IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE AMIT RAWAL

TUESDAY, THE 20TH DAY OF OCTOBER 2020 / 28TH ASWINA, 1942

WP(C).No.11483 OF 2017(I)

PETITIONER/S:

M/S. VIJAY CONSTRUCTIONS
MYKULANGARA, KINGINIMATTAM P O, KOLENCHERRY-682311,
REPRESENTED BY ITS MANAGING PERTNER M P ITTOOP.

BY ADVS.
SMT.S.K.DEVI
SRI.SANTHOSH P.ABRAHAM

RESPONDENT/S:

1 **THE COMMERCIAL TAX OFFICER**
(WORKS CONTRACT), OFFICE OF THE DEPUTY COMMISSIONER,
DEPARTMENT OF COMMERCIAL TAXES, MATTANCHERRY,
ERNAKULAM-682002.

2 **THE COMMERCIAL TAX OFFICER**
SPECIAL TEAM, OFFICE OF THE DEPUTY COMMISSIONER,
DEPARTMENT OF COMMERCIAL TAXES, MATTANCHERRY,
ERNAKULAM-682002.

3 **THE DEPUTY COMMISSIONER**
DEPARTMENT OF COMMERCIAL TAXES, MATTANCHERRY,
ERNAKULAM, 682002.

4 **THE COMMISSIONER**
DEPARTMENT OF COMMERCIAL TAXES, TAX TOWERS, KARAMANA,
THIRUVANANTHAPURAM-695002.

5 **STATE OF KERALA**
REPRESENTED BY ITS FINANCE SECRETARY, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM, PIN-695001.

OTHER PRESENT:

GP SMT JASMINE M M

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29-09-2020, THE COURT ON 20-10-2020 DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 20th day of October 2020

The petitioner, a partnership firm, through the instant writ petition has challenged the assessment orders dated 20.3.2017 for the assessment years 2009-10 and 2010-11. As per the averments the petitioner submitted returns for the aforementioned assessment years vide Exts.P1 and P2. Petitioner on compounded works remitted the tax due under the return. On 24.3.2017, received assessment orders from the 2nd respondent for the year 2009-10 and 2010-11, Exts.P3 and P4. As per the averments, 2nd respondent issued notices under Section 25(1) read with Section 42(2) (b) dated 22.2.2017 through e-mail to the e-mail ID of the petitioner, which was served on 25.2.2017 and an opportunity for personnel hearing was granted for 10.3.2017. Petitioner appeared before the 2nd respondent on 9.3.2017 and sought explanation with respect to the Audit Report for the year 2011-12.

2. Learned counsel for the petitioner submitted that

the proceedings for the assessment under Section 25(1) were initiated after the period of limitation provided ie., 5 years as the amendment in 2017 increasing the period from 5 to 6 years is prospective in nature. In support of the aforementioned contention, judgment of this Court in ***MCP Enterprises (M/s.) and Others v. State of Kerala and Others (2020 (1) KHC 127)*** has been referred whereby provisions of Section 42(3) of Kerala Value Added Tax Act, 2003 were also dealt in extenso. It was held Section 42 of the Act was amended through a Notification dated 13.11.2016 with retrospective effect from 1.4.2005. Even if there is no limitation for taking action under Section 42(3), the limitation as prescribed in the provisions of Section 25(1) was to be taken and accordingly the notices qua assessment orders were quashed being barred by limitation.

3. On other hand, Learned Government Pleader submits that it is not a simple case of assessment under Section 25(1) of 2003 Act. Section 42(3) of the Act provides that if any assessee fails to file any audited accounts referred to in sub Section 1 or annual return,

annexures, statements, certificates, details of sale and purchase, the assessment for the relevant year for the purposes of Section 25 shall be treated as pending and time limit mentioned therein shall not be applicable in such cases. In support of the aforementioned contention, he relied upon the Division Bench judgment of this Court in ***Assistant Commissioner (Assessment) v. Grasim Industries Ltd. (2006 (1) KLT 821)*** and unreported judgment in ***Johnson Plastics v. Intelligence Officer (O.P No.8290 of 2003)*** dated 22.11.2007 and urgeg this Court for dismissal of the writ petition.

4. I have heard the learned counsel for the parties and appraised the paper book. The time limit prescribed vide amendment was, from five years, extended to six years as per the amendment brought in 2017 in v the judgment in ***Baiju A.A & Others v. State Tax Officer (2020 (1) KHC 39)***. In view of the judgment, the amendment, extendimg period of limitation has been held to be prospective in nature and Assessment proceedings ,initiated after expiry of 5 years, were held to be beyond limitation. The question which is to be seen by this Court

is that the amendment of Section 42 brought vide notification dated 13.11.2016 having a retrospective effect, whether period of limitation as provided in Section 25 or rule 58 will be applicable and would give cause to the State to issue notice by commencing the proceedings or otherwise.

5. The judgment of the Single Bench of this Court in MCP Enterprises case (supra) was regarding amendment to Section 42 by inserting sub Section 3 having been given retrospective operation with effect from 1.4.2005. It was observed that retrospectivity would have the effect of removing the basis of the judgment rendered in case of such assessees in the context of limitation under the provisions of Section 25 of the KVAT Act. Once there was an absence of power other than mentioned in Section 25 of KVAT Act, the revenue could not re-open assessment after expiry of the limitation prescribed under Section 25. On analysis of the judgment and arguments, it was held that on account of a retrospective operation of newly introduced provision, assessee would not be in a position to adduce material to defend against an allegation of

suppressed / escaped turnover. No doubt, retrospective operation of Section 42(3) would entail into reopening of assessments completed years back and assessee would not have relevant books of accounts and other records to defend the case against alleged escaped turnover. As per Rule 58(20) of KVAT Rules, assessee is required to maintain the books for a period of five years from the end of assessment year in question or two years from the date of disposal of the appeal or revision arising out of such assessment or from the date of completion of any other provisions under the Act connected with such assessment appeal or revision, whichever is later. Fixing of a reasonable period would have to be read in deterimining what reasonable should be. The oral scheme of KVAT Act in the interest of ensuring certainity in tax matters and also the necessity to interpret the provisions in the manner is to avoid unconstitutional results such as unreasonablness, unfairness and arbitrariness of statutory provisions. For the purpose of determining limits of the exercise of powers, Section 42(3) is reproduced herein below:

> *"3. Notwithstanding anything to the contrary contained in this Act, if a dealer, (i) fails to file audited accounts referred to in sub-section (1), or (ii) fails to file revised annual return rectifying the mistake or omission, along with the audited statement of accounts and certificate or if the variance in the audited statement of accounts and certificate or if the variance in the audited statement of accounts with the returns is not satisfactorily explained in the reconciliation statement prescribed, or (iii) fails to file the annexures, statements, certificates, declarations, including the statutory declarations to be filed under the Central Sales Tax act, 1956 which are required to be filed along with the returns to prove the correctness of the concessional rate of tax, exemptions and exports claimed in the returns, or (iv) fails to declare any sale, purchase or interstate stock transfer as evidenced from the documents prescribed under Section 46 available with the assessing authority in the sales and purchase lists filed along with the returns, the assessment of such dealer for the relevant year for the purpose of Section 25 shall be treated as pending and the time limit mentioned thereunder shall not be applicable in such cases."*

As far as the judgment cited by the learned Government Pleader, which pertains to non-maintaining of the Books would attract only the penal or otherwise similar consequences. Therefore, In my view, time limits specified in Rule 58(20) of KVAT Rules offer a safe guarding factor to define the limits of power under Section 42(3) of the Act. Meaning thereby, it would not be proper to re-open assessments to bring the tax escaped turnover,

which cannot be exercised in a manner that prejudicially affect an assessee, who would not be in a position to meet the charge against him for want of books of accounts and other relevant material. Accordingly, assessment orders Exts.P3 and P4 are not sustainable and are set aside.

The writ petition stands allowed.

Sd/-

AMIT RAWAL

sab **JUDGE**

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	TRUE COPY OF THE ANNUAL RETURN FOR 2009-10
EXHIBIT P2	TRUE COPY OF THE ANNUAL RETURN FOR 2010-11
EXHIBIT P3	TRUE CPY OF THE ASSESSMENT ORDER NO 32151075895/09-10 DTD 20/3/2017
EXHIBIT P4	TRUE COPY OF THE ASSESSMENT ORDER NO 32151075895/10-11 DTD 20/3/2017.

RESPONDENT'S/S EXHIBITS:

R2(a) TRUE COPY OF THE ORDER DATED 28.3.2016

R2(b) TRUE COPY OF THE NOTICE ISSUED TO THE PETITIONER DATED 19.3.2016