Before Rajesh Bindal & Harinder Singh Sidhu, JJ.

M/S DHINGRA JARDINE INFRASTRUCTURE PVT. LTD.
— *Petitioner*

versus

THE STATE OF HARYANA AND ORS—*Respondents*

CWP No. 20788 of 2015 (O&M)

January 30, 2017

A. **Haryana Value Added Tax Act, 2003, sec 34—*Whether revisional power could be exercised on the basis of judgment of Supreme Court, even if the matter had been referred to be considered by a larger bench by the Supreme Court—Held, judgment of the Supreme Court is a binding precedent declaring the law at that time on the subject to be followed by all courts and authorities below and action could have been taken by the authorities on the basis thereof, if considered appropriate.***

Held that the relevant provisions of Section 34 of the Act, as existing before the amendment, are reproduced hereunder:

34. (1) The Commissioner may, on his own motion, call for the record of any case pending before, or disposed of by, any taxing authority for the purposes of satisfying himself as to the legality or to the propriety of any proceeding or of any order made therein which is prejudicial to the interests of the State and may, after giving the persons concerned a reasonable opportunity of being heard, pass such order in relation thereto as he may think fit:

Provided that no order passed by a taxing authority shall be revised on an issue which on appeal or in any other proceeding from such order is pending before, or has been settled by, an appellate authority or the High Court or the Supreme Court, as the case may be:

Provided further that no order shall be revised after the expiry of a period of three years from the date of the supply of the copy of such order to the assessee except where the order is revised as a result of retrospective change in law or on the basis of a decision of the Tribunal in a similar case or on the basis of law declared by the High Court or the Supreme Court.

(2) The State Government may, by notification in the Official Gazette,

confer on any officer not below the rank of Deputy Excise and Taxation Commissioner, the power of the Commissioner under sub-section (1) to be exercised subject to such exceptions, conditions and restrictions as may be specified in the notification and where an officer on whom such powers have been conferred passes an order under this section, such order shall be deemed to have been passed by the Commissioner under sub-section (1).

(Para 85)

Held that Section 34 of the Act enables the Excise &Taxation Commissioner, on his own motion to call for the records of any case pending before, or disposed of by, any taxing authority or any appellate authority other than the Tribunal for the purpose of satisfying himself as to the legality or propriety of the proceedings or the order made, which in the opinion of the Excise and Taxation Commissioner is prejudicial to the interest of the State. Second proviso to Section 34 of the Act provides that no order shall be revised after the expiry of three years from the date of supply of copy of such order to the assessee. The proviso, however, carves out exceptions to the aforesaid period of limitation, where an order can be revised even beyond the period of three years, in case:

(i) there is retrospective change in law;

(ii) any decision of the Tribunal in a similar case; and

(iii) on the basis of law declared by the High Court or the Supreme Court.

(Para 86)

Held that in the case in hand, it is not in dispute that neither there is any retrospective change in law nor a decision of the Tribunal, on the basis of which the revisional jurisdiction has been exercised, that too by invoking the exception clause beyond the normal period of limitation.

(Para 87)

Held that the exception clause for invoking the extended period for exercise of revisional jurisdiction was analysed by learned counsel for the petitioner in two parts, first being "on the basis of" and second being "law declared by the High Court or the Supreme Court."

(Para 88)

Held that the basis of anything is that on which it stands. Meaning thereby, in the case in hand, the very basis, on which notice

issued for revision of the assessment order by invoking the extended period of limitation, is sought to be justified is the law declared by Hon'ble the Supreme Court.

(Para 89)

Held that Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Here, we need to examine, what is the law declared ?

What is the law declared ?

(Para 90)

Held that Article 141 of the Constitution of India uses the phrase "law declared by the Supreme Court". It has been defined to mean law madewhile interpreting the statutes or the Constitution. It was held to be part of the judicial process.

(Para 91)

Held that the issue was considered by Hon'ble the Supreme Court in C.Golak Nath's case (supra) opining that to declare is to announce opinion.Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law. The relevant lines therefrom are extracted below:

"51....... Article 141 says that the law declared by the Supreme Court shall be binding on all courts; and Article142 enables it in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. These articles are designedly made comprehensive to enable the Supreme Court to declare law and to give such directions or pass such orders as are necessary to do complete justice. The expression "declared" is wider than the words "found or made". To declare is to announce opinion. Indeed, the later involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted,ascertained or evolved is declared as law. The law

declared by the Supreme Court is the law of the land. Ifso, we do not see any acceptable reason why it, in declaring the law in supersession of the law declared by it earlier, could not restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise that were effected on the basis of the earlier law..........."

[Emphasis supplied] (Para 92)

Held that the issue was later considered in Sahara India Real estate Corporation Limited and others v. Securities and Exchange Board of India and another, (2012) 10 SCC 603, wherein Hon'ble the Supreme Court opined that the law declared by the Supreme Court means law made while interpreting the statutes or the Constitution.

(Para 93)

Held that in the case in hand, it cannot be disputed that the law was declared by Hon'ble the Supreme Court regarding taxation on the transactions of the type involved in the present petition vide judgment in K. Raheja Development Corporation's case (supra) on 5.5.2005. It was only vide order dated 19.8.2008 passed in L&T's 1 s t case (supra) that the matter was referred to be considered by a larger Bench, which was finally decided vide judgment dated 26.9.2013 in L&T's 2 nd case (supra) approving the law as declared in K. Raheja Development Corporation's case (supra).

(Para 94)

Held that an ancillary issue, which arises for consideration in the facts of the present case, is as to whether the law declared by Hon'ble the Supreme Court is still a good law and a binding precedent, even if the issue is referred to be considered by a larger Bench. The question was considered by Hon'ble the Supreme Court in State of Rajasthan v. M/s R. S. Sharma and Co., (1988) 4 SCC 353. It was opined therein that final determination of acontroversy cannot be kept pending only on the ground that the issue ispending adjudication by a larger Bench. The contention raised by the parties before Hon'ble the Supreme Court was that as the issue was pendingconsideration before a Constitution Bench, the case should not b decided.However, keeping in view the law, as existing, the matter was finally decided. The relevant paras thereof are extracted below:

“7. It was contended before us that the question whether on the ground of absence of reasons, the award is bad per se, is pending consideration by a Constitution Bench of this Court in C.A. Nos. 3137-39 of 1985, 3145 of 1985 –*Jaipur Development Authority v. Firm Chhokhamal Contractor*. Itwas, hence, urged that this should await adjudication on this point by the Constitution Bench. We are unable to accept this contention. In our opinion pendency of this question should not postpone all decisions by this Court. One of the cardina lprinciples of the administration of justice is to ensure quick disposal of disputes in accordance with law, justice and equity......

8. The law it stands today is clear that unless there is an error of law

apparent on the face of the award, the award cannot be challenged merely on the ground of absence of reasons. This is settled law by a long series of decisions. Interests of justice and administration of justice would not be served by keeping at bay final adjudication of the controversy in this case on the plea that the question whether an unreasoned award is bad or not, is pending adjudication by a larger bench. There have been a large number of sittings before the arbitrators. Parties have been heard. There was no mis-conduct in the proceedings. There has been no violation of the principles of natural justice. In such a situation it would be inappropriate to postpone the decision pending adjudication of this question by a larger bench of this Court. We do not know how long it would take to decide that question, and whether ultimately this Court would decide that unreasoned awards per se are bad or whether the decision would have prospective application only in view of the long settled position of law on this aspect in this country or not. Justice between the parties in a particular case, should not be in suspended animation.......”

[Emphasis supplied]

Similar was the view in State of Orissa v. Dandasi Sahu, (1988) 4 SCC 12.

(Para 95)

B. **Haryana Value Added Tax Act, 2003, sec 34—*Extended period for exercise of revisional jurisdiction—it will be applicable only in cases where period prescribed prior to amendment had not expired and not where the period had earlier expired—Amendment cannot put life into a dead claim. Any instructions issued by the department are binding on departmental authorities except on issue where any judgment to the contrary exists—they are not binding on court—a circular which is contrary to statutory provisions has no existence in law.***

Held that the State issued Ordinance on 3.8.2015, seeking to amend Section 34 of the Act by enlarging the period during which power of *suomotu* revision could be exercised. The Ordinance was replaced byAmending Act, which got assent of the Governor on 15.9.2015 and waspublished in the gazette on 21.9.2015. Second proviso to Section 34(1) of the Act, as existed prior to the amendment, as has already been reproduced in para No. 82 of the judgment, provided that no order shall be revised after expiry of the period of three years from the date of supply of copy of such order to the assessee. This was the provision to be applied in normal circumstances.

Vide amendment in second proviso to sub-section (1) of Section 34 of the Act, for the words “three years”, words “six years” were substituted. Meaning thereby, the normal period of limitation for revising an assessment order was now six years, as against three years.

(Para 100)

Held that the issue, which arises for consideration, is as to whether the period stood extended even in the cases where three years had already expired from the date of supply of copy of order to an assessee. The answer would be in negative, as a dead claim cannot be revived. Right to revise the order had extinguished, which could not be revived. Further life could be injected only in the cases where limitation for revising an assessment order was still existing.

(Para 101)

Held that similar issue was considered by Hon'ble the Supreme Court in Uttam Steel Ltd.'s case (supra), where the claim for rebate on export shipment was made. The period prescribed under Section 11B of the Central Excise Act, 1944 at the relevant time for making such claim was six months,which was later on substituted by one year. The assessee therein did notprefer claim within the period of six months. The amendment enlarging the period came later on. Hon'ble the Supreme Court opined that where theclaim under the existing provision was already time-barred before the enlargement of period by the amending Act, the same will not be available to the assessee. While referring to earlier judgments on the issue, namely, (i)J.P. Jani, Income Tax Officer v. Induprasad Devshanker Bhatt, AIR 1969 SC 778; (ii) New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840(iii) T. Kallamurthi v. Five Gori Thaikkal Wakf, (2008) 9 SCC 306; and (iv)Thirumalai Chemicals Ltd. v. Union of India and others, (2011) 6 SCC 739,Hon'ble the Supreme Court opined as under:

“10. We have heard learned counsel for the parties and Shri Bagaria, the learned *Amicus Curiae* at some length. There is no doubt whatsoever that a period of limitation being procedural or adjectival law would ordinarily be retrospective in nature. This, however, is with one proviso super added which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time barred before an Amending Act with a larger period of limitation comes intoforce.....”

[Emphasis supplied]

(Para 102)

Held that the issue was subsequently considered by Hon'ble the Supreme Court in M/s Shreyans Indus. Ltd.'s case (supra), where a judgment of this court dealing with similar proposition of law was upheld. In that case, normal period for framing assessment, as provided for in Section 11(10) of the Punjab General Sales Tax Act, 1948 was three years, however, the Commissioner was empowered to extend that period further after recording reasons in writing. The issue which arose for consideration before the court was whether any extension for framing the assessment could be granted by the Commissioner after the expiry of period of three years, as provided for in the Act. The view expressed by this court was that after expiry of period of limitation for framing the assessment, the right to make assessment gets extinguished. Thereafter, the Commissioner is debarred from exercising power to grant extension for the purpose of framing of assessment. The relevant paras thereof are extracted below:

"6. The assessee took up the matter further by filing appeals before the High Court. Here, the assessee has succeeded in its submission as the High Court of Punjab and Haryana vide impugned judgment dated September 26, 2008 has held that once the period of limitation expires, the immunity from subjecting itself to the assessment sets in an the right to make assessment gets extinguished. Therefore, when the period of limitation prescribed in the Act for passing the assessment order expires, thereafter, the Commissioner is debarred from exercising his powers under sub-section (1) of Section 11 of the Act and cannot extend the period of limitation for the purpose of assessment. This order is assailed by the Revenue in the instant appeals before us.

xx xx xx

24. It was also observed that upon the lapse of the period of limitation prescribed, the right of the Department to assess an assessee gets extinguished and this extension confers a very valuable right on the assessee.

25. If one is to go by the aforesaid dicta, with which we entirely agree, the same shall apply in the instant cases as well.In the context of the Punjab Act, it can be said 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 against being subject to assessment sets in and the right to make assessment gets extinguished. Therefore, there would be no question of extending the time for assessment when the assessment has already become time barred. A valuable right has also accrued in favour of the assessee when the

period of limitation expires. If the Commissioner is permitted to grant the extension 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 even much after the last date of assessment in the instant appeals itself, when the last dates of assessment were 30th April, 2004."

(Para 103)

Held that the judgment in Jyoti Traders and another's case (supra) is distinguishable as in the aforesaid judgment, while relying upon two earlier judgments, it was opined that language of the amendment suggested that it was with retrospective effect, hence, it was given its true meaning. The facts of the case in hand are different. There are later judgments of Hon'ble the Supreme Court in Uttam Steel Ltd.'s case (supra) and M/s Shreyans Indus Ltd.,'s case (supra).

(Para 104)

Held that in view of our aforesaid discussions, it can safely be opined that extended period for exercise of revisional jurisdiction will be applicable only in cases where period prescribed prior to the amendment had not expired and not where the period had earlier expired as the amendment cannot put life to a dead claim.

ISSUE NO. (3)

Whether a show cause notice issued to exercise revisional jurisdiction is bad as it is lacking in basic facts to invoke exception clause and extended period of limitation ?

(Para 105)

C. **Haryana Value Added Tax Act, 2003, sec 34—*Held, for exercise of power of revision while invoking extended period of limitation as provided for in second proviso to Sec 34(1) of the Act, in normal circumstances, the event has to be after the normal period of limitation had already expired—however, there can be some exceptions where event occurred just before expiry of period of limitation and the action was taken within reasonable time or the delay is satisfactorily explained—exception clause is to be invoked only in exceptional circumstances—it is always required to be strictly interpreted even if there is hardship to any of the parties.***

The question posed deserves to be answered in negative opining that for exercise of power of revision while invoking extended period of limitation as provided for in second proviso to Section 34(1) of the Act, in normal circumstances, the event has to be after the normal

period of limitation had already expired. However, there can be some exception where event occurred just before the expiry of period of limitation and the action was taken within reasonable time or the delay is satisfactorily explained.Exception clause is to be invoked only in exceptional circumstances. It is always required to be strictly interpreted even if there is hardship to any of the parties.

ISSUE NO. (5)

Whether the circulars issued by the Department are binding on the department and the assessees ?

(Para 116)

The writ petitions stand disposed of accordingly.

(Para 147)

D. **Haryana Value Added Tax Act, 2003, Sec 2(1) (zg) (Explanation i)** ***– constitutional validity – Held, Explanation i) to Sec. 2(1)(zg) of the Act does not suffer from any vice or defect of unconstitutionality.***

The issue regarding vires of explanation (i) to Section 2(1)(zg)of the Act was considered by a Division Bench of this Court in CHD Developers Limited's case (supra), where the prayer was for declaring Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Haryana Value Added Tax Rules, 2003 (for short, 'the Rules') to be ultra vires to theConstitution of India. Challenge was also made to validity of Section 42 of the Act. The vires of explanation (i) to Section 2(1)(zg) of the Act wasupheld opining that it is not a charging section but merely a definition clause, however, Rule 25(2) of the Rules was held to be valid while reading it down to the extent mentioned in the affidavit filed by the State. The State was further directed to bring necessary changes in the Rules in consonance with the observations made in the judgment. It was further observed that any effort to levy tax on any amount other than value of goods transferred in the course of execution of works contract would be ultra vires. Relevant para thereof is extracted below:

“38. Explanation (i) to Section 2(1)(zg) of the Act, which defines “sales price” provides for deduction on account of labour, material and services related charges from the gross turnover as defined under Section 2(1)(u) of the Act while arriving at the “sale price” in a works contract. It is not a charging provision which creates any liability for assessing VAT in a “works contract”. It is in the definition clause of the Act and the provision does not embrace within its ambit something

which is otherwise prohibited by law. Thus, the said provision does not suffer from any vice or defect of unconstitutionality."

Finding

(Para 128)

As the vires of the aforesaid provision has already been upheld by this court, we do not find any reason to re-examine the issue.

ISSUE NO. (7)

Whether levy of tax on builders can be sustained in the absence of machinery provisions ? The period being upto 16.5.2010 and thereafter, when the Rules were framed.

(Para 129)

E. Haryana Value Added Tax Act, 2003, sec 34 – ***Manner of calculation of taxable turnover – for the period upto 16.5.2010, there were no rules or instructions on subject, to provide for manner of calculation of taxable turnover – in absence of machinery provisions specifying the details, though the levy as such cannot be disputed but it has become unenforceable upto 16.5.2010 – from 17.5.2010 onwards, there being rules in existence, having been amended in terms of judgement of the High Court, levy can be sustained.***

The writ petitions stand disposed of accordingly.

(Para 146)

F. Haryana Value Added Tax Act, 2003, sec 34 – ***no assessment can be framed against a company, which stood dissolved after its merger with another company***.

The issue is answered in negative. It is held that no assessment can be framed against a company, which stood dissolved after its mergerwith another company. As fairly stated by learned counsel for the State, theassessment order dated 8.3.2016 (Annexure P-8), passed against M/s Sukh Realtors Pvt. Ltd., the company which already stood dissolved after merger with M/s S. S. Group Pvt. Ltd., is set aside. There is no question of grant of specific liberty to the department to pass any fresh order, as if the law permits, it can always take action.

(Para 145)

RELIEF

146. For the reasons mentioned above, the legal issues, as framed in para No. 81 of the judgment, are answered as under:

(1) The judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was a binding precedent declaring the law at that time on the subject to be followed by

all courts and authorities below and action could have been taken by the authorities on the basis thereof, if considered appropriate.

(2) The extended period for exercise of revisional jurisdiction will be applicable only in cases where period prescribed prior to the amendment had not expired and not where the period had

earlier expired as the amendment cannot put life to a dead claim.

(3) The issue is not being examined as in pursuance to the show cause notices, orders have already been passed and those are under consideration before this court.

(4) The question is answered in negative opining that for exercise of power of revision while invoking extended period of limitation as provided for in second proviso to Section 34(1) of the Act, in normal circumstances, the event has to be after the normal period of limitation had already expired. However, there can be some exceptions such as where event occurred just before expiry of period of limitation and the action was taken within reasonable time or the delay is satisfactorily explained.

Exception clause is to be invoked only in exceptional circumstances. It is always required to be strictly interpreted even if there is hardship to any of the parties.

(5) Any instructions issued by the Department are binding on the departmental authorities except on the issue where any judgment to the contrary exists. These are not binding on the court. A circular which is contrary to statutory provisions has no existence in law.

(6) As the vires of the aforesaid provision has already been upheld by this court, we do not find any reason to re-examine the issue.

(7) For the period upto 16.5.2010, there were no Rules or instructions on the subject, to provide for manner of calculation of taxable turnover. In the absence of the machinery provisions specifying the details, though the levy as such cannot be disputed but it has become unenforceable upto 16.5.2010.From 17.5.2010 onwards, there being Rules in existence,

having been amended in terms of judgment of this Court in CHD Developers' case (supra) and observations made therein,we do not find

that the levy cannot be sustained.

(8) The issue is answered in negative. It is held that no assessment can be framed against a company, which stood dissolved after its merger with another company. As fairly stated by learned counsel for the State, the assessment order dated 8.3.2016(Annexure P-8), passed against M/s Sukh Realtors Pvt. Ltd., thecompany which already stood dissolved after merger with M/s

S. S. Group Pvt. Ltd., is set aside. There is no question of grantof specific liberty to the department to pass any fresh order, as if the law permits, it can always take action.

(Para 146)

The writ petitions stand disposed of accordingly.

(Para 147)

Ashok Aggarwal, Senior Advocate with
Puneet Agrawal, Advocate;
Abhishek Boob, Advocate;
Rishabh Kapoor, Advocate;
Sandeep Goyal, Advocate;
Rishabh Singla, Advocate;
Amrinder Singh, Advocate;
Amar Pratap Singh, Advocate; and
Rajiv Agnihotri, Advocate
for the petitioner(s).

Lokesh Sinhal, A.A.G., Haryana.

RAJESH BINDAL J.

(1) This order will dispose of a bunch of petitions bearing CWP Nos. 20788, 23671, 23721, 24700, 24847, 24966, 25336, 25848, 26508, 26833, 27005, 27006, 27032, 27448, 27458, 27526 of 2015, 787, 788, 798, 1868, 2197, 3196, 3748, 3768, 6796, 8820, 18377 and 19413 of 2016, as the issues involved in all the petitions are identical.

<u>FACTS OF THE CASES</u> <u>CWP No. 20788 of 2015</u>

(2) The petitioner claims itself to be a registered dealer under the provisions of the Haryana Value Added Tax Act, 2003 (for short, 'the Act'). The assessment of the petitioner for the year 2011-12 was framed vide order dated 15.5.2013. Notice under Section 34 of the Act for revision of the assessment order was issued on 4.6.2015. The revisional authority passed the order on 3.7.2015. The revisional order

has been challenged, *inter-alia*, on the ground that the same is without jurisdiction.

CWP No. 23671 of 2015

(3) Assessment of the petitioner for the year 2010-11 was framed vide order dated 30.4.2012 while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 14.5.2005. The same was challenged by filing CWP No. 37858 of 2015, which was disposed of on 29.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed order on 21.8.2015 and served upon the petitioner on 7.10.2015. In the writ petition, challenge has been made to the aforesaid order being in violation of the provisions of the Act.

CWP No. 23721 of 2015

(4) Assessment of the petitioner for the year 2009-10 was framed vide order dated 29.4.2011 while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 18.5.2015. The same was challenged by filing CWP No. 17880 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed order on 22.7.2015 and served upon the petitioner on 30.10.2015. In the writ petition, challenge has been made to the aforesaid order being in violation of the provisions of the Act.

CWP No. 24700 of 2015

(5) Assessment of the petitioner for the year 2008-09 was framed vide order dated 26.4.2010 while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 24.6.2015. The revisional order was passed on 15.7.2015. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 24847 of 2015

(6) Assessment of the petitioner for the year 2009-10 was framed vide order dated 28.4.2011. Notice under Section 34 of the Act for revision of the order was issued on 2.7.2015. The revisional order was passed on 15.7.2015. In the writ petition, challenge has been made

to the aforesaid order being without jurisdiction.

CWP No. 24966 of 2015

(7) Assessment of the petitioner for the year 2007-08 was framed vide order dated 11.2.2010 while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 17.7.2015. The same was challenged by filing CWP No. 16955 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 20.10.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1) (zg) of the Act.

CWP No. 25336 of 2015

(8) Assessment of the petitioner for the year 2009-10 was framed vide order dated 29.2.2012, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the asssessment order was issued on 13.8.2015. The same was challenged by filing CWP No. 18119 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed order on 6.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 25848 of 2015

(9) Assessment of the petitioner for the year 2006-07 was framed vide order dated 4.3.2010, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the order was issued on 13.8.2015. The same was challenged by filing CWP No. 17766 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 9.11.0215 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 26508 of 2015

(10) Assessment of the petitioner for the year 2006-07 was framed vide order dated 20.1.2010, while accepting the returns filed by

the petitioner. Notice under Section 34 of the Act dated nil was issued for revision of the assessment order, which was received by the petitioner on 9.10.2015. The same was challenged by filing CWP No. 15654 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 16.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 26833 of 2015

(11) Assessment of the petitioner for the year 2009-10 was framed vide order dated 15.3.2013, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 22.4.2015. The revisional authority passed the order on 13.11.2015. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction, vires of Explanation (i) to Section 2(1)(zg) of the Act and competence to levy tax in the absence of machinery provision.

CWP No. 27005 of 2015

(12) Assessment of the petitioner for the year 2008-09 was framed vide order dated 24.5.2010, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 18.6.2015. The same was challenged by filing CWP No. 14842 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 16.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 27006 of 2015

(13) Assessment of the petitioner for the year 2010-11 was framed vide order dated 17.4.2012, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 18.6.2015. The same was challenged by filing CWP No. 15494 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking

further action in the matter. The revisional authority passed the order on 16.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 27032 of 2015

(14) Assessment of the petitioner for the year 2007-08 was framed vide order dated 31.12.2009, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act dated nil was issued for revision of the assessment order, which was served upon the petitioner on 7.9.2015. The same was challenged by filing CWP No. 19417 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 16.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 27448 of 2015

(15) Assessment of the petitioner for the year 2009-10 was framed vide order dated 26.2.2013, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 18.6.2015. The same was challenged by filing CWP No. 16016 of 2015, which was disposed of on 29.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 20.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 27458 of 2015

(16) Assessment of the petitioner for the year 2008-09 was framed vide order dated 31.5.2010, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 18.6.2015. The same was challenged by filing CWP No. 15798 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 16.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 27526 of 2015

(17) Assessment of the petitioner for the year 2010-11 was framed vide order dated 29.11.2012, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 18.6.2015. The same was challenged by filing CWP No. 16010 of 2015, which was disposed of on 19.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 20.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 787 of 2016

(18) Assessment of the petitioner for the year 2007-08 was framed vide order dated 30.4.2009, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 2.7.2015. The same was challenged by filing CWP No. 15655 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 20.10.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1) (zg) of the Act.

CWP No. 788 of 2016

(19) Assessment of the petitioner for the year 2007-08 was framed vide order dated 26.11.2009, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 13.8.2015. The same was challenged by filing CWP No. 17752 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 9.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1) (zg) of the Act. Quashing of exception to second proviso to Section 34 of the Act has also been prayed for.

CWP No. 798 of 2016

(20) Assessment of the petitioner for the year 2008-09 was framed vide order dated 222.4.2010, while accepting the returns filed

by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 2.7.2015. The same was challenged by filing CWP No. 15656 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 20.10.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1) (zg) of the Act.

CWP No. 1868 of 2016

(21) Assessment of the petitioner for the year 2008-09 was framed vide order dated 20.8.2010, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 17.7.2015. The same was challenged by filing CWP No. 16916 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 20.10.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1) (zg) of the Act. Quashing of exception to second proviso to Section 34 of the Act has also been prayed for.

CWP No. 2197 of 2016

(22) Assessment of the petitioner for the year 2005-06 was framed vide order dated 6.3.2009, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 7.10.2015. The revisional authority passed the order on 30.11.2015. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1)(zg) of the Act. Quashing of exception to second proviso to Section 34 of the Act has also been prayed for.

CWP No. 3196 of 2016

(23) Assessment of the petitioner for the year 2007-08 was framed vide order dated 15.6.2009, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 23.6.2015. The same was challenged by filing CWP No. 14586 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by

the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 20.10.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1) (zg) of the Act.

CWP No. 3748 of 2016

(24) Assessment of the petitioner for the year 2010-11 was framed vide order dated 18.4.2012, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 13.2.2014. The same was challenged by filing CWP No. 17755 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 16.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 3768 of 2016

(25) Assessment of the petitioner for the year 2009-10 was framed vide order dated 18.4.2011, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 13.2.2014. The same was challenged by filing CWP No. 4920 of 2015, which was disposed of in terms of the judgment of this Court in CWP No. 5730 of 2014—***CHD Developers Limited, Karnal*** versus ***The State of Haryana and others***, decided on 22.4.2015. The revisional authority passed the order on 18.6.2015. The petitioner again challenged the same by filing CWP No. 17755 of 2015, which was disposed of on 14.9.2015 directing the authority to dispose of the objections raised by the petitioner for initiation of revisional proceedings before taking further action in the matter. The revisional authority passed the order on 16.11.2015 dismissing the objections. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction.

CWP No. 6796 of 2016

(26) Assessment of the petitioner for the year 2006-07 was framed vide order dated 19.5.2008, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 1.10.2015. In the writ petition, challenge has been made to the aforesaid notice, vires of Explanation (i) to Section 2(1)(zg) of the Act, second proviso to Section 34 of the

Act and competence to levy tax in the absence of machinery provisions.

CWP No. 8820 of 2016

(27) Assessment of the petitioner for the year 2006-07 was framed vide order dated 30.3.2009, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 28.12.2015. The same was challenged by filing CWP No. 6795 of 2015. The revisional authority dismissed the objections of the petitioner vide order dated 12.4.2016. Thereafter, the petitioner withdrew the writ petition on 25.4.2016 with liberty to challenge the order disposing of the preliminary objection. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1)(zg) of the Act.

CWP No.19413 of 2016

(28) Assessment of the petitioner for the year 2009-10 was framed vide order dated 29.9.2011, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 24.6.2015. Objections were filed by the petitioner on 7.7.2015. The revisional authority dismissed the objections of the petitioner vide order dated 30.11.2015. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1)(zg) of the Act.

CWP No. 18377 of 2016

(29) Assessment of the petitioner for the year 2006-07 was framed vide order dated 30.3.2009, while accepting the returns filed by the petitioner. Notice under Section 34 of the Act for revision of the assessment order was issued on 28.12.2015. The same was challenged by filing CWP No. 6795 of 2015. The revisional authority dismissed the objections of the petitioner vide order dated 12.4.2016. Thereafter, the petitioner withdrew the writ petition on 25.4.2016 with liberty to challenge the order disposing of the preliminary objection. In the writ petition, challenge has been made to the aforesaid order being without jurisdiction and vires of Explanation (i) to Section 2(1)(zg) of the Act.

ARGUMENTS ON BEHALF OF THE PETITIONERS

Reg. Invocation of extended period for revision

(30) Mr. Ashok Aggarwal, learned senior counsel for the petitioners submitted that there is no justification for initiation of

proceedings for revision of the order of assessment by invoking the extended period of limitation. Section 34 of the Act, under which notice for revision has been issued to the petitioner, provides that no order shall be revised after the expiry of a period of three years from the date of supply of the copy of such order to an assessee. Three exceptions have been carved out, namely, where order is sought to be revised as a result of retrospective change in law or on the basis of decision of the Tribunal in a similar case or on the basis of law declared by the High Court or the Supreme Court. For invoking the exception clause and the extended period of limitation for revision of the order, the base has to be made out in the show cause notice itself. In some of the cases, though second proviso to Section 34(1) of the Act has been mentioned in the notice, but without there being any factual basis showing how extended period of limitation is being invoked.

(31) Fundamental facts have to be mentioned therein, namely, the ground for invocation of extended period of limitation. The reasons have to be assigned so as to enable the noticee to respond to the same. Even if any fact is mentioned in the notice, there is no question of inference as the words have to be specific as to which of the grounds has been invoked for extended period of limitation. In the case in hand, none of the grounds was available for invocation of extended period of limitation. There was no retrospective change in law; no decision of the Tribunal and there was no fresh statement of law declared by this court or Hon'ble the Supreme Court, as the legal position was existing even before the assessment orders were passed.

(32) If the judgment of Hon'ble the Supreme Court in ***K. Raheja Development Corporation*** versus ***State of Karnataka,***[1] , delivered on 5.5.2005, much prior to the framing of assessment, which was the law declared at that time, was not considered by the assessing authority at the time of framing of assessment, despite there being circular issued by the department, the revisional power could possibly be exercised within the period of three years from the date of service of assessment order and not beyond that. Even change of opinion is no ground for exercise of revisional jurisdiction. In some of the notices, judgment of Hon'ble the Supreme Court in ***K. Raheja Development Corporation's*** case (supra) has been mentioned, which was delivered much prior to the framing of assessment, still extended period is sought

[1] (2005) 5 SCC 162

to be invoked.

(33) In support of the plea, reliance was placed upon ***Collector of Central Excise*** versus ***H. M. M. Limited***[2]; ***Kaur & Singh*** versus ***Collector of Central Excise, New Delhi***[3]; ***Aban Loyd Chiles Offshore Ltd.*** versus ***Commr. of Cus., Maharashtra***[4]; ***Uniworth Textiles Ltd.*** versus ***Commissioner of Central Excise, Raipur***[5].

(34) It was further contended that taxability of works contracts with reference to the builders was examined by Hon'ble the Supreme Court in ***K. Raheja Development Corporation's*** case (supra) and it was so admitted and noticed by the Excise & Taxation Commissioner in the circular dated 7.5.2013, where specific words used by him were that the same is still a good law. Merely because subsequently in any judgment, the legal position is reiterated will not give cause of action to the authority to invoke extended period of limitation from that date onwards as the law declared is to be seen from the first judgment on the issue and not the subsequent one where the law is merely reiterated or approved.

(35) He further submitted that in ***Larsen and Toubro Ltd***. versus ***State of Karnataka***[6] [hereinafter referred to as L&T Ist case (supra)], the legal issue as decided in K.Raheja Development Corporation’s case (supra) was referred to be considered by a larger Bench vide order dated 19.08.2008 and finally, Hon’ble the Supreme Court approved the law laid down in K.Raheja Development Corporation’s case (supra) vide judgment dated 26.9.2013 ***Larsen and Toubro Limited and another*** versus ***State of Karnataka and another***[7] (hereinafter referred to as L&T’s 2nd case.

(36) On the issue of declaration of law, learned counsel for the petitioner submitted that under Article 141 of the Constitution of India, Hon'ble the Supreme Court, while deciding lis between the parties, declares law, which is binding not only between the parties but is considered as law of the land. It has precedent value. In addition, under Article 142 of the Constitution of India, Hon'ble the Supreme Court can pass any order to do complete justice between the parties.

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[2] 1995(76) ELT 497 (SC)

[3] 1997 (94) ELT 289 (SC)

[4] 2006 (200) ELT 370 (SC)

[5] 2013 (288) ELT 161 (SC)

[6] (2008) 17 SCC 199

[7] (2014) 1 SCC 708

Referring to the judgment of Hon'ble the Supreme Court in ***C. Golak Nath and others*** versus ***State of Punjab and another***[8], it was submitted that declaration of law is when it is settled for the first time on any legal issue. Any subsequent judgment considering the same, either reiterates or approves the earlier one. That cannot be said to be declaration of law. In the case in hand, declaration of law was when Hon'ble the Supreme Court first opined on the issue in ***K. Raheja Development Corporation's*** case (supra), vide judgment dated 5.5.2005.

(37) Further the argument is that even if legal issue decided in an earlier judgment is referred to be considered by a larger Bench, the same does not lose its precedent value or enforcement. It is binding till such time a different view is expressed by a larger Bench. In support, reliance was placed upon the judgment of Bombay High Court in ***Madhao*** versus ***The State of Maharashtra and others***[9].

(38) Learned counsel further argued that in some of the cases, even at the stage of assessment,in the show cause notices issued, the Assessing Authority had referred to the judgment of Hon’ble the Supreme Court in K. Raheja Development Corporation’s case (supra). Meaning thereby he was conscious of thelaw laid down on the subject, but still at the time of assessment, the same was not referred to in the order passed. In some of the cases, even in the show cause notice under Section 34 of the Act, only judgment of Hon’ble the Supreme Court in K. Raheja Development Corporation’s case (supra) was referred to, which was delivered on 5.5.2005, whereas in some of the cases, additionally judgment of Hon'ble the Supreme Court in L&T's 2nd case (supra) has also been referred to, which merely approved the earlier judgment in K. Raheja Development Corporation's case (supra). In all the cases, the petitioners cannot be said to be at fault. They had filed their returns regularly. The law declared by Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) on 5.5.2005, was already available, which was well within the knowledge of the department, still the assessments were framed ignoring the same, hence, the provisions of Section 34 of the Act have to be given strict interpretation in these circumstances. We are concerned with indirect taxes, where the assessee has right to pass on the burden to the next buyer. A dealer merely acts as an agent of the State. The petitioner at

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[8] (1967) 2 SCR 762

[9] 2009 SCC OnLine Bom 688

this stage may neither be able to collect the tax nor pass on the burden to the next buyer on account of substantial period having passed.

Reg. Amendment dated 3.8.2015 enhancing period for revision

(39) Learned counsel further argued that in reply filed by the State, a plea has been taken that vide Ordinance dated 3.8.2015, the period provided for revision of assessment order has been substituted as six years against three years provided earlier. Ordinance dated 3.8.2015 was replaced by Amending Act, which got assent of the Governor on 15.9.2015 and was published in the gazette on 21.9.2015. The issue will arise as to whether that amendment can be applied in the cases where period of three years provided in the provision before the amendment was carried out, stood already expired. Can life be injected in a dead claim? He submitted that in most of the cases, the notices have been issued to the assessees beyond the period of three years and the amendment was notified later on. The contention is that once the period prescribed in the Act for exercising revisional power already stood expired, certain rights were vested in the assessees. The same could not be taken away. The period could possibly be extended only in the cases where three years had not yet expired. In support of the plea, reliance was placed upon judgment of Hon'ble the Supreme Court in ***Union of India and others*** versus ***Uttam Steel Ltd***.[10] and ***State of Punjab and others*** versus ***M/s Shreyans Inds Ltd. etc***.[11]. He further argued that the language used in the amendment made in Section 34 of the Act is indicative of the fact that the same is prospective and not retrospective. Even the amending Act also does not suggest the same.

Reg. Reasonableness of period for exercise of revisional jurisdiction

(40) The next contention raised by learned counsel for the petitioner was regarding reasonable period during which action under Section 34 of the Act can be taken by the authority. The submission is that Section 34(1) of the Act provides for normal period of three years before amendment and six years after amendment for exercise of power in terms of the conditions laid down in Section 34(1) of the Act. It is in normal circumstances. However, in case the exception as carved out under certain specified conditions is to be invoked, how much should be the reasonable period, as finality has to be accorded to the proceedings under the Act. It cannot be kept alive for infinity. If any of

[10] (2015) 319 ELT 598

[11] 2016 SCC OnLine SC 218

the event as narrated in the exception clause provided in second proviso to Section 34(1) of the Act takes place within the period of limitation provided for taking action for suo-motu revision, the action has to be taken within that period and in those circumstances, extended period of limitation cannot be invoked. If any of the events takes place just close to the expiry of the period of limitation for exercise of revisional jurisdiction, in a given fact situation, reasonableness of the period can be examined. However, in case the period of limitation expired and any of the situations, as enumerated in the exception clause, such as retrospective amendment, order of a Tribunal or declaration of law by Hon'ble the Supreme Court or the High Court takes place thereafter, then what is the reasonable time permitted to the authority for taking action for suo-motu revision, is the moot question. In case, the action is not taken immediately thereafter and the authority sleeps over the matter for years together, it needs to justify in- action for that period. In the case in hand, even after the judgment of Hon'ble the Supreme Court in L&T's 2nd case (supra), which was delivered on 26.9.2013, notices under Section 34 of the Act were issued after 1-1/2 years thereafter, which is totally unreasonable.

(41) Referring to the scheme of the Act, Mr. Ashok Aggarwal, learned senior counsel for the petitioner further contended that Section 15 of the Act provides for a period of three years for framing the assessment after the end of the assessment year. Section 17 of the Act provides period for framing re-assessment before the expiry of five years following the close of the year or before the expiry of two years following the date when the assessment for that year becomes final, whichever is later. It was further submitted that maximum period, as provided for under Section 29(2)(e) of the Act, for which books of accounts have to be retained by an assessee is eight years. Hence, any action thereafter would be barred. In support of the aforesaid plea, reliance was placed upon ***The State of Gujarat*** versus ***Patil Raghav Natha and others***[12]; ***Sulochana Chandrakant Galande*** versus ***Pune Municipal Transport and others***[13]; ***Neeldhara Weav. Factory*** versus ***Dir. Gen. Of Foreign Trade, New Delhi***[14]; ***Teekoy Rubbers (India) Ltd.*** versus ***Commissioner of Agricultural Income Tax***[15]; and ***Pratibha***

[12] (1969) 2 SCC 187
[13] (2010) 8 SCC 467
[14] 2007(5) STR 404 (P&H)
[15] (1996) 219 ITR 615 (Ker.)

Syntex Ltd. versus ***Union of India***[16].

Regarding instructions issued by the Department

(42) Mr. Ashok Aggarwal, learned senior counsel for the petitioners submitted that Excise & Taxation Commissioner had issued a circular bearing Memo No. 6152/ST-4 dated 7.5.2013 on the subject of taxability of civil works contracts/builders and developers. It was specifically mentioned in the aforesaid circular that judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) is still a good law, hence, that needs to be followed for uniformity. The aforesaid instructions were followed by subsequent instructions issued vide Memo No. 1166/ST-4 dated 4.6.2013 in continuation to the earlier one, where the issue regarding limitation for taking up cases for revision was also specified. If both the instructions are read together, it was clear therefrom that under normal circumstances, the assessment orders upto the year 2006-07 had attained finality and assessment orders for the year 2007-08 could be revised by March, 2014. In the cases where the assessment orders are prior to year 2007-08, as per the instructions issued by the Excise & Taxation Commissioner, which are binding in nature under Section 56(2) of the Act, limitation to revise that assessment order had already expired, hence, the notices issued or the orders passed for revision of the assessment for those years being without jurisdiction, deserve to be set aside. He further submitted that the validity of the aforesaid circular issued by the department was upheld by this court in CWP No. 5730 of 2014-- ***CHD Developers Limited, Karnal*** versus ***The State of Haryana and others***, decided on 22.4.2015.

(43) In support of the plea that the instructions issued in exercise of powers conferred under Section 56(2) of the Act are binding on the department, reliance was placed upon a Division Bench judgment of this court in ***Sonex Auto Industries P. Ltd***. versus ***State of Haryana***[17]. The aforesaid case was under the provisions of the Act. In fact, clarification was required to be issued by the Excise & Taxation Commissioner, as different Assessing Officers or the revisional authorities, engaged in the administration of the Act, were taking different views.

Reg: Vires of Explanation (i) to Section 2(1)(zg) of the Act and levy in the absence of machinery provisions

[16] 2013(287) ELT 290 (Guj.)

[17] (2014) 74 VST 518

(44) The next contention raised by learned counsel for the petitioner is with reference to challenge to the vires of Explanation (i) to Section 2(1) (zg) of the Act, as existing upto 20.3.2009 and for the period from 20.3.2009 till 17.5.2010 or in the alternative non-application of the aforesaid provision with reference to the builders. As a fact, it was submitted that the State Government had notified the Rules for computation of taxable turnover in the case of builders on 17.5.2010, which were under consideration before a Division Bench of this Court in CHD Developers Limited's case (supra). In that case, the State Government was directed to bring necessary changes in the Rules in consonance with the observations made therein. The re-framed Rules were notified on 23.7.2015 having retrospective effect from 17.5.2010, hence, in the absence of machinery provision, no demand of tax can be raised from the builders with reference to composite contracts of builders.

(45) Referring to the language of Section 2(1)(zg) of the Act, which defines 'sale price', it was submitted that normal definition is that it is the amount payable to a dealer as consideration for sale of any goods. The explanation attached to the definition defines the sale price with reference to works contract. As per the explanation, the sale price in case of transfer of property in goods involved in execution of a works contract shall mean total sale consideration received by him for execution of the works contract, reducing therefrom the amount representing labour and other service charges incurred for such execution. The submission is that Entry 54 in List-II of Seventh Schedule of the Constitution of India entitles the State Legislature to levy tax on sale of goods within the State. In case any other component is included for the purpose of taxation, the State Legislature will transgress its competence. In the case of a builder, the total sale consideration received does not include only the labour or certain service charges incurred for execution of works contract but includes land cost, external development charges, internal development charges, change of land use charges and various other different types of charges/expenses. These expenses incurred by the dealer which form part of the total cost of the works contract cannot, in any manner, be subjected to levy of VAT on the transfer of property in goods in execution of a works contract. The State Legislature does not have the jurisdiction to levy VAT on transfer of land. In the case of sale of flat in a building, proportionate share of land is also transferred, the value of which is included in total cost.

(46) In the alternative, the explanation provides that where such labour and other service charges are not quantifiable, the sale price shall be the cost of goods used in execution of works contract adding margin of profit thereon plus cost of transferring the property in goods and any other expenses incurred in relation thereto till the property is passed on to the contractee. The second part of the explanation includes even the service component for the purpose of taxation of the goods. To legislate on the subject, exclusive jurisdiction is with the Parliament in view of Entry 97 of List-I of Seventh Schedule of the Constitution of India. The alternate is applicable only where labour and other service charges are not quantifiable. In fact, the definition of 'sale price' does not provide for any direct method for calculation of the value of the goods, the property in which is transferred in execution of a works contract, which is the most appropriate method. Only indirect method has been provided which takes in its compass the amount which has no direct relation with value of goods used in works contract. As held by Hon'ble the Supreme Court in L&T's 2nd case (supra), it is only the property in goods transferred after agreement to sell is executed with the buyer, which can be considered for taxation, however, there is nothing in the section to provide for that. Any amount spent even on the goods used in works contract by the builder till such time the part of the property is sold cannot be taxed. No tax is to be charged in case the unit is sold after the construction is complete.

(47) The only change in the provision w.e.f. 20.3.2009 is that where the amount representing labour and other service charges is not quantifiable, the same can be calculated at such percentage, as may be prescribed. The provision still does not provide as to how the cost of the land and other expenses are to be taken care of. In any taxing statute, four para-meters are important, namely, taxable event, taxable person, rate of tax and the machinery provision. Even if any one of them is missing, the levy cannot be upheld. In the case in hand, fourth para-meter is missing.

(48) It was further submitted that Section 6 of the Act provides for determination of taxable turnover. It provides that no deductions shall be permissible except those provided in sub-section (1) thereof. No deduction on account of value of the land and other services provided by the builder has been provided at any stage. Meaning thereby even in terms of the definition of sale and the manner in which taxable turnover is to be determined, the value of land and other service charges will also be taxed under the Act, which is beyond the

competence of the State Legislature. It was further submitted that a provision is bad if it includes something for the purpose of taxation, which cannot be taxed. It is also bad in case what is required to be excluded has not been excluded, such as cost of land and other service charges in the present case. In support of the plea, reliance was placed upon L&T's 2rd case (supra); CHD Developers Limited's case (supra) and ***Gannon Dunkerley & Co.*** versus ***State of Rajasthan***[18].

(49) Learned counsel further submitted that details as to what is to be included and excluded for the purpose of taxation have to be provided either in the Act or at the most in the Rules, if the Act so permits. Mere statement in reply or the stand taken by counsel for the State in court is not sufficient for that purpose. Even administrative instructions also do not cure the mischief. In support of the plea, reliance was placed upon ***M/s Larsen & Toubro Ltd.*** versus ***The State of Bihar and others***[19] [hereinafter referred to as L&T's 3rd case (supra)]; ***State of Jharkhand and others*** versus ***Voltas Ltd.***[20] and ***Commissioner, Central Excise & Customs, Kerala*** versus ***M/s Larsen & Toubro Ltd.***[21] (hereinafter referred to as L&T's 4th case (supra)].

(50) In case detailed machinery provisions as to how taxable turnover is to be determined in the case of a builder is not provided either in the Act or in the Rules, it will be left to the assessing authorities to apply any formula according to their whims and fancies, which cannot be permitted. Transfer of property in goods in execution of works contract is a deeming fiction in taxation. It has to be strictly interpreted.

(51) Another contention raised is that in the absence of machinery provisions, the levy is violative of Articles 14 and 19(1)(g) of the Constitution of India. Article 265 of the Constitution of India provides that no tax can be levied or collected without authority of law. Even if one of the factors is missing, the levy will be bad. Detailed machinery provisions are required for effectively calculating the taxable turnover and consequently the tax. Mode and manner of determination of tax have to be provided in the machinery provision. In support, reliance was placed upon L&T's 4th case (supra). A

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[18] (1993) 88 STC 204 (SC)
[19] (2004) 134 STC 354 (Patna)
[20] (2007) 7 VST 317 (SC)
[21] (2016) 1 SCC 170

Division Bench judgment of Delhi High Court in ***Suresh Kumar Bansal*** versus ***Union of India and others***[22] was also relied upon. In the aforesaid judgment, Delhi High Court had struck down levy of service tax on the builders after the amendment carried out vide Finance Act, 2010, in the absence of explicit machinery provisions. Reference was also made to judgment of Hon'ble the Supreme Court in ***National Mineral Development Coporation Ltd***. versus ***State of M. P. and another***[23], wherein levy was set aside, even though the charging section provided for levy of tax, however, in the schedule, where rates were prescribed, nothing was mentioned regarding the commodity to be taxed.

ADDITIONAL ARGUMENTS

In CWP No. 25336 of 2015

(52) Mr. Sandeep Goyal, learned counsel for the petitioner submitted that the petitioner in the present case had opted for payment of tax under composition scheme on the entire turnover as works contracts. The assessment for the assessment year 2009-10 was framed on 29.2.2012. He further submitted that judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was well within the knowledge of the department. Even in the circular issued by the Commissioner on 7.5.2013, after the assessment of the petitioner had been framed, it was so referred. It was specifically mentioned therein that cost of land forming part of the houses or flats constructed by the developer/builder has to be excluded. Vide circular dated 10.2.2014, clause in the earlier circular was substituted stating that value of the land is also to be added. He further submitted that in the public notice available on the website of the department even today on the subject in question, it is mentioned that value of the land is not to be included for the purpose of taxation in the works contracts. The petitioner was issued notice under Section 34 of the Act on 13.8.2015 not invoking the extended period of limitation, as none of the ingredients, which enables the authority to issue notice for revision beyond the period of limitation has been mentioned in the notice. He further submitted that if the department could have exercised the revisional jurisdiction within the period of limitation, it cannot be permitted to allow the period to lapse and thereafter invoke the exception clause.

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[22] 2016 SCC OnLine Del 3657

[23] (2004) 6 SCC 281

(53) While referring to Section 34 of the Act, learned counsel for the petitioner submitted that the exception as carved out enabling the authority to exercise suo-motu power beyond the period of limitation is available only if any of the events takes place after the normal period of limitation had already expired and not where it was within the period of limitation. Even if any of the events takes place just before the expiry of that period, at least the proceedings have to be initiated. There the question of reasonableness of period has to be considered. He cited an order passed by the Full Bench of the Haryana Tax Tribunal (for short, 'the Tribunal') in ***M/s Amarnath Aggarwal Const. (Pvt.) Limited*** v. ***The State of Haryana***[24], where the action by the State, invoking extended period of limitation on the basis of an order passed by the Tribunal within the normal period of limitation was held to be bad in law. The aforesaid order was subsequently followed in ***M/s Cheeka Solvent (P) Ltd., Kaithal*** versus ***State of Haryana***, [VST1 2013 ... C-391.] The aforesaid orders have been accepted by the State and have attained finality as no further appeal was filed.

(54) While citing the judgment of this court in VATAP No. 132 of 2013—M/s H. R. Steels P. Limited versus State of Haryana and others, decided on 19.8.2014, it was submitted that if the return of an assessee is accepted under Section 15(1) of the Act, the period of limitation is to be counted from the last date of filing of return and not when any order of assessment is passed by the authority, as no order is required to be passed.

In CWP No. 26508 of 2015

(55) Mr. Amar Pratap Singh, learned counsel for the petitioner submitted that even if the exception clause is to be invoked, it can be during reasonable period, which can be maximum five years from the date of assessment order, which will make it total eight years. It gives further period of two years after the expiry of normal period of limitation for exercise of power under Section 34 of the Act. It was so opined by Hon'ble the Supreme Court in ***State of Punjab and others*** versus ***Bhatinda District Coop. Milk P. Union Ltd***.[25], while considering the scheme of Punjab General Sales Tax Act, 1948.

In CWP No. 18377 of 2016

(56) Mr. Amar Pratap Singh, learned counsel for the petitioner in

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[24] (2012) 42 PHT 109 (HTT)
[25] (2007) 19 VST 180 (SC)

the present case raised additional arguments. He submitted that in the case in hand, assessment had been framed against the company, namely, M/s Sukh Realtors Pvt. Ltd., which already stood dissolved on its merger with the petitioner w.e.f. 1.4.2013. It was in terms of the order dated 30.9.2014 passed by this court in CP No. 203 of 2013—In the matter of Amalgamation of ***Sukh Realtors Private Limited and M-Ganga Builders and Construction Pvt. Ltd. and others,*** as corrected on 10.11.2014. The assessment in the present case is pertaining to the year 2009-10. Show cause notice for assessment was issued under Section 16 of the Act on 19.2.2016 in the name of M/s Sukh Realtors Pvt. Ltd., which already stood dissolved. In reply dated 29.2.2016 submitted by the petitioner, without prejudice, besides raising other pleas, it was submitted that the company, namely, M/s Sukh Realtors Pvt. Ltd., in whose name notice was issued, already stood dissolved, hence, assessment cannot be framed in its name. The particulars of the transferee company were furnished. Other issue raised in the reply was regarding the notice being time-barred. Despite reply filed by the petitioner, assessment was framed on 8.3.2016 in the name of M/s Sukh Realtors Pvt. Ltd., which already stood dissolved on 1.4.2013. The order was served upon the petitioner on 27.6.2016.

(57) In support of the argument that no order of assessment could be passed against a non-existent company, reference was made to the judgment of Hon'ble the Supreme Court in ***Saraswati Industrial Syndicate Ltd.*** versus ***Commissioner of Income Tax***[26] and ***Delhi High Court in Spice Entertainment Ltd.*** versus **Commissioner of Service Tax**[27].

(58) It was further submitted that assessment had been framed under Section 16 of the Act, which provides period of three years as outer limit for passing order after the close of the period in question. The assessment year being 2009-10, closed on 31.3.2010, hence, the assessment could be framed only upto 31.3.2013. The order of assessment having been passed on 8.3.2016 was clearly time barred. Though reference has been made to the amendment carried out in Section 16 of the Act enhancing the period for framing the assessment from three years to six years, however, that will not be applicable in the case of the petitioner, as the period had already expired before the amendment was made on 3.8.2015. Despite the fact that the issue was

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[26] 1990 (Supp) SCC 675
[27] 2012 (280) ELT 43 (Del)

specifially raised before the assessing authority, the same was not considered in the order of assessment. Delay in service of order has not been explained. If taken from the date of service of order on 27.6.2016, it was beyond even six years from the close of assessment year in question. In fact, the order has been ante-dated.

(59) It was further argued that even if the transferee company joins proceedings, there is no estoppel to raise the issue that assessment could not be framed against the company, which had already been dissolved. Reference was made to the provisions of Rule 28(2) of the Rules, which provides for filing of objections in the assessment proceedings and Rule 28(3) of the Rules, which enjoins a duty on the assessing authority to decide those objections while recording reasons.

ARGUMENTS ON BEHALF OF THE STATE

(60) On the other hand, Mr. Lokesh Sinhal, learned Additional Advocate General, Haryana submitted that Section 34 of the Act gives ample power to the Commissioner to call for the records of any pending case or the decided one, to examine the legality or the propriety of the proceedings or of any order made thereunder which, in his opinion, is prejudicial to the interest of the State. Second proviso to the aforesaid section provides that the order can be revised within three years from the date of supply of copy of the order sought to be revised. There are three exceptions carved out, under which the period of limitation is not applicable. As far as the first exception is concerned, the same has to be an event subsequent to the passing of the order sought to be revised, namely, retrospective change in law. As far as other two exceptions are concerned, namely, on the basis of a decision of the Tribunal or on the basis of law declared by the High Court or the Supreme Court, the order/judgment could be either before the order is sought to be revised or later. There is nothing in the language of the section, which specifies that judgment of the Tribunal, High Court or the Supreme Court has to be subsequent to the order sought to be revised. The object for which the section has been added is to correct the errors committed by the authorities or where the law on the subject had been violated, such as any judgment had not been followed. The moment it comes to the notice of the Commissioner, he can initiate proceedings and limitation of three years (now extended to six years) will not be applicable. No words can be added or declared surpluses in a statute. The judgment of Division Bench of this Court in VATAP No. 172 of 2012 ***State of Haryana*** versus ***M/s Haryana State Warehousing Corporation and another***, decided on 22.8.2013 fully

supports the case of the department. It has been opined in that judgment that a controversy is settled when it is final. In the case in hand, the matter was referred to a larger Bench and the issue was still pending before Hon'ble the Supreme Court. It was not final. The judgment in L&T's 2nd case (supra) was delivered on 26.9.2013.

(61) It was at that stage that law on the subject was declared. Thereafter there is no delay in issuance of notices.

(62) In the light of earlier judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra), it was submitted that the assessing authority or the Commissioner had option either to follow the law laid down therein or wait for decision of the larger Bench in L&T's 2nd case (supra). In case the department had issued notices to the assessees referring to the judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra), the immediate response of the assessees would have been that the matter has been referred to a larger Bench and the correctness is in doubt, hence, no action should be taken.

(63) Regarding the circular issued by the department, it was submitted that it was no where mentioned in the circular that exception clause cannot be invoked. It only provided the normal period during which power of revision could be exercised. Referring to judgment of Hon'ble the Supreme Court in ***Commissioner of Central Excise Bolpur*** versus ***Ratan Melting & Wire Industries***[28], it was submitted that the circulars issued by the department are not binding on the court as it is merely understanding of law of the department.

(64) He could not dispute the fact that in the circular dated 7.5.2013, the Commissioner mentioned that judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was still a good law, however, he tried to explain that those were merely guide-lines so that assessments could be framed in terms thereof. For taking up a case for revision, the law is different. The revisional authority could have initiated action on the basis of judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra). Even if that was earlier in point of time, still the case will fall in exception clause. Even in the absence of judgment of Hon'ble the Supreme Court in L&T's 2nd case (supra), the notices could have been issued beyond a period of three years under Section 34 of the Act. Mere non-mentioning of judgment of Hon'ble the Supreme Court in

[28] (2008) 13 SCC 1

L&T's 2nd case (supra) in the notices issued to some of the parties will not make any difference.

(65) As regards the contents in the notice, it was submitted that notice is not a condition precedent for assumption of jurisdiction. The Act only provides that reasonable opportunity has to be granted before passing an order, which merely implies issuance of notice. The same was given to the assessee. There are no reasons to be recorded or mentioned in the notice, especially regarding invocation of exception clause. A simple notice under Section 34 of the Act by the Commissioner intimating the party that the order is sought to be revised, is sufficient. After the notice is issued, the party can always reply to that and object to the notice raising all possible grounds available to him. In any case, the judgment, on the basis of which the orders are sought to be revised, has been mentioned, hence, none of the notices can be said to be bad merely on the ground that the contents mentioned therein are not to the liking of the petitioner.

(66) With reference to additional contention raised by learned counsel for the petitioner in CWP No. 25336 of 2015, learned counsel for the State submitted that mere non-mentioning of any fact of the order/ judgment, on the basis of which revisional jurisdiction is sought to be invoked, is not fatal, as nothing as such is required to be mentioned in the notice.

(67) Learned counsel for the State, while relying upon the judgments of Hon'ble the Supreme Court in ***The Tata Iron & Steel Co., Ltd.*** versus ***The State of Bihar***[29]; ***State of Rajasthan and another*** versus ***J. K. Udaipur Udyog Ltd. and another***[30] and ***Commissioner of Trade Tax, U. P. and another*** versus ***Kajaria Ceramics Ltd***.[31], submitted that it is the liability of the dealer to pay the tax and it is his option either to pass on the burden to the buyer or not, though in law he may be entitled to. Mere this fact will not debar the State from collecting due taxes.

(68) Justifying the enhancement of period for revision from three years to six years and its applicability to all pending cases, while relying upon the judgment of Hon'ble the Supreme Court in ***Addl. Commissioner (Legal) and another*** versus ***Jyoti Traders and***

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[29] AIR 1958 SC 452
[30] (2004) 7 SCC 673
[31] (2005) 11 SCC 149

another[32], it was submitted that the amendment, in fact, being procedural and as the language suggests is retrospective in nature, hence, will be applicable to all the cases, even where limitation of three years for passing the revisional order had expired before the amendment was notified. Even the amendment suggests that the words "three years" had been substituted with words "six years". In support of the plea that if there is conflict in two judgments of Hon'ble the Supreme Court of equal number of Judges, which of the judgment is to be followed, reference was made to a Full Bench judgment of this Court in ***Indo Swiss Time Limited, Dundahera*** versus ***Umrao and others***[33].

(69) As regards reasonable time for passing the order, it was submitted that main reliance of the petitioner is on the judgment of Hon'ble the Supreme Court in ***Bhatinda District Coop. Milk P. Union Ltd.'s*** case (supra), where no limitation was provided under the Punjab General Sales Tax Act, 1948. In the present case, normal period of limitation of three years was provided, which now stands substituted with six years. However, for invocation of the exception clause under certain specified conditions, there is no period of limitation. In those eventualities, no time can be read in the provision. He further submitted that the department can issue notice at any time, as no prejudice as such is going to be caused to an assesee. Even if he is unable to produce the books of accounts, on the basis of proposition of law, order can be revised merely after seeing the returns or order of assessment. On a query of the court, as to what are the instructions of the department for preservation of records in office, he could not specifically answer. He further submitted that even if there is some delay in issuance of notice invoking any of the events in the exception clause, the reasons are not required to be given in the notice.

(70) The same have to form part of the order after considering the reply by the assessee. In the present case, the delay is well explained as the earlier judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was pending re-consideration before a larger Bench in L&T's 1st case (supra). As the notice had been issued to the assessee immediately after the judgment in L&T's 2nd case (supra), there was no delay.

(71) Learned counsel for the State further contended that even

[32] (1999) 2 SCC 77
[33] AIR 1981 P&H 213

though challenge in the present petitions is to Explanation (i) to Section 2(1)(zg) of the Act providing for definition of 'sale price', however, from the petition it is not clear as to whether vires of the provision have been challenged, as existed prior to 20.3.2009 or after that. The provision, as existed before 20.3.2009, provided for two methods for calculation of sale price, first being deductive method and second being additive method. The second was applicable where quantifiable data regarding labour and service was not available. While referring to the Division Bench judgment of this court in ***CHD Developers Limited's*** case (supra), it was submitted that provisions of Explanation (i) to Section 2(1)(zg) of the Act, as existed after 20.3.2009, Sections 9 and 42 of the Act and Rules 25(2) and 49 of the Rules were also challenged and prayer was also for setting aside the assessment orders and the revisional orders. This court, while deciding the aforesaid cases, upheld the vires of Section 2(1)(zg) of the Act opining that it was not a charging section, rather, the provision merely provided for definition.

(72) Analysing Explanation (i) to Section 2(1)(zg) of the Act, as existing prior to 20.3.2009, it was submitted that case of the petitioners before this court is that they are maintaining regular books of account, hence, the value of the property in goods, which is transferred in execution of works contract, can very well be calculated therefrom by applying deductive method. The provisions of the Act envisage levy of tax on sale of goods. The term “goods” has been defined and so the “gross turnover”. It also talks about the sale price of the goods. After deducting expenses incurred on account of labour and service charges, the gross turnover can be calculated and thereafter taxable turnover in terms of Section 6 of the Act. It is wrong to allege that tax is sought to be levied on the cost of the land, if any, included in the works contract. Section 2(zg) of the Act defines 'works contract'. The provision merely provides for levy of tax on sale of goods. Before the amendment was carried out in Section 2(1)(zg) of the Act w.e.f. 20.3.2009, in fact, no Rules were required. The necessity arose only after the amendment was carried out, which enabled the Government to provide for certain formulae for calculation of the sale price in the absence of quantifiable data. For the period prior to 20.3.2009, at this stage, there is no need to go into the validity thereof for the reason that admittedly, the petitioners have their books of accounts, which were maintained in normal course of business and from that taxable turnover can be determined and the case will not fall in second category, which shall be applicable only where quantifiable data of labour and service charges is not available. Whatever deductions are to be provided in terms of the

law laid down by Hon'ble the Supreme Court or this Court will be taken care of by the authorities under the Act.

(73) While referring to the judgment of Hon'ble the Supreme Court in ***Gannon Dunkerley and Co.'s*** case (supra), it was submitted that Hon'ble the Supreme Court has clearly defined as to the kind of deductions, which are available for assessing the value of goods, property in which is passed on in a works contract. The assessment of the petitioners for that period can very well be framed keeping in view the statement of law on the subject. He further submitted that the petitioners have not been able to refer to any case where the assessing authority or the revisional authority had taken into consideration the value of land for the purpose of levy of tax. The judgments relied upon by learned counsel for the petitioners are distinguishable. Even for the period from 20.3.2009 to 16.5.2010, when Rule 25(2) was added in the Rules, in case the books of accounts are available, there is no problem in calculation of taxable turnover, as the section provides for all necessary ingredients.

(74) Learned counsel for the State fairly submitted that no order could be passed against the company, which stood dissolved after being merged in another company, the order may be set aside, however, liberty be granted to the department to pass fresh order.

REPLY ON BEHALF OF THE PETITIONER

(75) In response, learned counsel for the petitioner submitted that in Bhatinda District Coop. Milk P. Union Ltd.'s case (supra), Hon'ble the Supreme Court opined that even if there is no time limit prescribed in any Act for exercise of jurisdiction, the same has to be read in it. Wherever no limitation is provided, the concept of reasonable period steps in. As the stand of learned counsel for the State is that for invoking the exception clause there is no limitation, reasonable period has to be read therein. The department cannot be permitted to invoke exception clause at its own whims and fancies after the cause of action arose. It is the admitted case of the department that judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was a good law. It was in favour of the department. There was no reason to wait for the decision of reference in L&T's 1st case (supra). In fact, the proper course would have been, if required, to initiate action for revision on the basis of K. Raheja Development Corporation's case (supra) and pass the order within the period permitted under the Act. At the most if the department so felt, it could have kept the recovery in abeyance; to be

fair to the assessee. It is not in dispute that the department could invoke jurisdiction under Section 34 of the Act on the basis of judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra). There were two eventualities possible in L&T's 2nd case (supra), where the matter was referred for re-consideration-- one is reiteration of the same view and second is taking a different view. In these circumstances, the department was not going to gain anything by keeping the matter pending. No insurmountable difficulties have been pointed out by the State either in the notice or in the order passed explaining the reasons why the notice has been issued so late after the cause of action arose.

(76) In the exception clause, three eventualities have been mentioned, namely, retrospective amendment of law, order passed by the Tribunal or law declared by the High Court or Hon'ble the Supreme Court. The provision has to be given purposive interpretation. Once it is admitted by the State that amendment in law has to be subsequent to the passing of the order by the assessing authority, the other two eventualities have also to be later in time if exception clause is to be invoked. However, if on account of any error the assessing authority has failed to take note of the existing law and the period of limitation is still available, the order could be revised during that period only.

(77) Regarding binding nature of the circulars issued by the department, it was submitted that it is only if judgment of a court takes a view different than what has been stated in the circular, that the circular is not binding, otherwise the department cannot be permitted to raise a plea that the circular issued by it is not binding on it, especially when the department is empowered under the Act to issue circulars. In the case in hand, there is no judgment contrary to the view expressed in the circular, rather, the orders of the Tribunals are in consonance therewith. Judgment of this Court in ***Sonex Auto Industries P. Limited's*** case (supra) was referred to.

(78) He further submitted that even after the judgment in L&T's 2nd case (supra), the circular issued by the department could have been amended, but nothing was done even though some amendment in the circular was made on 10.2.2014. Regarding contents of the notice, it was submitted that unless an assessee knows why the proceedings are sought to be initiated against him, especially invoking the extended period of limitation, he will not be able to file specific reply thereto. In support of the plea, reliance was placed upon ***Aban Loyd Chiles Offshore Ltd.'s*** case (supra) and ***Commissioner of***

Income-Tax versus ***Contimeters Electricals P. Ltd.***[34].

(79) The judgment of ***Jyoti Traders and another's*** case (supra) in support of the plea regarding substitution of period of limitation for passing the revisional order from three years to six years, as cited by learned counsel for the State, was distinguished by stating that in the facts of that case, while going through the language of amendment, Hon'ble the Supreme Court opined that intention was to amend the law with retrospective effect, otherwise the amendment could not be given true meaning. In the case in hand, neither from the language of the amendment nor from the Act, it can be opined that intention was to amend the Act with retrospective effect. The rights vested in an assessee on expiry of period of limitation cannot be taken away.

(80) It was further submitted that there is no possibility of passing order under the Act merely on the basis of returns or order of assessment, as for that purpose, books of accounts will always have to be gone into to determine the factual aspects for calculation of the amount of tax, hence, the department cannot be granted liberty to issue notice at any time.

(81) Mr. Sandeep Goyal, learned counsel for the petitioner submitted that in terms of Section 56(2) of the Act, the circulars issued by the department are binding on the authorities under the Act, except the appellate authority. The reasonable period for invoking revisional jurisdiction would start from 5.5.2005 when the judgment in K. Raheja Development Corporation's case (supra) was delivered by Hon'ble the Supreme Court.

(82) The judgment of this court in ***M/s Haryana State Warehousing Corporation's*** case (supra) is distinguishable on facts as in that case, this court permitted invocation of extended period of limitation on the basis of a judgment delivered by the High Court. In that case, the assessment was framed on 15.3.2007. Copy was supplied to the assessee on 25.7.2007. The revisional jurisdiction was sought to be exercised in view of the judgment of this court delivered subsequent to the passing of the assessment order in ***M/s Food Corporation of India*** versus ***State of Punjab***[35] on 19.3.2009. The contention raised by the assessee was that the department always had the view that incidental charges are part of the turn-over, hence, the extended period of limitation could not be invoked. The contention was rejected while

[34] (2009) 317 ITR 249

[35] (2009) 33 PHT 632 (P&H)

opining that in terms of the provisions of the Act, it is the judgment of the court laying down the law, which is relevant, and not the view of the department.

(83) Heard learned counsel for the parties and perused the paper book.

DISCUSSIONS

(84) After hearing learned counsel for the parties, we find that the following legal issues require adjudication by this Court:

(1) Whether revisional power could be exercised on the basis of judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation v. State of Karnataka, 2005 (141) STC 298, even if the matter had been referred to be considered by a larger Bench by Hon'ble the Supreme Court ?

(2) Whether extended period of limitation for exercise of revisional jurisdiction will apply even in cases where the period provided in the Act prior to the amendment had already expired?

(3) Whether a show cause notice issued to exercise revisional jurisdiction is bad as it is lacking in basic facts to invoke exception clause and extended period of limitation?

(4) Whether exception clause enabling exercise of revisional jurisdiction beyond the normal period of limitation prescribed in the Act, could be invoked even in cases where the event had taken place during the normal period prescribed in the Act?

(5) Whether the circulars issued by the Department are binding on the department and the assessees?

(6) Whether explanation (i) to Section 2(1)(zg) of the Act is *ultra vires*?

(7) Whether levy of tax on builders can be sustained in the absence of machinery provisions? The period being upto 16.5.2010 and thereafter, when the Rules were framed.

(8) Whether assessment could be framed in the name of a

company which stood merged in another company and lost its entity by operation of law?

ISSUE NO. (1)

Whether revisional power could be exercised on the basis of judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation v. State of Karnataka, 2005(141) STC 298, even if the matter had been referred to be considered by a larger Bench by Hon'ble the Supreme Court?

(85) The relevant provisions of Section 34 of the Act, as existing before the amendment, are reproduced hereunder:

> 34. (1) The Commissioner may, on his own motion, call for the record of any case pending before, or disposed of by, any taxing authority for the purposes of satisfying himself as to the legality or to the propriety of any proceeding or of any order made therein which is prejudicial to the interests of the State and may, after giving the persons concerned a reasonable opportunity of being heard, pass such order in relation thereto as he may think fit:
>
> Provided that no order passed by a taxing authority shall be revised on an issue which on appeal or in any other proceeding from such order is pending before, or has been settled by, an appellate authority or the High Court or the Supreme Court, as the case may be:
>
> Provided further that no order shall be revised after the expiry of a period of three years from the date of the supply of the copy of such order to the assessee except where the order is revised as a result of retrospective change in law or on the basis of a decision of the Tribunal in a similar case or on the basis of law declared by the High Court or the Supreme Court.
>
> (2) The State Government may, by notification in the Official Gazette, confer on any officer not below the rank of Deputy Excise and Taxation Commissioner, the power of the Commissioner under sub-section (1) to be exercised subject to such exceptions, conditions and restrictions as may be specified in the notification and where an officer on whom such powers have been conferred passes an order

under this section, such order shall be deemed to have been passed by the Commissioner under sub-section (1).

(86) Section 34 of the Act enables the Excise & Taxation Commissioner, on his own motion to call for the records of any case pending before, or disposed of by, any taxing authority or any appellate authority other than the Tribunal for the purpose of satisfying himself as to the legality or propriety of the proceedings or the order made, which in the opinion of the Excise and Taxation Commissioner is prejudicial to the interest of the State. Second proviso to Section 34 of the Act provides that no order shall be revised after the expiry of three years from the date of supply of copy of such order to the assessee. The proviso, however, carves out exceptions to the aforesaid period of limitation, where an order can be revised even beyond the period of three years, in case:

(i) there is retrospective change in law;

(ii) any decision of the Tribunal in a similar case; and

(iii) on the basis of law declared by the High Court or the Supreme Court.

(87) In the case in hand, it is not in dispute that neither there is any retrospective change in law nor a decision of the Tribunal, on the basis of which the revisional jurisdiction has been exercised, that too by invoking the exception clause beyond the normal period of limitation.

(88) The exception clause for invoking the extended period for exercise of revisional jurisdiction was analysed by learned counsel for the petitioner in two parts, first being "on the basis of" and second being "law declared by the High Court or the Supreme Court".

(89) The basis of anything is that on which it stands. Meaning thereby, in the case in hand, the very basis, on which notice issued for revision of the assessment order by invoking the extended period of limitation, is sought to be justified is the law declared by Hon'ble the Supreme Court.

(90) Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. Here, we need to examine, what is the law declared ?

What is the law declared ?

(91) Article 141 of the Constitution of India uses the phrase "law declared by the Supreme Court". It has been defined to mean law made while interpreting the statutes or the Constitution. It was held to be part of the judicial process.

(92) The issue was considered by Hon'ble the Supreme Court in ***C. Golak Nath's*** case (supra) opining that to declare is to announce opinion. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law. The relevant lines therefrom are extracted below:

> "51....... Article 141 says that the law declared by the Supreme Court shall be binding on all courts; and Article 142 enables it in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. These articles are designedly made comprehensive to enable the Supreme Court to declare law and to give such directions or pass such orders as are necessary to do complete justice. The expression "declared" is wider than the words "found or made". To declare is to announce opinion. Indeed, the later involves the process, while the former expresses result. Interpretation, ascertainment and evolution are parts of the process, while that interpreted, ascertained or evolved is declared as law. The law declared by the Supreme Court is the law of the land. If so, we do not see any acceptable reason why it, in declaring the law in supersession of the law declared by it earlier, could not restrict the operation of the law as declared to future and save the transactions, whether statutory or otherwise that were effected on the basis of the earlier law "

[Emphasis supplied]

(93) The issue was later considered in Sahara India Real estate Corporation Limited and others v. Securities and Exchange Board of India and another[36], wherein Hon'ble the Supreme Court opined that the law declared by the Supreme Court means law made while interpreting the statutes or the Constitution.

(94) In the case in hand, it cannot be disputed that the law was

[36] (2012) 10 SCC 603

declared by Hon'ble the Supreme Court regarding taxation on the transactions of the type involved in the present petition vide judgment in K. Raheja Development Corporation's case (supra) on 5.5.2005. It was only vide order dated 19.8.2008 passed in L&T's 1st case (supra) that the matter was referred to be considered by a larger Bench, which was finally decided vide judgment dated 26.9.2013 in L&T's 2nd case (supra) approving the law as declared in K. Raheja Development Corporation's case (supra).

Binding nature of judgment even if issue refered to larger Bench

(95) An ancillary issue, which arises for consideration in the facts of the present case, is as to whether the law declared by Hon'ble the Supreme Court is still a good law and a binding precedent, even if the issue is referred to be considered by a larger Bench. The question was considered by Hon'ble the Supreme Court in ***State of Rajasthan*** versus ***M/s R. S. Sharma and Co.***[37]. It was opined therein that final determination of a controversy cannot be kept pending only on the ground that the issue is pending adjudication by a larger Bench. The contention raised by the parties before Hon'ble the Supreme Court was that as the issue was pending consideration before a Constitution Bench, the case should not be decided. However, keeping in view the law, as existing, the matter was finally decided. The relevant paras thereof are extracted below:

> "7. It was contended before us that the question whether on the ground of absence of reasons, the award is bad per se, is pending consideration by a Constitution Bench of this Court in C.A. Nos. 3137-39 of 1985, 3145 of 1985 –*Jaipur Development Authority v. Firm Chhokhamal Contractor*. It was, hence, urged that this should await adjudication on this point by the Constitution Bench. We are unable to accept this contention. In our opinion pendency of this question should not postpone all decisions by this Court. One of the cardinal principles of the administration of justice is to ensure quick disposal of disputes in accordance with law, justice and equity......
>
> 8. The law it stands today is clear that unless there is an error of law apparent on the face of the award, the award cannot be challenged merely on the ground of absence of reasons. This is settled law by a long series of decisions.

[37] (1988) 4 SCC 353

> Interests of justice and administration of justice would not be served by keeping at bay final adjudication of the controversy in this case on the plea that the question whether an unreasoned award is bad or not, is pending adjudication by a larger bench. There have been a large number of sittings before the arbitrators. Parties have been heard. There was no mis-conduct in the proceedings. There has been no violation of the principles of natural justice. In such a situation it would be inappropriate to postpone the decision pending adjudication of this question by a larger bench of this Court. We do not know how long it would take to decide that question, and whether ultimately this Court would decide that unreasoned awards per se are bad or whether the decision would have prospective application only in view of the long settled position of law on this aspect in this country or not. Justice between the parties in a particular case, should not be in suspended animation ”
>
> [Emphasis supplied]

Similar was the view in State of Orissa v. Dandasi Sahu, (1988) 4 SCC 12.

(96) The issue was subsequently considered by a Division Bench of Bombay High Court in Madhao's case (supra). On the subject-matter involved therein, the legal issue was decided by Hon'ble the Supreme Court in ***State of Maharashtra*** versus ***Sant Joginder Singh***[38], however, doubting the judgment delivered by two Hon'ble Judges in the aforesaid case, in ***Girnar Traders*** versus ***State of Maharashtra***[39] (hereinafter referred to as “Girnar-I case”), the matter was referred to a larger Bench. The Bench consisting of three-Judges in ***Girnar Traders*** versus ***State of Maharashtra***[40] (hereinafter referred to as “Girnar- II case”) referred the matter still to be heard by a larger Bench. The contention sought to be raised by the party before the Bombay High Court was that in view of the order passed by Hon'ble the Supreme Court in “Girnar-I and Girnar-II cases”, the law laid down by Hon'ble the Supreme Court in ***Sant Joginder Singh's*** case (supra) no more holds the field, hence, cannot be relied upon, as the issue has not been finally decided by Hon'ble the Supreme Court after reference

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[38] (1995 Supp (2) SCC 475)

[39] (2004) 8 SCC 505

[40] (2007) 7 SCC 555

in "Girnar-II case" (supra). While referring to the judgment of Hon'ble the Supreme Court in ***R. S. Sharma and Co.'s*** case (supra) and other judgments on the issue, it was opined that pending decision of a reference to a larger Bench, any *lis* between the parties cannot be kept suspended. Any reference to a larger Bench does not make the law already laid down by the Apex Court not binding on the courts below till the issue is decided by a larger Bench. Relevant paragraph thereof is extracted below:

> "56. In view of the above referred observations of the Apex Court and the Division benches of this Court, it is evident that justice between the parties should not be kept in suspended animation in view of pendency of reference for decision before the larger Bench. Similarly, the decision of the Apex Court referred to the larger Bench does not make the law already laid down by the Apex Court not binding on the High Court till the authoritative pronouncement is delivered by the larger Bench of the Apex Court. In the instant case, the land acquisition proceedings were initiated much prior to 2005 and the award came to be passed by the Special Land Acquisition Officer on 20.6.2008. There is no challenge to the land acquisition procedure adopted by the Authorities nor validity of the award is questioned except on the ground of applicability of provisions of Section 11-A of the Land Acquisition Act. The Apex Court in the case of *Sant Joginder Singh* has already declared the law on the subject by holding that Section 11-A of the Land Acquisition Act is not applicable to the proceedings under the MRTP Act. In the subsequent decision in the case of *Girnar-I*, the Apex Court by giving reasons referred the decision in *Sant Joginder Singh's* case for re-consideration to the three-Judges' Bench, which in turn, again referred the said issue to the five Judges' Bench without declaring the law on the subject, with the result the law declared by the Apex Court in *Sant Joginder Singh's case* continues to hold field and, therefore, for the reasons stated above, it is difficult for us to accept the contention canvassed by the learned counsel for the petitioner in this regard."

(97) In the aforesaid judgment, Division Bench of Bombay High Court had framed four issues, two of which relevant herein, are extracted below:

"(II) Whether the decisions of the Apex Court in *Girnar-I and Girnar-II* cases affect the binding nature of the law declared by the Apex Court in *Sant Joginder Sxingh's* case and whether it loses its efficacy ?

(III) Whether the law declared by the Apex Court in the case of *Sant Joginder Singh* in regards to applicability of Section 11-A of Land Acquisition Act to the acquisition proceedings under the MRTP Act loses its binding nature under Article 141 of the Constitution in view of pendency of reference in this regard before the larger Bench of the Apex Court for decision ?"

Both the aforesaid questions were answered in negative.

(98) A Division Bench of Kerala High Court in ***Denny Fernandez*** versus ***State of Kerala***[41] opined that the judgment pronounced by Hon'ble the Supreme Court continues to be the law of land under Article 141 of the Constitution of India and binding upon all the courts below till such time it is reversed or modified by a larger Bench. The observation made in ***Indian Oil Corporation Limited, Barauni*** versus ***The Presiding Officer Central Government Industrial Tribunal and another***[42] in para No. 23 is also in same line. The relevant part thereof is extracted below:

"23. Counsel for the petitioner submitted that the correctness of the aforesaid Constitution Bench decisions of the Supreme Court is likely to be reconsidered by a larger Bench of the Supreme Court since a similar question arising in a batch of matters before the Supreme Court has been referred to a larger Bench. Assuming it to be so, the decision of the Supreme Court is nonetheless binding upon me as the law of the land declared, which I am bound to follow having regard to the mandate of Article 141 of the Constitution. The mere fact that the matter has been referred to a larger Bench does not denude the decision of its authority as a binding precedent "

[Emphasis supplied]

Similar was the view taken by Hon'ble the Supreme Court in ***State of Maharashtra and another*** versus ***Sarva Shramik Sangh, Sangli and***

[41] 2003(1) KLT 280

[42] 1994 SCC OnLine Pat 277

others[43].

Finding

(99) In view of our aforesaid discussions, it can safely be opined that judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was a binding precedent declaring the law at that time on the subject to be followed by all courts and authorities below and action could have been taken by the authorities on the basis thereof, if considered appropriate.

ISSUE NO. (2)-

> Whether extended period of limitation for exercise of revisional jurisdiction will apply even in cases where the period provided in the Act prior to the amendment had already expired ?

(100) The State issued Ordinance on 3.8.2015, seeking to amend Section 34 of the Act by enlarging the period during which power of *suo- motu* revision could be exercised. The Ordinance was replaced by Amending Act, which got assent of the Governor on 15.9.2015 and was published in the gazette on 21.9.2015. Second proviso to Section 34(1) of the Act, as existed prior to the amendment, as has already been reproduced in para No. 82 of the judgment, provided that no order shall be revised after expiry of the period of three years from the date of supply of copy of such order to the assessee. This was the provision to be applied in normal circumstances. Vide amendment in second proviso to sub-section (1) of Section 34 of the Act, for the words "three years", words "six years" were substituted. Meaning thereby, the normal period of limitation for revising an assessment order was now six years, as against three years.

(101) The issue, which arises for consideration, is as to whether the period stood extended even in the cases where three years had already expired from the date of supply of copy of order to an assessee. The answer would be in negative, as a dead claim cannot be revived. Right to revise the order had extinguished, which could not be revived. Further life could be injected only in the cases where limitation for revising an assessment order was still existing.

(102) Similar issue was considered by Hon'ble the Supreme Court in ***Uttam Steel Ltd.'s*** case (supra), where the claim for rebate on

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[43] (2013) 16 SCC 16

export shipment was made. The period prescribed under Section 11B of the Central Excise Act, 1944 at the relevant time for making such claim was six months, which was later on substituted by one year. The assessee therein did not prefer claim within the period of six months. The amendment enlarging the period came later on. Hon'ble the Supreme Court opined that where the claim under the existing provision was already time-barred before the enlargement of period by the amending Act, the same will not be available to the assessee. While referring to earlier judgments on the issue, namely, (i)***J. P. Jani, Income Tax Officer*** versus ***Induprasad Devshanker Bhatt***[44]; (ii) ***New India Insurance Co. Ltd.*** versus ***Shanti Misra***[45]; (iii) ***T. Kallamurthi*** versus ***Five Gori Thaikkal Wakf***[46]; and (iv) ***Thirumalai Chemicals Ltd.*** versus ***Union of India and others***[47], Hon'ble the Supreme Court opined as under:

> "10. We have heard learned counsel for the parties and Shri Bagaria, the learned *Amicus Curiae* at some length. There is no doubt whatsoever that a period of limitation being procedural or adjectival law would ordinarily be retrospective in nature. This, however, is with one proviso super added which is that the claim made under the amended provision should not itself have been a dead claim in the sense that it was time barred before an Amending Act with a larger period of limitation comes into force "

[Emphasis supplied]

(103) The issue was subsequently considered by Hon'ble the Supreme Court in ***M/s Shreyans Indus. Ltd.'s*** case (supra), where a judgment of this court dealing with similar proposition of law was upheld. In that case, normal period for framing assessment, as provided for in Section 11(10) of the Punjab General Sales Tax Act, 1948 was three years, however, the Commissioner was empowered to extend that period further after recording reasons in writing. The issue which arose for consideration before the court was whether any extension for framing the assessment could be granted by the Commissioner after the expiry of period of three years, as provided for in the Act. The view

[44] AIR 1969 SC 778
[45] (1975) 2 SCC 840
[46] (2008) 9 SCC 306
[47] (2011) 6 SCC 739

expressed by this court was that after expiry of period of limitation for framing the assessment, the right to make assessment gets extinguished. Thereafter, the Commissioner is debarred from exercising power to grant extension for the purpose of framing of assessment. The relevant paras thereof are extracted below:

> "6. The assessee took up the matter further by filing appeals before the High Court. Here, the assessee has succeeded in its submission as the High Court of Punjab and Haryana vide impugned judgment dated September 26, 2008 has held that once the period of limitation expires, the immunity from subjecting itself to the assessment sets in an the right to make assessment gets extinguished. Therefore, when the period of limitation prescribed in the Act for passing the assessment order expires, thereafter, the Commissioner is debarred from exercising his powers under sub-section (1) of Section 11 of the Act and cannot extend the period of limitation for the purpose of assessment. This order is assailed by the Revenue in the instant appeals before us.
>
> xx xx
>
> 24. It was also observed that upon the lapse of the period of limitation prescribed, the right of the Department to assess an assessee gets extinguished and this extension confers a very valuable right on the assessee.
>
> 25. If one is to go by the aforesaid dicta, with which we entirely agree, the same shall apply in the instant cases as well. In the context of the Punjab Act, it can be said 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 against being subject to assessment sets in and the right to make assessment gets extinguished. Therefore, there would be no question of extending the time for assessment when the assessment has already become time barred. A valuable right has also accrued in favour of the assessee when the period of limitation expires. If the Commissioner is permitted to grant the extension 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 even much after the last date of assessment in the instant appeals itself, when the last dates of assessment were 30th April,

2004."

[Emphasis supplied]

(104) The judgment in ***Jyoti Traders and another's*** case (supra) is distinguishable as in the aforesaid judgment, while relying upon two earlier judgments, it was opined that language of the amendment suggested that it was with retrospective effect, hence, it was given its true meaning. The facts of the case in hand are different. There are later judgments of Hon'ble the Supreme Court in ***Uttam Steel Ltd.'s*** case (supra) and ***M/s Shreyans Indus Ltd.,'s*** case (supra).

Finding

(105) In view of our aforesaid discussions, it can safely be opined that extended period for exercise of revisional jurisdiction will be applicable only in cases where period prescribed prior to the amendment had not expired and not where the period had earlier expired as the amendment cannot put life to a dead claim.

ISSUE NO. (3)

> Whether a show cause notice issued to exercise revisional jurisdiction is bad as it is lacking in basic facts to invoke exception clause and extended period of limitation ?

(106) The petitioners in the bunch of petitions have also sought to challenge validity of the show cause notices issued to the petitioners invoking jurisdiction to revise orders of assessment, primarily taking the plea that basic ingredients required for invoking the jurisdiction were missing in the notices. Special reference was made to invocation of extended period of limitation. It was submitted that extended period could be invoked only in three specified circumstances. If the authority sought to initiate proceedings after the limitation as provided in Section 34 of the Act had already expired, it was required to be specifically mentioned in the notice itself. In the absence thereof, the notice as such was bad. In support, reliance was placed upon ***H. M. M. Limited; Kaur & Singh; Aban Loyd Chiles Offshore Ltd.;*** and ***Uniworth Textiles Ltd.'s*** cases (supra).

(107) On the other hand, the contention was sought to be controverted by learned counsel for the State by raising the plea that a mere notice under Section 34 of the Act proposing to revise order of assessment was sufficient. No facts were required to be mentioned. The section envisages only opportunity of hearing before passing an order. There are no pre-requisites required to be fulfilled before jurisdiction is

assumed by the Commissioner.

(108) This court is not going into this aspect of the matter for the reason that at this stage, it has lost its significance, in terms of the earlier order passed by this court, the Commissioner has already disposed of the preliminary objections raised by the petitioner regarding assumption of jurisdiction. Once the order has already been passed, this court is examining the validity of the order as such. Though the order as such may be appealable before the Tribunal, but the unfortunate situation, as existed was that for the last about two years, till the arguments were heard, there was no functional Tribunal in the State of Haryana on account of non-appointment of Presiding Officer and the Members thereof.

(109) The issue is not being examined as in pursuance to the show cause notices, orders have already been passed and those are under consideration before this court.

ISSUE NO. (4)

> Whether exception clause enabling exercise of revisional jurisdiction beyond the normal period of limitation prescribed in the Act, could be invoked even in cases where the event had taken place during the normal period prescribed in the Act?

(110) A perusal of Section 34(1) of the Act provides that for the purpose of satisfying himself as to the legality of an order and propriety of any proceedings which, in the opinion of the Commissioner, is prejudicial to the interest of the State, he may call for the record of that case except the cases, which are either pending or have been disposed of by an appellate authority, High Court or the Supreme Court. Second proviso to Section 34(1) of the Act provides that no order shall be revised after the expiry of three years from the date of supply of copy of the order of assessment, sought to be revised. This is the normal period of limitation. However, the limitation is not applicable in three eventualities, namely, (i) where there is a retrospective change in law; (ii) any decision of the Tribunal in a similar case; and (iii) on the basis of law declared by the High Court or the Supreme Court.

(111) It is the conceded position by learned counsel for the State that to enable the Commissioner to invoke revisional jurisdiction after expiry of normal period, retrospective change in law has to be after the order had been passed by the assessing authority. However, with reference to the order passed by the Tribhunal or the judgments of High

Court or the Supreme Court, the contention was that these can be even prior to the order passed by the assessing authority. Meaning thereby, the assessing authority at the stage of passing of assessment order had ignored certain binding precedents by the Tribunal or jurisdictional High Court or Hon'ble the Supreme Court. There cannot be any dispute in the proposition of law to the extent that if there is any error in the order passed by the assessing authority, who failed to take notice of a binding precedent in favour of the revenue, the order being prejudicial to the interest of the State can be revised. However, in those circumstances, it will be the normal period of limitation within which such a power is to be exercised. The exception clause cannot be permitted to be invoked in normal circumstances as the department had ample time as provided in the provision, namely, three years from the date of passing of order sought to be revised. If the exception clause is to be invoked, there have to be exceptional circumstances. Even if any amendment, order of the Tribunal or judgment of the High Court or Hon'ble the Supreme Court is subsequent to the passing of the order of assessment, in normal circumstances the exercise of revisional jurisdiction has to be during the period of limitation except in cases, where the amendment or the order/ judgment, on the basis of which revisional jurisdiction is sought to be exercised, had come into existence just before the limitation, as provided in Section 34 of the Act, was to expire. Those cases will depend on the facts of each case to be examined as to whether exception clause for exercise of power for revision beyond the period prescribed in that section can be allowed to be invoked or not.

(112) However, in the cases, where the grounds, namely, three exceptions as carved out in second proviso to Section 34(1) of the Act were available much before even the passing of the order of assessment, the exception clause providing extended period of limitation cannot possibly be permitted in those cases. In case permitted, that would amount to adding premium to in-action, incompetence of the authorities, which is clearly against the spirit of the Act. It cannot be said to be exceptional circumstance, which was beyond the control of the Commissioner for exercise of power within the period of limitation, as provided for under Section 34(1) of the Act. If interpretation, as is sought to be contended by learned counsel for the State is accepted, that would do away the period of limitation as provided for under the Act for exercise of revisional jurisdiction, as in all the cases the department would be at liberty to invoke the same at any time, without there being any distinction.

(113) The law on the subject was laid down by Hon'ble the Supreme Court vide judgment delivered on 5.5.2005 in K. Raheja Development Corporation's case (supra), much prior to the assessment years involved herein. The details regarding assessment order; date on which order of assessment was passed; date of supply of copy of assessment order (wherever available); date on which normal period of limitation for revision had expired; date of issuance of notice under Section 34(1) of the Act; date on which the order was passed by the revisional authority finally or deciding the preliminary objection are given as under. The aforesaid information was furnished by the State in the form of a table attached as Annexure R-1/3 with reply in CWP No. 25336 of 2015.

Sr. No.	CWP No.	Parties Name	Assessment year	Date of assessment order	Date of supply of assessment order	Limitation for passing order	Date of issuance of notice for revision	Date of revisional order
1.	20788 of 2015-	M/s Dhingra Jardine Infrastructure Pvt. Ltd. v. The State of Haryana and others	2011-12	15.5.2013	15.5.2013	14.5.2016	04.06.15	03.07.15
2	23671 of 2015	Omaxe Ltd. v. The State of Haryana and others	2010-11	30.4.2012	7.6.2012	06.06.2015	14.5.2015 30.6.2015	21.8.2015
3	23721 of	Omaxe Ltd. v. The State	2009-10	30.4.2012	29.4.2011 and date of	26.09.2014	18.5.2015	22.7.2015

	2015	of Haryana and others			rectification 27.9.2011			
4	24700 of 2015	M/s Dhingra Jardine Infrastructure Pvt. Ltd. v. The State of Haryana and others	2008-09	26.4.2010	26.4.2010	25.04.2013	24.6.2015	15.7.2015
5	24847 of 2015	M/s Dhingra Jardine Infrastructure Pvt. Ltd. v. The State of Haryana and others	2009-10	28.4.2011	04.10.2011	03.10.2014	02.07.15	15.7.2015
6	24966 of 2015	M/s DLF Ltd. v. The State of Haryana and others	2007-08	11/02/2010	25.2.2010	24.02.2013	17.7.2015	31.5.2016
7	25336 of 201	M/s Amarnath Aggarwa	2009-10	29.2.2012	29.2.2012	28.02.2015	24.8.2015	Revision proceedings are

	5	l Investment Pvt. Ltd. v. State of Haryana & others						in progress
8	25848 of 2015	M/s Raheja Developers Ltd. v. The State of Haryana and others	2006-07	04/03/10	---		13.8.2015	23.11.2015
9	26508 of 2015	M/s Vatika Limited v. State of Haryana and others	2006-07	20.1.2010	12.3.99	11/03/16	09.07.15	13.11.2015
10	26833 of 2015	Emaar MGF Land Limited v. State of Haryana and others	2009-10	15.3.2013	-		22.4.2015 9.10.2015	13.11.2015
11	27005 of 2015	Bestech India Pvt. Ltd. v. The State of Haryana and others	2008-09	24.5.2010	-		18.6.2015	16.11.2015
12	27006 of 2015	Bestech India Pvt. Ltd. v. The State of	2010-11	17.4.2012	-		18.6.2015	16.11.2015

		Haryana and others						
13	27032 of 2015	Bestech India Pvt. Ltd. v. The State of Haryana and others	2007-08	31.12.2009	-		15.9.2015	16.11.2015
14	27448 of 2015	Ajay Enterprises Pvt. Ltd. v. The State of Haryana and others	2009-10	26.2.2013	26.2.2013	25.02.2016	18.6.2015	18.8.2015
15.	27458 of 2015	Ajay Enterprises Pvt. Ltd. v. The State of Haryana and others	2008-09	31.5.2010	-		18.6.2015	16.11.2015
16.	27526 of 2015	Ajay Enterprises Pvt. Ltd. v. The State of Haryana and others	2010-11	29.11.2012	-		18.6.2015	20.11.2015
17.	787 of 2016	M/s BPTP Ltd. v. The State of Haryana and others	2007-08	22.4.2010	22.4.2010	21.04.2013	2.7.2015	30.11.2015
18.	788 of 201	M/s Raheja Developer	2007-08	26.11.2009	-		13.8.2015	23.11.2015

	6	s Ltd. v. The State of Haryana and others						
19.	798 of 2016	M/s BPTP Ltd. v. The State of Haryana and others	2007-08	30.4.2009	30.4.2009	29.4.2012	2.7.2015	30.11.2015
20.	1868 of 2016	M/s DLF Ltd. v. The State of Haryana and others	2008-09	20.8.2010	27.9.2010	28.9.2013	17.10.2015	31.5.2016
21.	2197 of 2016	M/s Raheja Developers Ltd.v. The State of Haryana and others	2005-06	6.3.2009	22.4.2009	21.4.2012	7.10.2015	23.11.2015
22.	3196 of 2016	M/s DLF Home Developers Ltd. v. The State of Haryana and others	2007-08	15.6.2009	25.6.2009	24.6.2012	26.6.2015	16.11.2015
23.	3748 of 2016	M/s Parsvnath Developers Ltd. v. The State of Haryana	2010-11	18.4.2012	-		18.6.2015	16.11.2015

		and others						
24.	3768 of 2016	M/s Parsavnath Developers Ltd. v. The State of Haryana and others	2009-10	18.4.2011	-		18.6.2015	16.11.2015
25.	6796 of 2016	M/s DLF Home Developers Ltd. v. The State of Haryana and others	2006-07	19.5.2008	-		1.10.2015	
26.	8820 of 2016	M/s DLF Ltd. v. The State of Haryana and others	2006-07	13.2.20009	-		28.12.2015	25.2.2016
27.	19413 of 2016	M/s S. P.R. Buildtech Ltd. v. The State of Haryana and others	2009-10	29.9.2011	-	-	24.6.2015	30.11.2015

(114) Though any order passed by the Tribunal will not be a binding precedent for this court, however, it can certainly be referred to in the light of the fact that a view was taken by the Full Member Tribunal and the same was accepted by the State by not taking any proceeding further. However, it can be ignored if against settled principles of law. In ***M/s Cheeka Solvent (P) Ltd.'s*** case (supra), a

three-Member Bench of the Tribunal dealing with an identical situation with reference to Section 40 of the Haryana General Sales Tax Act, 1973 read with the provisions of Act, as the action was initiated after the enactment of the Act, *inter-alia* opined that in case the order of the Tribunal on the basis of which revisional jurisdiction was sought to be invoked was already existing for a long time, the revisional power should have been exercised within the period of limitation. An earlier order passed by the Tribunal was referred to. It is not in dispute that the aforesaid two orders attained finality.

(115) If considered in the light of the facts in the present case, binding precedent in the form of judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was delivered on 5.5.2005. Undisputedly, all the assessment orders were passed subsequent thereto ignoring that settled principle, for which there is no explanation available. Merely because the co-ordinate Bench of Hon'ble the Supreme Court had referred the matter to be considered by a larger Bench in L&T's 1st case (supra), vide order dated 19.8.2008, it did not take away its value of binding precedent till such time the matter was decided by the larger Bench. The judgment by the larger Bench in L&T's 2nd case (supra) was pronounced on 26.9.2013. The notices were issued for revision to the petitioners much after the judgment of Hon'ble the Supreme Court in L&T's 2nd case (supra).

Finding

(116) The question posed deserves to be answered in negative opining that for exercise of power of revision while invoking extended period of limitation as provided for in second proviso to Section 34(1) of the Act, in normal circumstances, the event has to be after the normal period of limitation had already expired. However, there can be some exception where event occurred just before the expiry of period of limitation and the action was taken within reasonable time or the delay is satisfactorily explained. Exception clause is to be invoked only in exceptional circumstances. It is always required to be strictly interpreted even if there is hardship to any of the parties.

ISSUE NO. (5)

Whether the circulars issued by the Department are binding on the department and the assessees ?

(117) Relevant provisions of Sections 56(2)(3) and (4) of the Act are reproduced hereunder:

" **56. Tax administration.**

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(2) The State Government or the Commissioner may, from time to time, issue such orders, instructions and directions to all such persons who are employed in the administration of this Act as the State Government or the Commissioner may deem fit for such administration and all such persons shall observe and follow such orders, instructions and directions of the State Government and the Commissioner:

PROVIDED that no such orders, instructions or directions shall be issued so as to interfere with the discretion of any appellate authority in the exercise of its appellate functions.

(3) The State Government may, if it considers it necessary or expedient so to do, for the purpose of maintaining uniformity in the levy, assessment and collection of tax or for the removal of any doubt, *suo motu*, or on an application made to it in the prescribed form and manner on payment of the prescribed fee by a dealer or a body of dealers, issue an order clarifying any point relating to levy, assessment and collection of tax and all persons employed in the administration of this Act except an appellate authority, and all dealers affected thereby shall observe and follow such order.

(4) Every order issued under sub-section (3) shall be publicised simultaneously by uploading on the website www.haryanatax.com under the head 'VAT orders'.

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(118) Section 56 of the Act enables the State Government or the Commissioner to issue orders, instructions or directions to all such persons, who are employed in the administration of the Act and they are bound to follow the same except in the case of the appellate authority. It further provides that the State Government may, if it considers necessary, for the purpose of maintaining uniformity in the levy, assessment and collection of tax or for removal of any doubt, *suo motu*, or on an application made by any affected party issue an order clarifying the points. Such a clarification shall be binding on all except the appellate authority. Any order passed under Section 56(3) of the Act is to be publicised by uploading on the website of the

department.

(119) In exercise of the aforesaid power, the Commissioner vide memo dated 7.5.2013, issued instructions to all the officers in the department on the subject "instructions regarding civil works contracts/ builders and developers- deductions allowable in computation of turnover and consideration liable to tax". Referring to the fact that there is some confusion regarding levy of tax on the works being executed by the developers/builders of flats and buildings, especially in the cases where there are agreements for sale of constructed buildings, while referring to the definition of "sale" and the "works contract" as provided for in the Act, it was specifically mentioned that judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was still a good law and had not been reversed by Hon'ble the Supreme Court in any subsequent judgment. The authorities were advised by the Commissioner to tax such transactions and reject all the claims made, which are contrary to the judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra). Guidance was also given regarding registration of such contractors/builders. The relevant paras of the aforesaid instructions are extracted below:

> "It has come to the notice of this office that there is some confusion amongst the departmental officers in determining the gross turnover and deductions allowable therefrom and consideration liable to tax in civil works contract cases, especially in case of builders and developers of flats and buildings. It has led to lack of uniformity in assessment of tax in such cases and has also resulted into avoidable disputes. The matter has been examined and it has been considered necessary that suitable instructions should be issued in this regard correct assessment and recovery of tax in these cases. Accordingly, the following instructions are being issued:
>
> **1. Assessment of tax in case of building contracts (Agreement for sale of constructed building):**
>
> It has been noticed that several builders and developers enter into agreements with prospective buyers for sale of constructed flats/apartments or other buildings and claim that their transaction of sale of constructed buildings do not amount to transfer of property in goods involved in the execution of a works contract. However, such claim is

contrary to the provisions of the Haryana Value Added Tax Act, 2003 (in short, "HVAT Act") because the "sale" as defined under clause (ii) of Section 2(1)(ze) of the HVAT Act includes, "the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract." The term "works contract" has been defined under Section 2(1)(zt) which "includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the assembling, construction, building, altering, manufacturing, processing, fabrication, installation, fitting out, improvement, repair or commissioning of any movable or immovable property". As such agreements or contracts entered into by the developers or others with prospective customers for sale of fully constructed apartments or flats or other buildings before the commencement of actual construction or before completion of construction, should be treated as agreements or contracts for execution of works contract of construction of building as held by the Hon'ble Supreme Court in the case of K. Raheja Development Corporation v/s State of Karnataka (reported in 141 STC at page 298). It is still a good law and has not been reversed by the Hon'ble Supreme Court in any subsequent judgment. Claims to the contrary, if any, should be rejected.

It has come to the notice of this office that many developers/promoters/builders are not registered and not paying any tax, except tax deducted at source of Works Contract Tax (WCT) while making payments to the contractors engaged by them for the construction of building. Even where they are registered they are not filing returns in form VAT R-1 or VAT R-6, as the case may be. They are actually filing returns in form VAT R-4A as contractee. The correct interpretation of law in such cases is that the developers/promoters/builders are liable to pay tax as works contractors. They need to be registered under the HVAT Act and are required to file their returns in form VAT R-1 or VAT R-6, as the case may be, disclosing the correct amount of total receipts, including the receipts from the prospective buyers of constructed residential/commercial properties/buildings.

xx xx

(120) In the aforesaid clarification, all the officers were specifically instructed to follow the instructions.

(121) In addition to the aforesaid instructions, with a view to ensure that the orders passed by the authorities under the Act do not suffer from any illegality or impropriety, especially with reference to the issue of limitation in passing the orders, fresh instructions were issued on 4.6.2013. Para No. 1 of the aforesaid instructions provided for period of limitation to be observed by the authorities with reference to Section 15 of the Act providing for regular assessment, Section 16 of the Act provides for re-assessment of un- registered dealers, whereas Section 17 thereof provides for re-assessment. The dates were specifically provided till such time the action can be taken or has to be finalised. The issue regarding exercise of revisional power under Section 34 of the Act was also specifically dealt with in the instructions in para No. 1.5 thereof. It was mentioned therein that assessment orders for the years 2007-08 can be revised by March, 2014, the normal period of limitation being three years. Relevant part thereof is extracted below:

> "1.5 Revision is provided under Section 34 of the Act. It contains that no order shall be revised after the expiry of a period of 3 years from the date of supply of the copy of such order to the assessee. This implies that under normal circumstances assessment orders upto the AY 2006-07 have attained finality. Assessment orders for the AY 2007-08 can be revised by March, 2014."

(122) It was directed that period of limitation as provided for in different sections of the Act have to be kept in view while initiating action. The instructions further provided for monitoring of the cases of developers/ builders/contractors on the issue including the cases, which require exercise of power of revision or re-assessment.

(123) The validity of the aforesaid instructions was subject-matter of challenge in ***CHD Developers Limited's*** case (supra), wherein the same was upheld.

(124) The instructions issued by the department clarifying any position under the Act are binding on the department, however, the same are not binding on the court, if there is a judgment to the contrary. No direction can be given to give effect to any instructions, which run contrary to the view expressed by the court. Relevant paragraph of the judgment in ***Ratan Melting & Wire Industries'*** case (supra), dealing

with the issue, is extracted below:

> "7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/ circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

(125) There are two aspects in the aforesaid instructions issued by the department-- first being to apprise various authorities under the Act about the correct position of law laid down by Hon'ble the Supreme Court and the second being the issue of limitation for passing order under the Act. As far as the second issue is concerned, in our opinion, the instructions do not specifically state that extended period of limitation can or cannot be invoked in the circumstances of the cases. It only provided for normal period during which the revisional power can be exercised. The issue as regards exercise of revisional jurisdiction by invoking exception clause has been dealt with in the present case, hence, to that extent it cannot be opined that action of the authorities below the Commissioner are in any way contrary to the instructions issued by the department.

(126) However, one fact is clearly established from the instructions, i.e., acceptance of the fact that judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was the law of the land and should be meticulously followed by all the authorities. To this extent, the instructions were in consonance with the settled position.

Finding

(127) Any instructions issued by the Department are binding on the departmental authorities except on the issue where any judgment to the contrary exists. These are not binding on the court. A circular which

is contrary to statutory provisions has no existence in law.

ISSUE NO. (6)

Whether explanation (i) to Section 2(1)(zg) of the Act is ultra vires ?

(128) The issue regarding vires of explanation (i) to Section 2(1)(zg) of the Act was considered by a Division Bench of this Court in ***CHD Developers Limited's*** case (supra), where the prayer was for declaring Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Haryana Value Added Tax Rules, 2003 (for short, 'the Rules') to be ultra vires to the Constitution of India. Challenge was also made to validity of Section 42 of the Act. The vires of explanation (i) to Section 2(1)(zg) of the Act was upheld opining that it is not a charging section but merely a definition clause, however, Rule 25(2) of the Rules was held to be valid while reading it down to the extent mentioned in the affidavit filed by the State. The State was further directed to bring necessary changes in the Rules in consonance with the observations made in the judgment. It was further observed that any effort to levy tax on any amount other than value of goods transferred in the course of execution of works contract would be ultra vires. Relevant para thereof is extracted below:

> "38. Explanation (i) to Section 2(1)(zg) of the Act, which defines "sales price" provides for deduction on account of labour, material and services related charges from the gross turnover as defined under Section 2(1)(u) of the Act while arriving at the "sale price" in a works contract. It is not a charging provision which creates any liability for assessing VAT in a "works contract". It is in the definition clause of the Act and the provision does not embrace within its ambit something which is otherwise prohibited by law. Thus, the said provision does not suffer from any vice or defect of unconstitutionality."

Finding

(129) As the vires of the aforesaid provision has already been upheld by this court, we do not find any reason to re-examine the issue.

ISSUE NO. (7)

Whether levy of tax on builders can be sustained in the absence of machinery provisions ? The period being upto 16.5.2010 and thereafter, when the Rules were framed.

(130) The relevant provisions of the Act are reproduced below:

" **2. Definitions**

(1) In this Act, unless the context otherwise requires,-

xx xx xx

(u) "gross turnover" when used in relation to any dealer means the aggregate of the sale prices received or receivable in respect of any goods sold, whether as principal, agent or in any other capacity, by such dealer and includes the value of goods exported out of State or disposed of otherwise than by sale;

xx xx

(zg) "sale price" means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed at the time of sale as cash or trade discount according to the practice, normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof and the expression "purchase price" shall be construed accordingly;

Explanation.-

(i) In relation to the transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract, 'sale price' shall mean such amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of such works contract, the amount representing labour and other service charges incurred for such execution, and where such labour and other service charges are no quantifiable, the amount of such charges shall be calculated at such percentage as may be prescribed.

xx xx

6. Determination of taxable turnover

(1) Subject to the provisions of sub-section (2), in determining the taxable turnover of a dealer for the purposes of this Act, the following deductions shall be made from his gross turnover, namely:-

(a) turnover of sale of goods outside the State;

(b) turnover of sale of goods in the course of inter-State trade and commerce;

(c) turnover of sale of goods in the course of the import of the goods into the territory of India;

(d) turnover of sale of goods in the course of the export of the goods out of the territory of India.

(e) turnover of export of goods out of State;

(f) turnover of disposal of goods otherwise than by sale;

(g) turnover of sale of exempted goods in the State;

(h) turnover of sale of goods to such foreign diplomatic missions/consulates and their diplomats, and agencies and organizations of the United Nations and their diplomats as may be prescribed; and

(i) turnover of sale of goods returned to him, subject to such restrictions and conditions as may be prescribed,

and to the remainder shall be added the purchases taxable under sub-section (3) of section 3, if any.

xx xx

(128) 'Dealer' has been defined in Section 2(1)(m) of the Act. 'Goods' have been defined in Section 2(1)(r) of the Act. 'Sale' has been defined in Section 2(1)(ze) of the Act to include even transfer of property in goods involved in execution of works contract. Explanation (I) thereto provides that in relation to transfer of property in goods involved in execution of a works contract 'sale price' shall mean, amount arrived at by deducting from the amount of valuable consideration, the amount representing labour and other service charges. No details of other service charges have been provided. Cost of land cannot be said to be falling in the term service charges. No procedure was provided before notifying Rule 25 in the Rules w.e.f. 17.5.2010. 'Sale price' has been defined in Section 2(1)(zg) of the Act. Works contract has been defined in Section 2(1)(z) of the Act. 'Gross turnover' has been defined in Section 2(1)(u) of the Act to mean aggregate of sale prices received or receivable in respect of any goods sold and 'tax turnover' has been defined in Section 2(1)(zn) of the Act to mean the figure arrived at in terms of the provisions of Sections 6 and

3(3) of the Act. Levy of tax on the transfer of property in goods in a works contract is no more an issue. It is only the quantum for the purpose of taxation.

(129) The definition of 'sale price', as existed upto 19.3.2009 and from 20.3.2009 onwards is extracted below:

zg) "sale price" means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed at the time of sale as cash or trade discount according to the practice, normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof and the expression "purchase price" shall be construed accordingly;	zg) "sale price" means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed at the time of sale as cash or trade discount according to the practice, normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof and the expression "purchase price" shall be construed accordingly;
Explanation:-	Explanation:-
(i) In relation to the transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract, 'sale price' shall mean such amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for execution of such works contract, the amount representing labour an other service charges incurred for such execution, and where such labour and other service charges are not quantifiable, the sale price shall be the cost of acquisition of the goods and the margin of profit on them prevalent in the trade plus the cost of transferring the	(i) In relation to the transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract, 'sale price' shall mean such amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of such works contract, the amount representing labour and other service charges incurred for such execution, and where such labour and other service charges are not quantifiable, the amount of such charges shall be calculated at such percentage as may be prescribe.

property in the goods and all other expenses in relation thereto till the property in them, whether as such or in any other form, passes to the contractee and where the property passes in a different form shall include the cost of conversion.	

(130) Rules 25(2) to (5) were added in the Rules vide notification dated 26.3.2010. These provide for method for calculation of taxable turnover in execution of a works contract. Certain deductions are provided. The issue was considered by this Court in earlier round of litigation between the parties in CHD Developers Ltd.'s case (supra). Finding that there were certain anomalies in the Rules, the matter was disposed of *inter-alia* with observation that the State will carry out amendment in the Rules in terms of the stand taken before the Court. Rules 25(2) to (5) were substituted vide notification dated 23.7.2015 with retrospective effect from 26.3.2010.

(131) The levy being bad in the absence of machinery provision was considered by Hon'ble the Supreme Court in L&T's 4th case (supra). The issue under consideration before Hon'ble the Supreme Court was as to whether service tax can be levied on indivisble works contracts prior to its introduction on 1.6.2007 by Finance Act, 2007, which expressly made the works contracts liable to service tax. Hon'ble the Supreme Court traced entire history of the works contract. Service tax was levied with amendments carried out vide Finance Act, 1995. Section 65(105) of the Finance Act, 1994 defined taxable service. Clause (zzzh) thereof provides that service provided to any person, by any other person, in relation to construction of a complex, will be a taxable service. It was added in the year 2004. Section 67 of the Finance Act, 1994 provides for valuation of taxable services for charging service tax. It provides that value of any taxable service shall be the gross amount charged by the service provider for such service rendered by him. The provisions of the Finance Act, 1994 were amended vide Finance Act, 2007. Section 65(105)(zzzza) was added. It provides for levy of service tax in relation to execution of works contract. Works contract was also defined. Section 67 of the Finance Act, 1994 was also amended. It provides that in case where the provision for service is under consideration, which is not ascertainable, it shall be the amount as may be determined in the prescribed manner. Subsequent thereto, in Service Tax (Determination of Value) Rules,

2006, Rule 2-A was added. It provided for determination of value of service tax in execution of a works contract. The judgment of Hon'ble the Supreme Court in ***Gannon Dunkerley and Co.'s*** case (supra) was considered. It provided for modalities of taxing composite indivisible works contracts. The enunciation of law in the aforesaid judgment of Hon'ble the Supreme Court was summed up in the following paras:

> "14. A reading of this judgment, on which counsel for the assessees heavily relied, would go to show that the separation of the value of goods contained in the execution of a works contract will have to be determined by working from the value of the entire works contract and deducting therefrom charges towards labour and services. Such deductions are stated by the Constitution Bench to be eight in number. What is important in particular is the deductions which are to be made under sub-paras (f), (g) and (h). Under each of these paras, a bifurcation has to be made by the charging Section itself so that the cost of establishment of the contractor is bifurcated into what is relatable to supply of labour and services. Similarly, all other expenses have also to be bifurcated insofar as they are relatable to supply of labour and services, and the same goes for the profit that is earned by the contractor. These deductions are ordinarily to be made from the contractor's accounts. However, if it is found that contractors have not maintained proper accounts, or their accounts are found to be not worthy of credence, it is left to the legislature to prescribe a formula on the basis of a fixed percentage of the value of the entire works contract as relatable to the labour and service element of it. This judgment, therefore, clearly and unmistakably holds that unless the splitting of an indivisible works contract is done taking into account the eight heads of deduction, the charge to tax that would be made would otherwise contain, apart from other things, the entire cost of establishment, other expenses, and profit earned by the contractor and would transgress into forbidden territory namely into such portion of such cost, expenses and profit as would be attributable in the works contract to the transfer of property in goods in such contract. This being the case, we feel that the learned counsel for the assessees are on firm ground when they state that the service tax charging section itself must lay down with

specificity that the levy of service tax can only be on works contracts, and the measure of tax can only be on that portion of works contracts which contain a service element which is to be derived from the gross amount charged for the works contract less the value of property in goods transferred in the execution of the works contract. This not having been done by the Finance Act, 1994, it is clear that any charge to tax under the five heads in Section 65(105) noticed above would only be of service contracts simpliciter and not composite indivisible works contracts.

15. At this stage, it is important to note the scheme of taxation under our Constitution. In the lists contained in the 7th Schedule to the Constitution, taxation entries are to be found only in lists I and II. This is for the reason that in our Constitutional scheme, taxation powers of the Centre and the States are mutually exclusive. There is no concurrent power of taxation. This being the case, the moment the levy contained in a taxing statute transgresses into a prohibited exclusive field, it is liable to be struck down. In the present case, the dichotomy is between sales tax leviable by the States and service tax leviable by the Centre. When it comes to composite indivisible works contracts, such contracts can be taxed by Parliament as well as State legislatures. Parliament can only tax the service element contained in these contracts, and the States can only tax the transfer of property in goods element contained in these contracts. Thus, it becomes very important to segregate the two elements completely for if some element of transfer of property in goods remains when a service tax is levied, the said levy would be found to be constitutionally infirm. This position is well reflected in Bharat Sanchar Nigam Limited v. Union of India, (2006) 3 SCC 1, as follows:-

"88. No one denies the legislative competence of the States to levy sales tax on sales provided that the necessary concomitants of a sale are present in the transaction and the sale is distinctly discernible in the transaction. This does not however allow the State to entrench upon the Union List and tax services by including the cost of such service in the value of the goods. Even in those composite contracts which

are by legal fiction deemed to be divisible under Article 366(29-A), the value of the goods involved in the execution of the whole transaction cannot be assessed to sales tax. As was said in Larsen & Toubro v. Union of India[(1993) 1 SCC 364] : (SCC p. 395, para 47) :-

"47....The cost of establishment of the contractor which is relatable to supply of labour and services cannot be included in the value of the goods involved in the execution of a contract and the cost of establishment which is relatable to supply of material involved in the execution of the works contract only can be included in the value of the goods."

89. For the same reason the Centre cannot include the value of the SIM cards, if they are found ultimately to be goods, in the cost of the service. As was held by us in Gujarat Ambuja Cements Ltd. v. Union of India [(2005) 4 SCC 214] , SCC at p. 228, para 23:-

"23...This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject- matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field."

[Emphasis supplied]

(132) Examining the provisions of the Finance Act, 1994, as amended vide Finance Act, 2006, with reference to levy of tax on the works contract, it was opined that for the first time with amendment in the Finance Act, 2006, provisions were made for ascertaining the amount of service component in a works contract. Relevant paras thereof are extracted below:

"23. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts . This is clear from the very language of Section 65(105) which

defines "taxable service" as "any service provided". All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid Sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.

xx xx xx

25. We have already seen that Rule 2(A) framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and minusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and

> this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax."

(133) Thereafter, the issue was considered regarding leviability of service tax on the composite works contract in the absence of machinery provision prior to 1.6.2007. Relevant paras thereof, where the earlier judgments were discussed, are extracted below:

> "33. The aforesaid finding is in fact contrary to a long line of decisions which have held that where there is no machinery for assessment, the law being vague, it would not be open to the assessing authority to arbitrarily assess to tax the subject. Various judgments of this Court have been referred to in the following passages from Heinz India (P) Ltd. v. State of U.P., (2012) 5 SCC 443. This Court said:-
>
> "15. This Court has in a long line of decisions rendered from time to time, emphasised the importance of machinery provisions for assessment of taxes and fees recoverable under a taxing statute. In one of the earlier decisions on the subject a Constitution Bench of this Court in K.T. Moopil Nair v. State of Kerala [AIR 1961 SC 552] examined the constitutional validity of the Travancore-Cochin Land Tax Act (15 of 1955). While recognising what is now well-settled principle of law that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, this Court found that the enactment in question was violative of Article 14 of the Constitution for inequality was writ large on the Act and inherent in the very provisions under the taxing section thereof. Having said so, this Court also noticed that the Act was silent as to the machinery and the procedure to be followed in making the assessment. It was left to the executive to evolve the requisite machinery and procedure thereby making the whole thing, from beginning to end, purely administrative in character completely ignoring the legal position that the assessment of a tax on person or property is a quasi- judicial exercise."
>
> 16. Speaking for the majority Sinha, C.J. said: (K.T. Moopil case [AIR 1961 SC 552] , AIR p. 559, para 9)

"9. … Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse to proceedings in a higher civil court. The Act merely declares the competence of the Government to make a provisional assessment, and by virtue of Section 3 of the Madras Revenue Recovery Act, 1864, the landholders may be liable to pay the tax. The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the Executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi-judicial character."

16. In Rai Ramkrishna v. State of Bihar [AIR 1963 SC 1667] this Court was examining the constitutional validity of the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961. Reiterating the view taken in K.T. Moopil Nair [AIR 1961 SC 552] this Court held that a statute is not beyond the pale of limitations prescribed by Articles 14 and 19 of the Constitution and that the test of reasonableness prescribed by Article 304(b) is justiciable. However, in cases where the statute was completely discriminatory or provides no procedural machinery for assessment and levy of tax or where it was confiscatory, the Court would be justified in striking it down as unconstitutional. In such cases the character of the material provisions of the impugned statute may be such as may justify the Court taking the view that in substance the taxing statute is a cloak adopted by the legislature for achieving its confiscatory purpose.

17. In Jagannath Baksh Singh v. State of U.P. [AIR 1962 SC 1563] this Court was examining the constitutional validity of the U.P. Large Land Holdings Tax Act (31 of 1957). Dealing

with the argument that the Act did not make a specific provision about the machinery for assessment or recovery of tax, this Court held: (AIR pp. 1570-71, para 17)

"17. … if a taxing statute makes no specific provision about the machinery to recover tax and the procedure to make the assessment of the tax and leaves it entirely to the executive to devise such machinery as it thinks fit and to prescribe such procedure as appears to it to be fair, an occasion may arise for the courts to consider whether the failure to provide for a machinery and to prescribe a procedure does not tend to make the imposition of the tax an unreasonable restriction within the meaning of Article 19(5). An imposition of tax which in the absence of a prescribed machinery and the prescribed procedure would partake of the character of a purely administrative affair can, in a proper sense, be challenged as contravening Article 19(1)(f)."

18. In State of A.P. v. Nalla Raja Reddy [AIR 1967 SC 1458] this Court was examining the constitutional validity of the Andhra Pradesh Land Revenue (Additional Assessment) and Cess Revision Act, 1962 (22 of 1962) as amended by the Amendment Act (23 of 1962). Noticing the absence of machinery provisions in the impugned enactments this Court observed: (AIR p. 1468, para 22)

"22. … if Section 6 is put aside, there is absolutely no provision in the Act prescribing the mode of assessment. Sections 3 and 4 are charging sections and they say in effect that a person will have to pay an additional assessment per acre in respect of both dry and wet lands. They do not lay down how the assessment should be levied. No notice has been prescribed, no opportunity is given to the person to question the assessment on his land. There is no procedure for him to agitate the correctness of the classification made by placing his land in a particular class with reference to ayacut, acreage or even taram. The Act does not even nominate the appropriate officer to make the assessment to deal with questions arising in respect of assessments and does not prescribe the procedure for assessment. The whole thing is left in a nebulous form. Briefly stated under the Act there is no procedure for assessment and however grievous the blunder made there is

no way for the aggrieved party to get it corrected. This is a typical case where a taxing statute does not provide any machinery of assessment."

The appeals filed by the State against the judgment of the High Court striking down the enactment were on the above basis dismissed.

19. Reference may also be made to Vishnu Dayal Mahendra Pal v. State of U.P. [(1974) 2 SCC 306] and

D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala [(1980) 2 SCC 410] where this Court held that sufficient guidance was available from the Preamble and other provisions of the Act. The members of the committee owe a duty to be conversant with the same and discharge their functions in accordance with the provisions of the Act and the Rules and that in cases where the machinery for determining annual value has been provided in the Act and the rules of the local authority, there is no reason or necessity of providing the same or similar provisions in the other Act or Rules.

20. There is no gainsaying that a total absence of machinery provisions for assessment/recovery of the tax levied under an enactment, which has the effect of making the entire process of assessment and recovery of tax and adjudication of disputes relating thereto administrative in character, is open to challenge before a writ court in appropriate proceedings. Whether or not the enactment levying the tax makes a machinery provision either by itself or in terms of the Rules that may be framed under it is, however, a matter that would have to be examined in each case."

34. In a recent judgment by one of us, namely, Shabina Abraham & Ors. v. Collector of Central Excise & Customs, judgment dated 29th July, 2015, in Civil Appeal No.5802 of 2005, this Court held:-

"27. It is clear on a reading of the aforesaid paragraph that what revenue is asking us to do is to stretch the machinery provisions of the Central Excise and Salt Act, 1944 on the basis of surmises and conjectures. This we are afraid is not possible. Before leaving the judgment in Murarilal's case (supra), we wish to add that so far as partnership firms

are concerned, the Income Tax Act contains a specific provision in Section 189(1) which introduces a fiction qua dissolved firms. It states that where a firm is dissolved, the Assessing Officer shall make an assessment of the total income of the firm as if no such dissolution had taken place and all the provisions of the Income Tax Act would apply to assessment of such dissolved firm. Interestingly enough, this provision is referred to only in the minority judgment in M/s. Murarilal's case (supra).

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32. The impugned judgment in the present case has referred to Ellis C. Reid's case but has not extracted the real ratio contained therein. It then goes on to say that this is a case of short levy which has been noticed during the lifetime of the deceased and then goes on to state that equally therefore legal representatives of a manufacturer who had paid excess duty would not by the self-same reasoning be able to claim such excess amount paid by the deceased. Neither of these reasons are reasons which refer to any provision of law. Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs to be interpreted accordingly. We wholly disapprove of the approach of the High Court. It flies in the face of first principle when it comes to taxing statutes. It is therefore necessary to reiterate the law as it stands. In Partington v. A.G., (1869) LR 4 HL 100 at 122, Lord Cairns stated:

"...... If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute".

35. We find that the Patna, Madras and Orissa High Courts have, in fact, either struck down machinery provisions or

held machinery provisions to bring indivisible works contracts into the service tax net, as inadequate. The Patna High Court judgment was expressly approved by this Court in State of Jharkhand v. Voltas Ltd., East Singhbhum, (2007) 9 SCC 266. This Court held:-

36. "9. Section 21 of the Bihar Finance Act, 1981, as amended states:

"21.***Taxable turnover***.—(1) For the purpose of this part the taxable turnover of the dealer shall be that part of his gross turnover which remains after deducting therefrom— (a)(i) in the case of the works contract the amount of labour and any other charges in the manner and to the extent prescribed;"

10. Rule 13-A of the Bihar Sales Tax Rules which was also amended by a notification dated 1-2-2000 reads as follows:

"13-A.Deduction in case of works contract on account of labour charges.—If the dealer fails to produce any account or the accounts produced are unreliable deduction under sub-clause (i) of clause (a) of sub- section (1) of Section 21 on account of labour charges in case of works contract from gross turnover shall be equal to the following percentages..."

11. The aforesaid provisions have been adopted by the State of Jharkhand vide notification dated 15- 12-2000 and thus are applicable in the State of Jharkhand.

12. Interpretation of the amended Section 21(1) and the newly substituted Rule 13-A fell for consideration of a Division Bench of the Patna High Court in Larsen & Toubro Ltd. v. State of Bihar [(2004) 134 STC 354] . The Patna High Court in the said decision observed as under:

"22. Rule 13-A unfortunately does not talk of 'any other charges'. Rule 13-A unfortunately does not take into consideration that under the Rules the deduction in relation to any other charges in the manner and to the extent were also to be prescribed. Rule 13-A cannot be said to be an absolute follow-up legislation to sub-clause (i) of clause (a) of Section 21(1). When the law provides that something is to be prescribed in the Rules then that thing must be

prescribed in the Rules to make the provisions workable and constitutionally valid. In Gannon Dunkerley & Co. [(1993) 1 SCC 364 :

(1993) 88 STC 204] the Supreme Court observed that as sub-section (3) of Section 5 and sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Act and the Rules were not providing for particular deductions, the same were invalid. In the present matter the constitutional provision of law says that particular deductions would be provided but unfortunately nothing is provided in relation to the other charges either in Section 21 itself or in the Rules framed in exercise of the powers conferred by Section 58 of the Bihar Finance Act.

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31. In our considered opinion sub-clause (i) of clause (a) of Section 21(1) read with Rule 13-A of the Rules did not make sub-clause (1) fully workable because the manner and extent of deduction relating to any other charges has not been provided/prescribed by the State."

37. Similarly, the Madras High Court in Larsen and Toubro Ltd. v. State of Tamil Nadu and Ors., [1993] 88 STC 289, struck down Rules 6A and 6B of the Tamil Nadu General Sales Tax Rules as follows:-

"32.….The eight principles are the criteria and the norms which every State legislation has to conform as per the decision of the Apex Court which has been already adverted to by us supra. In addition thereto, we have also referred to at considerable length the particular reasons assigned by the apex Court while striking down section of the Rajasthan Sales Tax Act and rule 29(2) of the Rules made thereunder. The impugned rules 6-A and 6-B of the Rules, in our view, do not pass the above vital and essential test and the basic requirements laid down by the ratio of the decision of the apex Court in Gannon Dunkerley's case supra; . The impugned rules are squarely opposed to the ratio of the said decision and particularly the ratio laid down in conclusion Nos. 1, 2, 3, 6 and 7 of the decision in Gannon Dunkerley's case [1993] 88 STC 204 supra; and also reiterated by the apex Court in the second Builders

Association of India case [1993] 88 STC 248 (SC); [1992] 2 MTCR 542. In the light of the above, we see no merit in the stand taken for the respondents relying upon the decisions reported in [1957] 8 STC 561 (SC) (A. V. Fernandez v. State of Kerala) and [1969] 23 STC 447 (Mad.) (Kumarasamy Pathar v. State of Madras) that the omission to exclude certain items relating to non-taxable turnovers is of no consequence and does not affect or undermine the validity of the impugned proceedings. Consequently, applying the ratio of the above decisions, we hereby strike down rules 6-A and 6-B as illegal and unconstitutional, besides being violative of sections 3 to 6, 14 and 15 of the Central Sales Tax Act and consequently unenforceable.

33. The provisions of section 3-B merely levied the tax on the transfer of property in goods involved in the execution of the works contract. The assessment, determination of liability and recovery had to be under the provisions of the Act read with the relevant rules. In exercise of rule- making power conferred under section 53(1) and (2)(bb), rules 6-A and 6-B came to be made and published. The rules miserably failed to provide the procedure and principles for effectively determining the taxable turnover, after excluding the items of turnover relating to such works contract which could not be subjected to levy of tax by the State in exercise of its power of legislation under entry 64 of the State List. Rule 6 by its own operation had no application in the matter of determination of liability under section 3-B since it has been made applicable only in respect of determining the taxable turnover of a dealer under section 3, 3-A, 4 or 5. Consequently, with our decision above striking down rules 6-A and 6-B of the Rules, there is no proper machinery provisions to determine the taxable turnover for purposes of section 3-B. The provisions of section 3-B, therefore, in the absence of the necessary rules for enforcing the same and determining the taxable turnover for the purposes of section 3-B is rendered dormant, ineffective and unenforceable. Such would be the position till sufficient provisions are made either in the Act itself or in the rules by virtue of the rule-making power to ignite, activate and give life and force to section 3-B of the Act."

> 38. And the Orissa High Court in Larsen & Turbo v. State of Orissa, (2008) 012 VST 0031, held that machinery provisions cannot be provided by circulars and held that therefore the statute in question, being unworkable, assessments thereunder would be of no effect."
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> [Emphasis supplied]

(134) Finally, it was opined that no sevice tax was leviable prior to 1.6.2007.

(135) High Court, *inter-alia*, considered the issue regarding taxability of the service provided by the builders in the absence of machinery provision for computation of value of service, if any, involved in construction of a complex. Vide Section 65(105)(zzzh) of the Finance Act, 1994, service provided to any person by any other person in relation to construction of complex was defined to be taxable service. The term "construction of complex" was defined under Section 65 (30a) of the Finance Act, 1994. It was opined that service tax is essentially a tax on the value created by services as distinct from a tax on the value added by manufacturing goods. Construction of a complex essentially has three broad components, namely, land on which complex is constructed; (ii) goods which are used in construction; and (iii) various activities which are undertaken by the builder directly or through other contractors. The title of the unit (immoveable property) does not pass on to the prospective buyer at the stage of booking. No service tax is leviable for sale of a completed building as it would amount to sale of immoveable property. Examining the provisions of the Finance Act, 1994 and the relevant rules framed thereunder, the court found that there were no machinery provisions for ascertaining the service element involved in the composite contract. To ascertain levy of service tax on services, it is essential that machinery provisions provide for a mechanism for ascertaining the measure of tax, i.e., value of services which can be charged to service tax. Rule 2A of the Service Tax (Determination of Value) Rules, 2006 providing for determination of value of taxable services involved in the execution of works contract provided that such value shall be the gross amount charged for the works contract less the value of transfer of property in goods involved in execution of works contract. However, the same was not held to be valid for the reason that in a composite contract in the case of builder, sale of land is also involved. The consideration charged by the builder from a buyer does not include only the services provided or the element of goods. Referring to various judgments dealing with the issue

including the judgment of Hon'ble the Supreme Court in L&T's 2nd case (supra) and also dealing with the fact that vide notification of the circular, abatement to the extent of 75% was provided from the gross receipt for the purpose of determination of services rendered in a contract, the court opined that no service tax is chargeable on the composite contract and levy to that extent was set aside.

(136) The issues, as involved therein, were summed up in para No. 4 thereof, which is extracted below:

> "4. The controversy involved in these petition relates to the question whether the consideration paid by flat buyers to a builder/promoter/developer for acquiring a flat in a complex, which is under construction/development, could be subjected to levy of service tax. According to the Petitioners, the agreements entered into by them with the builder are for purchase of immovable property and the Parliament does not have the legislative competence to levy service tax on such transaction. The Petitioners further claim that the Act and the rules made thereunder do not provide any machinery for computation of value of services, if any, involved in construction of a complex and, therefore, no such tax can be imposed."

(137) Analysing the provisions, as existed and referring to the judgment of Hon'ble the Supreme Court in L&T's 4th case (supra), considering the amendment as carried out in Finance Act, 1994 vide Finance Act, 2010 and in Service Tax (Determination of Value) Rules, 2006, w.e.f. 1.7.2012, it was opined that no service tax was chargeable in respect of composite contract as entered into by the builder. The relevant paras thereof are extracted below:

> "53. As noticed earlier, in the present case, neither the Act nor the Rules framed therein provide for a machinery provision for excluding all components other than service components for ascertaining the measure of service tax. The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract.
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> 55. In view of the above, we negate the challenge to insertion of clause (zzzzu) in sub-section 105 of Section 65

> of the Act. However, we accept the Petitioners contention that no service tax under section 66 of the Act read with Section 65(105)(zzzh) of the Act could be charged in respect of composite contracts such as the ones entered into by the petitioners with the builder. The impugned explanation to the extent that it seeks to include composite contracts for purchase of units in a complex within the scope of taxable service is set aside."

(138) The assessment years involved in the present bunch of petitions are from 2005-06 to 2011-12.

(139) A combined reading of the provisions of the Act and the Rules, as added w.e.f. 17.5.2010, provides for the manner of calculation of taxable turnover. Prior to 17.5.2010, there were no machinery provisions in the Act or the Rules to calculate taxable turnover ensuring that only value of goods used in the works contracts are taxed. The issue was considered in the earlier round of litigation including Rule 25(2) of the Rules. Certain anomalies were found in the Rules added w.e.f. 17.5.2010. Affidavit was filed by the State. The matter was disposed of vide detailed judgment in CHD Developers Limited's case (supra) giving liberty to the State to amend the Rules in consonance with the affidavit filed in the court. Subsequent thereto, Rule 25 of the Rules was amended vide notification dated 23.7.2015 with retrospective effect from 17.5.2010. Relevant paras of the aforesaid judgment are extracted below:

> "44. In case the provisions of law are seeking to charge sales tax on any amount other than the value of the goods transferred in course of execution of works contract, the provisions would be *ultra vires* to the Constitution of India. The tax is to be computed on a value not exceeding the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. However, the 'deductive method' requires all the deductions to be made therefrom to be specifically provided for to ensure that tax is charged only on the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. When 'deductive method' has been prescribed under the rules for ascertaining the taxable turnover, ordinarily it should include a residuary clause in consonance with the mandate of law so as to cover all situations which can be

envisaged.

45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property. Consequently, Rule 25(2) of the Rules is held to be valid by reading it down to the extent indicated hereinbefore and subject to the State Government remaining bound by its affidavit dated 24.4.2014. The State Government shall bring necessary changes in the Rules in consonance with the above observations."

(140) Vires of the Rules is not in question in the present set of petitions. The stand of the petitioners was that to challenge the vires of the Rules, separate petitions have been filed, which are pending.

Finding

(141) For the period upto 16.5.2010, there were no Rules or instructions on the subject, to provide for manner of calculation of taxable turnover. In the absence of the machinery provisions specifying the details, though the levy as such cannot be disputed but it has become unenforceable upto 16.5.2010.

(142) From 17.5.2010 onwards, there being Rules in existence, having been amended in terms of judgment of this Court in CHD Developers' case (supra) and observations made therein, we do not find that the levy cannot be sustained.

ISSUE NO. (8)

Whether assessment could be framed in the name of a company which stood merged in another company and lost its entity by operation of law ?

(143) In ***Saraswati Industrial Syndicate Ltd.'s*** case (supra), Hon'ble the Supreme Court, while considering the issue regarding existence of a company after it is dissolved having been merged in another company on account of re-construction or amalgamation,

opined that after the amalgamation on the basis of the order passed by the High Court, the transferor-company ceases to exist in the eyes of law and it effaced itself for all practical purposes. It is not possible to treat two companies, namely, the transferor and transferee company as partners or jointly liable in respect of their liabilities and assets.

(144) The issue was subsequently considered by a Division Bench of Delhi High Court in ***Spice Entertainment Ltd.'s*** case (supra), where challenge was to the order of assessment framed in the case of the company, which stood dissolved after amalgamation with the transferee company. As to whether it was merely procedural defect or fatal, was addressed. While referring to the judgment of Hon'ble the Supreme Court in ***Saraswati Industrial Syndicate Ltd.'s*** case (supra), it was opined that the company incorporated under the Companies Act is a juristic person. It takes its birth and gets life with the incorporation and dies with the dissolution. On amalgamation, the amalgamating company ceases to exist in the eyes of law. It was further opined that mere participation by the transferee company in assessment proceedings will be of no consequence as there is no estoppel against law. It is not a mere procedural defect. Relevant paras thereof are extracted below:

> "8. A company incorporated under the Indian Companies Act is a juristic person. It takes its birth and gets life with the incorporation. It dies with the dissolution as per the provisions of the Companies Act. It is trite law that on amalgamation, the amalgamating company ceases to exist in the eyes of law. This position is even accepted by the Tribunal in para 14 of its order extracted above. Having regard this consequence provided in law, in number of cases, the Supreme Court held that assessment upon a dissolved company is impermissible as there is no provision in Income-Tax to make an assessment thereupon. ....
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> 11. After the sanction of the scheme on 11th April, 2004, the Spice ceases to exist w.e.f. 1st July, 2003. Even if Spice had filed the returns, it become incumbent upon the Income tax authorities to substitute the successor in place of the said "dead person". When notice under Section 143(2) was sent, the Appellant/ amalgamated company appeared and brought this fact to the knowledge of the AO. He, however, did not substitute the name of the Appellant on record. Instead, the

Assessing Officer made the assessment in the name of M/s Spice which was non existing entity on that day. In such proceedings and assessment order passed in the name of M/s Spice would clearly be void. Such a defect cannot be treated as procedural defect. Mere participation by the Appellant would be of no effect as there is no estoppel against law."

Finding

(145) The issue is answered in negative. It is held that no assessment can be framed against a company, which stood dissolved after its merger with another company. As fairly stated by learned counsel for the State, the assessment order dated 8.3.2016 (Annexure P-8), passed against M/s Sukh Realtors Pvt. Ltd., the company which already stood dissolved after merger with M/s S. S. Group Pvt. Ltd., is set aside. There is no question of grant of specific liberty to the department to pass any fresh order, as if the law permits, it can always take action.

RELIEF

(146) For the reasons mentioned above, the legal issues, as framed in para No. 81 of the judgment, are answered as under:

(1) The judgment of Hon'ble the Supreme Court in K. Raheja Development Corporation's case (supra) was a binding precedent declaring the law at that time on the subject to be followed by all courts and authorities below and action could have been taken by the authorities on the basis thereof, if considered appropriate.

(2) The extended period for exercise of revisional jurisdiction will be applicable only in cases where period prescribed prior to the amendment had not expired and not where the period had earlier expired as the amendment cannot put life to a dead claim.

(3) The issue is not being examined as in pursuance to the show cause notices, orders have already been passed and those are under consideration before this court.

(4) The question is answered in negative opining that for exercise of power of revision while invoking extended period of limitation as provided for in second proviso to Section 34(1) of the Act, in normal circumstances, the event has to be after the normal period of limitation had

already expired. However, there can be some exceptions such as where event occurred just before expiry of period of limitation and the action was taken within reasonable time or the delay is satisfactorily explained. Exception clause is to be invoked only in exceptional circumstances. It is always required to be strictly interpreted even if there is hardship to any of the parties.

(5) Any instructions issued by the Department are binding on the departmental authorities except on the issue where any judgment to the contrary exists. These are not binding on the court. A circular which is contrary to statutory provisions has no existence in law.

(6) As the vires of the aforesaid provision has already been upheld by this court, we do not find any reason to re-examine the issue.

(7) For the period upto 16.5.2010, there were no Rules or instructions on the subject, to provide for manner of calculation of taxable turnover. In the absence of the machinery provisions specifying the details, though the levy as such cannot be disputed but it has become unenforceable upto 16.5.2010.

From 17.5.2010 onwards, there being Rules in existence, having been amended in terms of judgment of this Court in ***CHD Developers'*** case (supra) and observations made therein, we do not find that the levy cannot be sustained.

(8) The issue is answered in negative. It is held that no assessment can be framed against a company, which stood dissolved after its merger with another company. As fairly stated by learned counsel for the State, the assessment order dated 8.3.2016 (Annexure P-8), passed against M/s Sukh Realtors Pvt. Ltd., the company which already stood dissolved after merger with M/s S. S. Group Pvt. Ltd., is set aside. There is no question of grant of specific liberty to the department to pass any fresh order, as if the law permits, it can always take action.

(147) The writ petitions stand disposed of accordingly.

Payel Mehta