

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 5TH DAY OF JANUARY 2017/15TH POUSHA, 1938

WP(C).No. 21077 of 2016 (H)

PETITIONER :

M/S. PAHARPUR COOLING TOWERS LIMITED.,
PAHARPUR HOUSE, 8/1/B, DIAMOND HARBOUR ROAD,
KOLKATA -700 022, WEST BENGAL,
REPRESENTED BY ITS AUTHORISED SIGNATORY,
ANURITA CHATURVEDI,
CONTROLLER FINANCE & ACCOUNTS.

BY ADV. SRI.JOSE JACOB

RESPONDENT(S):

1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY,
COMMERCIAL TAXES, GOVT. OF KERALA,
TRIVANDRUM, KERALA.
2. ASSISTANT COMMISSIONER (WC),
OFFICE OF THE DEPUTY COMMISSIONER,
COMMERCIAL TAXES DEPARTMENT, 2ND FLOOR,
CLASS TOWERS, OLD RAILWAY STATION,
KOCHI - 18.

R1 & R2 BY GOVERNMENT PLEADER SRI.V.K.SHAMSUDHEEN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 05-01-2017, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

sts

WP(C).No. 21077 of 2016 (H)

APPENDIX

PETITIONER(S)' EXHIBITS

**EXT.P1 TRUE COPY OF THE NOTICE UNDER SECTION 25(1) OF THE KVAT ACT
DATED 19.3.2016.**

EXT. P2 TRUE COPY OF THE POSTING NOTICE DATED 31.5.2016.

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.A.TO JUDGE

sts

C.R.

K. VINOD CHANDRAN, J.

W.P.(C) No. 21077 of 2016 (H)

Dated: 5th January, 2017

J U D G M E N T

The petitioner is concerned with Ext.P1 notice dated 19.03.2016 issued under Section 25(1) of the Kerala Value Added Tax Act, 2003 ('Act' for short). The ground raised is one of limitation. The learned Counsel has two contentions; one, with respect to the limitation, as provided under Section 25(1) of the Act and the other, with reliance placed on the third proviso to sub section (1) of Section 25 of the Act.

2. The learned Government Pleader, appearing for the Department, submits that the decision of a Full Bench of this Court, reported in **Cholayil Private Limited v. Assistant Commissioner (Assessment) - (2016) 92 VST 308 (Ker.)**, squarely covers the issue.

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The learned Counsel for the petitioner, however, refers to the Full Bench decision to contend that at least after the introduction of the third proviso there is a limitation provided, which indication has been made by the Full Bench in the concluding portion. Reference is also placed on the decision dated 05.10.2016 of a learned Single Judge in W.P.(C) No.21184/2016 and connected cases.

3. The limitation provided under Section 25(1) of the Act, is a period of five years from the last date of the year to which the return relates. The limitation, as per the words employed, is also to 'proceed to determine' to the best of judgment inter alia any escaped assessment to tax. The Full Bench has held that the words employed in sub section (1) indicates only an initiation of proceedings within the limitation period and not the conclusion of the assessment.

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4. The learned Counsel for the petitioner, first contends that there are two stages required insofar as proceeding to determine, as is evident from the provision; which are issuance of a notice and also an enquiry to be made. In the present case only the first stage has occurred before the limitation period and hence, there can be no enquiry made or proceedings continued after the limitation period, is the argument. This Court is unable to countenance such contention since the Full Bench has clearly held that the words 'proceed to determine' would only require initiation of proceedings before the limitation period. Initiation of proceedings can only be with a notice and the mandate of an enquiry definitely has to be complied with by the Assessing Officer, but, there can be no limitation period provided for that enquiry.

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5. The next contention is based on the third proviso which reads as under:

“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 upto 31st March, 2016”.

The above proviso was first introduced in the year 2010 extending the time for completion of assessments for the year 2005-2006 upto 31.03.2011 and then of each successive year from 2005-2006 to the close of the current assessment year, by successive amendments. In such circumstance, it is contended that after 2010 at least there should be a limitation for conclusion of the proceedings; as per the third proviso as declared by the Full Bench.

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6. The reliance is also on the following statement made by the Full Bench in the decision in **Cholayil** (supra):

“All these taken together, the net effect of the introduction of the third 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.”

The said statement made by the Full Bench is not a declaration of law especially since the Full Bench has specifically observed that this was not an issue

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pointedly covered by the reference order of the Division Bench to the Full Bench. It was also specifically stated so: "Though we have noted the 3rd proviso to subsection (1) of section 25 of the KVAT Act, the Full Bench is not called upon, through the reference order, to consider the impact of that proviso."(sic). In such circumstance, there is no interpretation made specifically of the proviso by the Full Bench.

7. The proviso, as it reads, only indicates that completion of assessments including those in which an extension is made under Section 25B and expiring on 31.03.2015, would stand extended up to 31.03.2016. There is no limitation for completion of assessment provided therein. In the present case the assessment year is 2010-2011 and the limitation for initiating proceedings, under Section 25(1) expires only on 31.03.2016. The notice impugned herein is dated

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19.03.2016; within the limitation period as provided under Section 25(1) of the Act. The argument is that the proviso deems conclusion of assessment within the extended period.

8. The proviso is a well-known devise of statutory construction, which cannot be interpreted as stating a general rule and creates either a qualification of or an exception from, what is stated in the substantive section or rule. It cannot be said to include or add what is not available in the original enactment. In **Madras and Southern Maharatta Railway Co. vs. Bezwada Municipality - AIR 1944 PC 71**. It was held so:

“The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where, as in the present case, the

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language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms”.

9. Ram Narain Sons Ltd. v. Asst. Sales Tax Commr. - AIR 1955 SC 765 held:

“It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other” (Para 10).

10. In Abdul Jabar Butt vs. State of Jammu and Kashmir - 1957 SCR 51 a Constitution Bench held so:

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“In the first place it is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso” (Para 8).

11. 'Interpretation of Statutes' by Prof.D.S.Chopra [First Edition] in Chapter III at page 135; describes the function of a proviso to be:

“intended to limit the enacted provision so as to exempt something which **would have otherwise been within it or in some measure to modify the enacting clause.**”

12. The principle in **Madras and Southern Maharatta Railway Co.** (supra) was reiterated in **Commr. of Income Tax, Mysore vs. Indo Mercantile Bank Ltd. -1959 Supp (2) SCR 256 = AIR 1959 SC 713** where it was held that :

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“The proper function of a proviso was merely to qualify the generality of the main enactment by providing an exception and taking out, as it were, from the main enactment a portion which, but for the proviso, would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject foreign to the main enactment.(sic)”

13. In Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yogaj Sinha - (1962) 2 SCR 159 = AIR 1961 SC 1596 it was held so:

“As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule”.

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14. The decision in **Dwarka Prasad v. Dwarka Das Saraf - (1976) 1 SCC 128 = AIR 1975 SC 1758**, declared:

“If, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges.” [Para16]

xxx

xxx

xxx

The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. 'Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be

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read as divorced from their context' (1912 A.C. 544) If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

15. The principle so reiterated in **Dwarka Prasad** (supra) has survived over the long years and has been quoted and relied on recently by the Hon'ble Supreme Court in **Dashrath Rupsingh Rathod v. State of**

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Maharashtra - (2014) 9 SCC 129 and Union of India v. Dileep Kumar Singh - (2015) 4 SCC 421.

The proviso, as employed here, cannot be deemed to provide for a limitation. The limitation provided in Section 25(1) of the Act is for initiation of proceedings and not completion of assessment. The extension enabled for completion of assessment, hence, is inoperative and neither saves limitation provided in Section 25(1) or provides for a limitation as such.

16. In that context, Section 25B has to be specifically referred to:

“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

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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.”

17. The language of Section 25B specifically refers to extension of period of completion, beyond the 'period specified in **those** sections' meaning sections 24 and 25. While section 24 prescribes a limitation period of three years to reject the return and complete the assessment, section 25(1) of the Act does not speak of any limitation period as to the final determination or conclusion of the proceedings and specifically refers to the initiation of the proceedings to determine the escaped assessment to tax within a period of five years from the last date of the year to which the return relates.

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18. The third proviso to section 25 (1) extends period for completion of assessment including an extension made under Section 25B. Section 25B confers powers on the Deputy Commissioner to extend the time for completion of investigation or enquiry, for good and sufficient reasons notwithstanding Sections 24 and 25, thus enabling extension of the period of completion of the assessment beyond the period specified in those Sections. Section 25(1) does not speak of any limitation for completion of the proceedings. In such circumstances, if at all extension of completion of assessment is permitted by the Deputy Commissioner, that would not enable the State to initiate proceedings after the limitation period is over nor can a limitation be found from the proviso.

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19. This Court has, in W.P.(C) No.21314/2016 by judgment dated 03.10.2016, on the same reasoning, held that Section 25B, as it now stands, is redundant insofar as sub section (1) of Section 25 not providing for any limitation for conclusion of the proceedings. Para 7 and 8 are extracted hereunder:

“7. Both the above provisions speak of extension of period of completion of assessment beyond the period specified. What is pertinent is that Section 25(1) of the K.V.A.T. Act does not provide for any period for completion of assessment and speaks of only initiation of proceedings to determine the escaped turnover to be commenced within the five year period. Hence, within the limitation period, if a notice is issued, the provisions under the K.V.A.T. Act does not provide for any period for completion of such assessment. In fact, the Full Bench noticed the Reference Order of the

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Division Bench which also emphasised the absence of a time frame to complete the assessment as provided under Section 25B of the K.V.A.T. Act. The Full Bench refused to answer the question; finding that it is not for the Courts to bring in a time frame and opined that suffice would be an observation that the completion should be within a reasonable period.

8. At the risk of repetition it has to be noticed that Section 25(1) of the K.V.A.T. Act does not speak of any period for completion of assessment and if a proceeding was initiated prior to the limitation period, then going by the Full Bench decision, there would only be a mandate on the department to complete the assessment within a reasonable period, which, again is not a statutory mandate. Without having initiated the proceedings within the limitation period, the consequence of the limitation cannot

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be averted by extending the period of completion, for which no limitation is provided for in the statute. In such circumstance, it has to be held that the proceedings initiated herein, by Ext.P1 dated 12.08.2014, is far beyond the limitation period and the same cannot be sustained.”

20. W.P. (C) No. 21184 of 2016 also did not find anything to the contrary. The reliance placed by the learned counsel for the petitioner is on the statement made in paragraph 21 of the judgment: “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 the assessment proceedings, however assessment has to be completed within five years from the prescribed date.”(sic). As noticed herein above there is no prescribed date or

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limitation provided for completion of assessment. The aforesaid sentence cannot be read out of context especially when the Court goes on to hold in the same paragraph that: "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."(sic) It was also held: "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

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authority to issue notice to the assessee under section 25 (1) within the time-limit limit provided under the statute.”

21. The irrefutable conclusion is that, even if an extension is made under Section 25B, the same would not enable the State to initiate proceedings after expiry of the period of limitation provided under sub section (1) of Section 25 of the Act. As a corollary the proceedings initiated before the limitation period would not be rendered nugatory merely for the reason that it was not concluded within the period allegedly provided in the third proviso, for the simple reason that the third proviso read with Section 25B does not provide a period of limitation. The power of extension granted under Section 25B having been found to be redundant, there can be no limitation for conclusion of the proceedings and as the Full bench held, there can only be a mandate

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that the proceeding should be completed within a reasonable time.

In such circumstance, the writ petition is found to be devoid of merit and the same is dismissed. No Costs.

Sd/-
K.VINOD CHANDRAN,
JUDGE