on which the alleged offence came to the notice of the Commercial Tax Department.

25. On facts, there is no dispute that the proposal for penalty in all these cases were issued beyond five years from the date of Ext.P7. The question is whether the assessment orders can be set aside on the ground of limitation in taking action. Learned counsel for the petitioner placed reliance upon the following judgments.

(i) ***E.I.D.Parry (I) Ltd. v. Assistant Commissioner of***

W.P(C) No.10979/2014 & conn.cases

-:72:-

Commercial Taxes and Another [(2000) 117 STC 457. (SC)].

This judgment is relied upon to emphasize the point regarding imposition of penalty, wherein it was held that if the correct position of law was in doubt and the amounts had not been included in the return of turnover on the *bona fide* belief that they were not includable in the taxable turnover, penalty cannot be levied.

(ii) ***Sreekrishna Electricals v. State of Tamil Nadu*** [(2009) 23 VST 249 (SC)].

In this case, the Apex Court was considering a question relating to an assessment made under the Tamil Nadu General Sales Tax Act, 1959 and it was held that in regard to the question of penalty, the items which were not included in the turnover were found incorporated in the appellant's account books. When the assessing authority includes those items in the dealers' turnover disallowing the exemption, penalty cannot be imposed.

(iii) ***Chakkiath Brothers (M/s.) v. Assistant Commissioner, Commercial Taxes*** (2014 (3) KHC 55).

This judgment is passed by the learned Single Judge wherein it is held that penalty proceedings cannot be initiated on the basis of a mere dispute in classification.

W.P(C) No.10979/2014 & conn.cases

-:73:-

(iv) **Cement Marketing Company of India Ltd. v. Assistant Commissioner of Sales Tax, Indore and others** [(1980) 1 SCC 71].

This is also a case in which the Apex Court was considering whether *mens rea* was essential for taking penalty proceedings under the sales tax laws. It was held that where the assessee does not include a particular item in the taxable turnover under a *bona fide* belief that he is not liable so to include it, it would not be right to condemn the return as a false return inviting imposition of penalty. Para 5 is relevant, which reads as under:-

“5. The next question that arises for consideration is whether the Assistant Commissioner of Sales Tax was right in imposing penalty on the assessee for not showing the amount of freight as forming part of the taxable turnover in its returns. The penalty was imposed under Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 and Section 9 sub-section (2) of the Central Sales Tax Act, 1956 on the ground that the assessee had furnished false returns by not including the amount of freight in the taxable turnover disclosed in the returns. Now it is difficult to see how the assessee could be said to have filed “false” returns, when what the assessee did, namely, not including the amount of freight in the taxable turnover, was under a bona fide belief that the amount of freight did not form part of the

W.P(C) No.10979/2014 & conn.cases

-:74:-

sale price and was not includible in the taxable turnover. The contention of the assessee throughout was that on a proper construction of the definition of "sale price" in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 and Section 2(h) of the Central Sales Tax Act, 1956, amount of freight did not fall within the definition and was not liable to be included in the taxable turnover. This was the reason why the assessee did not include the amount of freight in the taxable turnover in the returns filed by it. Now, it cannot be said that this was a frivolous contention taken up merely for the purpose of avoiding liability to pay tax. It was a highly arguable contention which required serious consideration by the Court and the belief entertained by the assessee that it was not liable to include the amount of freight in the taxable turnover could not be said to be mala fide or unreasonable. What Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 requires is that the assessee should have filed a "false" return and a return cannot be said to be 'false' unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberations and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not

W.P(C) No.10979/2014 & conn.cases

-:75:-

liable so to include it, it would not be right to condemn the return as a "false" return inviting imposition of penalty. This view which is being taken by us is supported by the decision of this Court in Hindustan Steel Limited v. State of Orissa where it has been held that "even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute...." It is elementary that Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 providing for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. If the view canvassed on behalf of the Revenue were accepted, the result would be that even if the assessee raises a bona fide contention that a particular item is not liable to be included in the taxable turnover, he would have to show it as forming part of the taxable turnover in his return and pay tax upon it on pain of being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable. That surely could never have been intended by the legislature."

(v) **Eastern Ore Corporation v. Commercial Tax Officer**

[(1974) 33 STC 129].

W.P(C) No.10979/2014 & conn.cases

-:76:-

This is a Full Bench judgment of the Andhra Pradesh High Court. The question considered was whether the assessment initiated under Sections 14(1), (3) and (4) of the Andhra Pradesh General Sales Tax, was barred by limitation or not. It was held that where on the date of initiation of penalty proceedings, the amended sub section (4) of section 14 had come into force, it is the law regarding penalty contained in the amended provision that is applicable. In the facts of the said case, the power to assess the dealer for escaped assessment had to be exercised within six years of expiry of the relevant assessment year. The Full Bench was interpreting the two periods of limitation prescribed for escapement of assessment and it was held that sub sections (4) and (4)(a) of section 14 has been provided to take care of instances where there is escapement of turnover from tax on account of the dealer to disclose the turnover or any of the particulars correctly. While answering the reference, it was held that penalty proceedings do not stand by themselves but are dependant upon a finding by the assessing authority that the whole or any of the turnover of the business of a dealer has escaped assessment. It is only the finding that turnover has escaped assessment as a deterrent for the dealer, the penalty

W.P(C) No.10979/2014 & conn.cases

-:77:-

proceedings are taken. While these proceedings were distinct from the assessment proceedings themselves, they are not wholly independent from the assessment proceedings. It is therefore argued that penalty proceedings also require to be adjudicated within a reasonable time, failing which it has to be held that it is barred by limitation.

(vi) ***State of Andhra Pradesh v. Dhanalakshmi General Stores*** [(1998) 26 STL 185].

This is a Division Bench judgment of the Andhra Pradesh High Court in which it is held that penalty proceedings being ancillary to the assessment proceedings, the period of limitation prescribed for assessment equally applies to an order levying penalty. The short judgment reads as under:-

"The Tribunal was right in our opinion, in holding that the order of penalty in this case is barred by limitation. The relevant dates are the following : The original assessment order was served upon the assessee on 20th July, 1978. Thereafter the assessment was reopened under sub-section (4) of section 14 and order of reassessment was made on 31st July, 1979. Simultaneously penalty proceedings were also initiated, but for one or the other reason, which is not Clear from the record, the order of penalty was made only on 15th February, 1983. It was served on the assessee on

W.P(C) No.10979/2014 & conn.cases

-:78:-

3rd March, 1983. It needs no reiteration that this penalty was levied under sub-section (4) itself. Sub-section (4-A) prescribes the period of limitation for any ion under sub-section (4). It says :

"Any assessment or levy under sub-section (4) shall be made within a period of four years from the date on which any order of assessment or levy was served on the dealer."

Sub-section (4) provides for reopening of the assessment in certain situations. It says further : "In addition to the tax assessed or fee levied under this sub-section, the assessing authority may also direct the dealer to pay a penalty as specified in sub-section (8)."

3. *It is thus clear that penalty proceedings are part of, or at any rate ancillary to the reopening proceedings under sub-section (4). If so, the period of limitation prescribed by sub-section (4-A) applies equally to an order levying penalty as it applies to reassessment order. Indeed, this is the decision of this Court in State of Andhra Pradesh v. Sri Ganesh Bhavan Hotel [1983] 53 STC 169 which, in turn, refers to, and follows the decision in M. Sayanna and Garikapati Narasimhulu v. State, a decision dated 18th August, 1969 in W.P. No. 338 of 1965 [reported as an Appendix in [1974] 33 STC 144 (AP)]. The said decision directly dealt with sub-section (4) and held that penalty proceedings are not independent proceedings, and though the proceedings for penalty are distinct from reassessment proceedings they cannot be treated as wholly independent assessment proceedings. It*

W.P(C) No.10979/2014 & conn.cases

-:79:-

was observed that levy of penalty is ancillary to the power to levy the tax. In view of the aforesaid decisions, we agree with the Tribunal that the order of penalty is barred by sub-section (4-A) of section 14.

Tax Revision Case, accordingly, fails and is dismissed. No costs."

(vii) **St.Mary's Hotels (P) Ltd. v. Intelligence Officer** (LAWS (KER) 2010-2-75)

This case was decided by learned Single Judge of this Court. In this case, the dictum laid down is that limitation for taking action for penalty starts from the date of detection of offence and not from the date of inspection by the authorities concerned. It is only after verification of the books of accounts and in the light of the incriminating circumstances brought out in the course of inspection that the offence can be detected.

(viii) **State of Kerala v. Jayan Medical Store** (1979 KLT 738)

This was a case in which a Division Bench of this Court held that the notice for imposition of penalty issued after termination of the assessment proceedings cannot be said to be in terms with section 19(2) of the KGST Act. The said judgment reads as under:-

"Aggrieved by the judgment of the learned Single

W.P(C) No.10979/2014 & conn.cases

-:80:-

Judge in W.P. (C) No.23049 of 2007, the appellants who were respondents 1 to 3 in that Writ Petition have preferred this Writ Appeal. The brief facts of the case are the following.

2. Respondents 1 and 2 herein have filed the above Writ Petition. They have approached this Court challenging Exts.P1 and P2 orders of the District Educational Officer (D.E.O.), Thrissur. A vacancy arose in the school of the 3rd respondent in the post of Peon on 01.10.03 as a result of the retirement of the existing Peon on 30.09.2003. The 2nd respondent who was working as FTM was clamouring for promotion, but, because of the dispute regarding management and the orders of the Government restraining the Manager from making appointment, he was not promoted. Finally, the Manager by order dated 25.10.06, promoted the 1st respondent as Peon. In the resultant vacancy, the manager appointed the 2nd respondent as FTM on 08.11.2006. The D.E.O. rejected the approval of appointment of the 1st respondent by Ext.P1, on the ground that the incumbent holding the post of Manager at the relevant time, though he was permitted by the Government to function as Manager, was restrained from making any appointments. The D.E.O. declined to approve the appointment of 2nd respondent on the same ground mentioned in Ext.P1. Feeling aggrieved by Exts.P1 and P2 the Writ Petition was filed by respondents 1 and 2. The learned Judge quashed Exts.P1 and P2 and directed the D.E.O. to approve their appointments, provided,

W.P(C) No.10979/2014 & conn.cases

-:81:-

they are otherwise qualified and eligible. It was observed that the dispute regarding the management cannot affect the appointments of the staff.

3. The official respondents have preferred this appeal contending that Annexure-II order of the Government dated 22.10.01, provided that, all posts lying vacant for more than one year should be abolished forthwith. The appellants would submit that relying on Annexure-II order, the Deputy Director of Education (DDE), Thrissur has issued Annexure-I order dated 28.07.07 abolishing the post of Peon in VVSHS (3rd respondent's school), which was lying vacant for more than one year. So, there is no post of Peon with effect from 28.07.07, it is submitted. In view of Annexures I and II, the appellants would submit that the direction of the learned Single Judge given in the judgment under appeal is unsustainable.

4. We notice that creation of posts, abolition and retrenchment of staff etc. in aided schools are governed by the provisions of Chap.XXIII and XXIVA KER. Of course, R.9 of Chap.XXIVA enables the Government to extend any ban in the creation of posts, retrenchment of staff etc. concerning government schools to aided schools also. The said Rule reads as follows:

"9. Notwithstanding anything contained in these rules, if it is found necessary, Government may by orders extend any ban on the creation of posts, retrenchment of staff etc. affected by them in Government schools to aided schools."

W.P(C) No.10979/2014 & conn.cases

-:82:-

5. *The appellants relied on the said rule and Annexures I & II to support their contentions. A close reading of Annexure II would show that it is a general order applicable to all Government departments and therefore the same would apply to Government Schools also. Since the creation of posts, retrenchment of staff etc. in aided schools are governed by statutory rules, if the Government wanted to apply Annexure II to aided schools also, there should have been a separate order. In this case, there is no such separate order. Therefore, we are of the view that, Annexure II order does not apply to aided schools. If that be so, Annexure I is ab initio void and unenforceable. Further the said order has been passed on 28.07.07 reviewing the staff strength of the year 2006-2007 long after the said academic year was over. Such an order by the Deputy Director is without jurisdiction in view of the time limit fixed for review of strength of teaching staff contained in Chapter XXIII, which applies mutatis mutandis to the fixation of the strength of non-teaching staff also by virtue of R. 9 A of Chapter XXIV A.*

6. *We notice that whoever be the Manager, the 1st respondent is entitled to get promotion. In the resultant vacancy of FTM, the Manager can appoint any qualified hand from the open market. Government is not concerned whether 'A' is appointed or 'B' is appointed and the appointment is made by the Manager 'C' or Manager 'D'. Regarding the fresh appointment made, the rival claimant to the post of Manager may have*

W.P(C) No.10979/2014 & conn.cases

-:83:-

grievance. But, Government have no locus standi to voice that. In view of the above position, we find no reason to interfere with the directions issued in favour of respondents 1 and 2 by the learned Single Judge, at the instance of the appellants. Therefore, the Writ Appeal fails and it is dismissed. Having regard to the facts of the case, the appellants are given one month's time from today to implement the directions of the learned Single Judge."

It is submitted that the penalty proceedings had been initiated based on information received from the Director of Revenue Intelligence as early in the year 2008 as evident from Ext.P7. When such an information is received, necessarily, penalty proceedings, if any, has to be initiated within a reasonable time. Section 45A of the KGST Act reads as under:-

"45A. Imposition of penalty by officers and authorities (1) *Notwithstanding anything contained in section 46 if the assessing authority or the Appellate Assistant Commissioner is satisfied that any person,-*

- (a) being a person required to register himself as dealer under this Act, did not get himself registered; or*
- (b) has failed to keep true and complete accounts; or*
- (c) has failed to submit any return as required by the provisions of this Act or the rules made there*

W.P(C) No.10979/2014 & conn.cases

-:84:-

under; or

*(d) has submitted an untrue or incorrect return; or
(e) has failed to comply with all or any of the terms
of any notice or summons issued to him by or
under the provisions of this Act or the rules made
thereunder; or*

*(f) after purchasing any goods in respect of which
he has made a declaration under proviso to sub-
section (3) of section 5 , has failed to make use of
the goods for the declared purpose; or*

*(g) has acted in contravention of any of the
provisions of this Act or any rule made there under,
for the contravention of which no express provision
for payment of penalty or for punishment is made
by this Act;*

*(h) or has abetted the commission of any of the
above offences.*

*Such authority or officer may direct that such
person shall pay, by way of penalty, an amount not
exceeding twice the amount of Sales Tax or other
amount evaded or sought to be evaded where it is
practicable to quantify the evasion or an amount
not exceeding ten thousand rupees in any other
case.*

Explanation I: - *The burden of proving that any
person is not liable to the penalty under this
section shall be on such person.*

Explanation II: - *for the purposes of this sub-
section the expression "assessing authority"
includes any officer not below the rank of Sales Tax
Officer specified by the Government in this behalf
by notification in the Gazette.*

W.P(C) No.10979/2014 & conn.cases

-:85:-

(2) No order under sub-section (1) shall be passed unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter.

(3) The Deputy Commissioner may, on application by any person on whom a penalty is imposed under sub-section (1) within thirty days from the date of receipt by him of the order imposing such penalty, for reasons to be recorded in writing confirm, reduce or waive such penalty or remand the case to the assessing authority or Appellate Assistant Commissioner, as the case may be, for reconsideration.

Provided that the Deputy Commissioner may admit an application made after the expiry of the said period of thirty days if he is satisfied that the applicant had sufficient cause for not making the application within the said period.

(4) An order of the Deputy Commissioner under sub-section (3) shall, subject to the provisions of sub-section (5), be final.

(5) The Board of Revenue may, either suo-motu or on application, call for and examine the record of any order passed under sub-section (1) or sub-section (3) and make such order as it thinks fit.

Provided that the Board of Revenue shall not admit an application made after the expiry of thirty days from the date of receipt by the applicant of the order under sub-section (1) or sub-section (3), as the case may be, unless it is satisfied that the applicant had sufficient cause for not making the application within the said period.

W.P(C) No.10979/2014 & conn.cases

-:86:-

Provided further that no order enhancing a penalty or canceling the waiver of a penalty shall be passed unless the person affected thereby is given an opportunity of being heard in the matter.

(5A) An application under sub-section (3) shall be accompanied by a fee of rupees three hundred and that under sub-section (5) by a fee of rupees seven hundred.

(6) An order of the Board of Revenue under sub-section (5) shall be final.

In fact, no time limit is specified under section 45A for initiating or completing the penalty proceedings. Section 67(1) of the KVAT Act (as on 31/3/2005) reads as under:

“67. Imposition of penalty by authorities (1)

Notwithstanding anything contained in section 71 if any authority empowered under this Act is satisfied that any person,-

(a) being a person required to register himself as a dealer under this Act, did not get himself registered; or

(b) has failed to keep true and complete accounts; or

(c) has failed to submit any return as required by the provisions of this Act or the rules made thereunder; or

(d) has submitted an untrue or incorrect return; or

(e) has made any bogus claim of input tax credit or refund; or

(f) has continued the business during the period of suspension of registration; or

W.P(C) No.10979/2014 & conn.cases

-:87:-

(g) has failed to return the un used statutory Forms and Declarations under this Act after the cancellation or suspension of the registration; or

(h) has not stopped any vehicle or vessel when required to do so; or

(i) has failed to comply with all or any of the terms of any notice or summons issued to him by or under the provisions of this Act or the rules made thereunder; or

(j) has acted in contravention of any of the provisions of this Act or any rule made thereunder, for the contravention of which no express provision for payment of penalty or for punishment is made by this Act; or

(k) has abetted the commission of the above offences, or

(l) has abetted or induced in any manner another person to make and deliver any return or an account or a statement or declaration under this Act or rules made thereunder, which is false and which he either knows to be false or does not believe to be true, such authority may direct that such person shall pay, by way of penalty, an amount not exceeding twice the amount of tax or other amount evaded or sought to be evaded where it is practicable to quantify the evasion or an amount not exceeding ten thousand rupees in any other case:

Provided that the authority empowered under this section shall dispose off the case within one year from the date of detection of offence mentioned under this section except where the extension of

W.P(C) No.10979/2014 & conn.cases

-:88:-

time is granted by the Deputy Commissioner."

It is clear from the statutory provisions aforesaid that the penalty proceedings had to be completed within a specified time, i.e., within one year under Section 67 from the date of detection of offence mentioned under this section except where the extension of time is granted by the Deputy Commissioner. One year period aforementioned has been amended as three years with effect from 1/04/2005. Apparently the time limit starts only from the date of detection of the offence. In the present case, it is stated that though the offences were detected as early as on 5/9/2008, proceedings were taken only after several years from the date of detection of the alleged irregularity.

26. Apparently under section 67(1), as it then was, provided a limitation for completing the penalty proceedings after detecting the offence. Necessarily a question arises when the offence was detected. Ext.P7 would indicate that the department was aware of the alleged offence as early as on 25/4/2008. However, a contention had been urged stating that they were awaiting further orders. But no materials are produced to support the stand that even after 25/4/2008, there was difficulty in taking penalty proceedings against the petitioners. When a specific

W.P(C) No.10979/2014 & conn.cases

-:89:-

contention is raised regarding limitation, it is for the respondents to justify the same by producing all necessary materials. In the absence of any material other than Ext.P7, it has to be assumed that the department was aware of the alleged offence as early as on 25/4/2008. In that event, the penalty orders under section 67 (1) ought to have been completed within three years even taking the outer limit. The penalty orders had been issued only on 5/12/2014 which is clearly beyond the time specified under the statute. In regard to section 45A, no specific period of limitation has been specified. However, as held by the Full Bench of Andhra Pradesh High Court, penalty proceedings have to be completed within a reasonable time from the date of detection. In ***Eastern Ore Corporation*** (supra), it was held that penalty proceedings do not stand by themselves but are dependent upon a finding by the assessing authority that the whole or any of the turnover of the business of a dealer has escaped assessment. While these proceedings were distinct from the assessment proceedings themselves, they are not wholly independent from the assessment proceedings. Similarly, in ***Dhanalakshmi General Stores*** (supra), it is held that penalty proceedings being ancillary to the assessment proceedings, the period of limitation prescribed

W.P(C) No.10979/2014 & conn.cases

-:90:-

for assessment equally applies to the order levying penalty. I fully concur with the above view. As held in ***St.Mary's Hotels (P) Ltd.*** (supra), limitation for taking action for penalty starts from the date of detection of offence and not from the date of inspection by the authorities concerned, after verification of the books of accounts and in the light of the incriminating circumstances brought out in the course of inspection that the offence can be detected. Therefore, even in respect of penalty under section 45A, the same has to be completed within a reasonable time and at any rate within 5 years provided for completing assessment under section 19 of the KGST Act. In the light of the above discussion, I am of the view that penalty orders in this case are liable to be set aside, since orders are passed beyond the period of limitation as stated above.

27. In regard to Group-E cases, proceedings seems to have been initiated under Section 25A of the Act. Section 25A reads as under:-

"25A. Assessment of Tax based on Audit Objections- *Notwithstanding anything contained in this Act, where an objection has been raised by the Comptroller and Auditor General of India in respect of an assessment or reassessment made or scrutiny of any return filed under this Act, and if the*

W.P(C) No.10979/2014 & conn.cases

-:91:-

assessing authority is satisfied that such objection is lawful, the assessing authority shall proceed to re-assess the dealer or dealers with respect to whose assessment or re-assessment or scrutiny as the case may be, the objection has been made:

Provided that no order under this section shall be passed without giving the dealer an opportunity of being heard."

An eventuality to invoke Section 25A arises when there is an audit report. According to the petitioner, there is no audit report from the Comptroller and Auditor. This aspect of the matter has not been controverted by the petitioners. Therefore, the notices issued in these cases are to be treated as notices under Section 25(1) of the KVAT Act. Therefore, necessarily it has to be within the time specified in Section 25(1). The same being beyond the time specified, the assessment orders are liable to be set aside.

28. In WP(C) No.13183/2016, challenge is with reference to a penalty order issued in respect of the year 2008-09 by issuing notice on 31/10/2015. Nothing is stated in the notice regarding the time when the offence is detected. Apparently, when a notice for penalty is issued, necessarily, time limit has to be specified which is lacking in the case. Hence this writ petition is liable to be allowed.

W.P(C) No.10979/2014 & conn.cases

-:92:-

In the light of the above discussion and findings, the cases are disposed in the following manner:-

(1) **Group-A cases:-** {WP(C) Nos.10979, 27736/2014, 1489, 20497, 21123, 24864, 31360, 32836/2015, 1617, 11463, 13959, 14350, 14355, 14426, 14600, 16716, 17660, 18048, 19366, 20995, 21184, 21378 & 22479/16}. It is declared that the proceedings under Section 25(1) of the KVAT Act have to be taken within the period of limitation of five years by issuing notice under the first proviso to Section 25(1), failing which further proceedings will be barred by limitation. The 3rd proviso by which time has been extended for completing the assessment will not save the period of limitation unless notice under the proviso to Section 25 (1) has been issued within the period of limitation. Hence, the impugned orders in all these cases are quashed.

(2) **Group-B cases:-** {WP(C) No.28422/14, 17769, 21230, 21285, 22481/2015, 20442, 20521, 22181, 23377 & 26723/2016}. It is declared that the Deputy Commissioner while exercising power under Section 25B can only extend time for completing the assessment and that too for good and sufficient reasons. By virtue of an order passed under Section 25B, no action can be taken by the assessing officer to initiate

W.P(C) No.10979/2014 & conn.cases

-:93:-

proceedings under Section 25(1) by issuing notice in terms of the first proviso. Hence, these cases in which assessment orders are passed based on notices issued after the period of limitation are hereby set aside.

(3) **Group-C cases:-** {W.P.(C) Nos. 12708, 12716, 12717, 12723, 12725, 17390, 17392, 17393, 17394, 17398, 17399, 17400, 17428, 18403, 18405, 19472, 19492, 19493, 23170 & 23185/2016} As already held, in these cases, notices under Section 25B has been issued for completing assessments after the period of limitation. In some cases, part of the order is well within time. Therefore, these writ petitions are allowed declaring that those orders issued under Section 25B permitting extension of time after the period of five years wherein no proceedings had been taken under section 25(1) within the five year period are hereby set aside. In some of the cases, petitioners had only sought for quashing part of the impugned orders, which alone is allowed.

(4) **Group-D case:-** {WP(C) No.12066/2015}. Writ petition is allowed and Ext.P4 series of penalty orders are hereby quashed.

(5) **Group-E cases:-** {WP(C) Nos. 3116 & 13183/2016}

W.P(C) No.10979/2014 & conn.cases

-:94:-

The impugned orders, Exts.P1 and P1(a), in WP(C) No. 13183/2016, are quashed. In WP(C) No. 3116/2016, Ext.P3 is quashed.

A.M. SHAFFIQUE, JUDGE

Rp