



Dimensions – 44th Edition

Judgment under the GST era:

1. M/s Kabear Reality Pvt. Ltd. v. The Union of India & others¹

Issue for Consideration	Whether recovery proceedings could be initiated under section 79 of the CGST Act in the absence of determination of tax under section 73 and without invoking section 78 of the CGST Act, 2017?
Discussion & Judgment	<p>Discussion:</p> <ul style="list-style-type: none"> The Petitioner is owner of a commercial building carrying on business of renting of immovable property and allied services. The Petitioner did not file any GSTR-3B nor GSTR-1 for the period July 2017 to March 2018 and had filed GSTR-1 only for the period April 2018 to May 2019 and hence provisions of section 79(1)(c) of the CGST Act, 2017 has been invoked for initiating recovery of GST from Petitioner’s tenants. Aggrieved by the impugned notice, the Petitioner filed a Writ Petition before the Hon’ble High Court of Madhya Pradesh. Also, the Petitioner has issued a legal notice to the department. The Service tax authorities had earlier passed an order for recovery of Service tax directing the tenants of the Petitioner’s building to deposit the rent with the Exchequer. However, on subsequent recovery of the entire dues with penalty, this notice was withdrawn. The Hon’ble High Court observed as under: <ul style="list-style-type: none"> - The Petitioner has only filed GSTR-1 return prescribed under section 37 of the CGST Act, 2017 and has failed to file GSTR-3B returns resulting in loss of revenue to the Government and avilment of Input Tax Credit (ITC) by the tenants on the basis of

¹ TS-1121-HC-2019(MP) – The High Court of Madhya Pradesh



invoices issued by the Petitioner. Thus, no GST was paid by the Petitioner on the services provided by it;

- GSTR-1 is a declaration of the tax liability and GSTR-3B is evidence of the actual payment. Reliance was placed on notification no. 49/2019 dated October 9, 2019 which amended rule 61 of the CGST Rules, 2017 with retrospective effect, making filing of GSTR-3B compulsory for the taxpayers;
- The High Court observed that the action under section 79 of the CGST Act, 2017 had been rightly invoked by the authorities. The High Court rejected the Petitioner's contention that no recovery proceedings could be initiated in absence of tax determination under section 73 of the CGST Act, 2017 stating that the determination of tax had already taken place and the liability was quantified vide filing GSTR-1 returns;
- The impugned notice was not violative of the provisions contained in section 78 of the CGST Act since there was no dispute on the quantum of the tax liability and the action taken is not in furtherance to an order. The authorities were only pressing for actual payment of the tax declared under GSTR-1, which was not complied by the Petitioner;
- It was also observed that the Petitioner was a chronic defaulter and had in the past requested the authorities for grant of instalment for the payment of tax dues.

Judgment:

The Hon'ble High Court held that the tax was being recovered after following the due process laid down under the GST law. Furthermore, the Petitioner cannot escape his liability of GST payment when the tax payable has been quantified on the filing of GSTR-1 returns.

**Dhruva
Comments /
Observations**

In cases where GST liability is self-assessed and remains unpaid, authorities could directly initiate recovery proceedings under section 79 of CGST Act, 2017 without any recourse to section 73 and 78 of the Act. It is also noteworthy to mention that filing of GSTR-1 has been considered as declaration of tax liability and GSTR-3B is evidence of actual payment by the Hon'ble High Court.

Judgment under the Pre-GST era:

2. Baiju A. A. v. State Tax Officer²

**Issues for
Consideration**

- Whether, under the provisions of section 25 (1) of the Kerala Value Added Tax Act ('KVAT Act'), as amended, the six year period of limitation for re-opening assessments could be relied upon to issue pre-assessment notices in cases where, by March 31, 2017, the five year period for reopening assessments under the unamended provisions of section 25 (1) of the KVAT Act had already expired?
- If the answer to the above is in negative, whether the amendment to the third proviso of section 25(1) of KVAT Act would enable the revenue to re-open assessments in cases

² TS-1123-HC-2019(KER)-NT – The Hon'ble High Court of Kerala



where, by March 31, 2017, the five year period for re-opening assessments under the un-amended provisions of section 25 (1) of the KVAT Act had already expired?

- Whether, the State Legislature, after introduction of Constitution Amendment Act, 2016 ('CAA') and repeal of the KVAT Act on June 22, 2017, retained any residual powers to amend the KVAT Act through Kerala Finance Act, 2018?
- Whether the amendment to provisions of section 25(1) of the KVAT Act could be justified by relying on the savings clause under section 174 of the SGST Act, 2017?

Discussion & Judgment

Discussion:

- Writ Petitions were filed challenging the legality of notices and assessment orders issued for the assessment years 2010-11 and 2011-12 on the ground that the authorities did not have the jurisdiction to issue them since the amendments to section 25(1) of the KVAT Act, through Kerala Finance Acts of 2017 and 2018, did not contemplate a retrospective operation of the amended provisions.
- The Petitioners submitted the following:
 - Prior to the amendment, effective from April 1, 2017, limitation period for re-opening an assessment under the KVAT Act was five years from the end of the relevant assessment year as per section 25(1) of the KVAT Act and no notices had been served within the said period;
 - Increasing the period of limitation by a subsequent amendment to six years would not confer a jurisdiction on the authorities to re-open an assessment which was finalised by March 31, 2017;
 - Placing reliance on various judgments pronounced by the Hon'ble Supreme Court the Petitioner submitted that an amendment in a taxing statute cannot have retrospective implications to revive assessments that had already attained finality prior to such amendment;
 - Third proviso to section 25(1) of the KVAT Act cannot empower the authorities to re-open assessments beyond six years prior to April 1, 2017 since a proviso cannot expand the ambit of the main provision.
- The Respondents submitted that the amendments consequent to the Kerala Finance Act, 2017 are retrospective in nature. Further, these amendments have a retrospective implication for the sole purpose of recovering taxes which were not assessed in years prior to introduction of GST.
- The Hon'ble High Court observed as follows:
 - An assessee gets immunity from assessments on expiry of period of limitation prescribed under the law for re-opening of assessments. Placing reliance on the judgment pronounced by the Hon'ble Supreme Court in the case of *State of Punjab and Others v. M/s Shreyans Indus Ltd.*³ it was observed that the power to extend a

³ AIR 2016 SC 1185



period of limitation must be exercised before the expiry of the normal period of limitation;

- It is a well settled law that legislature can take away vested rights accruing to the assessee by retrospective amendment of the statutory provisions. In the instant cases, the amendment, enlarging the period of re-opening assessments from five to six years, was expressly made effective only from April 1, 2017 and hence, it can only have a prospective operation subject to proviso to section 25(1) of KVAT Act;
- With regards to the amendment to the third proviso to section 25(1) w.e.f. April 1, 2017, reliance was placed on various judgments and the circumstances under which amendment was made to state that such an amendment would enable the revenue to re-open assessments where the period of limitation would have expired on March 31, 2017 prior to such amendment so as to give it full effect;
- The amendment must be viewed in the backdrop of introduction of GST which led to the repealing of KVAT Act. The amendment was carried out to permit re-opening of past assessments till March 31, 2018 and thus would have a retrospective effect;
- With regards to the argument of the assessee that a proviso cannot enlarge the scope of the main provision, reliance was placed on the case of *S. Sundaram Pillai & Ors. v. R. Pattabiraman & Ors*⁴. Accordingly, in the present case it was observed that the third proviso to section 25(1) of the KVAT Act was added with the object of explaining the real intent of the statutory exercise. Hence, the said proviso was valid to re-open assessments whose period of limitation had expired before the amendment;
- With regards to the amendment to the KVAT Act by the Kerala Finance Act, 2018 w.e.f. April 1, 2018 after the enforcement of CAA and consequent repeal of KVAT Act w.e.f. June 22, 2017, the court observed as under:
 - o After the CAA, the powers of the State to further legislate on the subject of taxes on sale and purchase of goods were denuded. Accordingly, the power to amend a statute being a facet of legislative power itself, the State legislature could not amend the KVAT Act as it did not retain any residual right to further legislate on the matter except to the extent retained under the Constitution;
 - o Further, reliance was placed upon the Hon'ble Supreme Court judgment in the case of *State of Bihar v. Bihar Distillery*⁵. It was observed that to determine the constitutional validity of an Act, the intention of the Parliament must be determined not only from the language used in the statute but also from surrounding circumstances to understand the mischief that was sought to be remedied;
 - o Applying the above test, the Court observed that the purpose of CAA was introduction of GST and phasing out of the multiple indirect tax levies including Value Added taxes.

⁴ (1985) 1 SCC 591

⁵ IJT [1996] 10 SC 854]



- Hence, when the State Legislature itself repealed the KVAT Act, while bringing into force a new SGST Act, 2017 it effectively acknowledged the absence of any power to legislate on the subject of tax on sale and purchase of goods.
- The savings clause under section 174 of SGST Act, 2017 operates to save rights, privileges, immunities, action taken etc under the erstwhile enactment as it stood at the time of its repeal.

Judgment:

- The assessments for which the period of limitation was set to expire on March 31, 2017 **can be re-opened** up to March 31, 2018 by virtue of the amendment to the third proviso to section 25(1) of KVAT Act vide Kerala Finance Act, 2017.
- The assessments for which the period of limitation was set to expire on March 31, 2018 **cannot be re-opened** up to March 31, 2019 since the State legislature did not have the power to amend the KVAT Act after the CAA and repeal of KVAT Act.

**Dhruva
Comments /
Observation**

The instant judgment would be relevant to examine legislative competence for reopening concluded assessments / reassessments basis the savings clause under the GST laws.



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