
(2014) 10 KL CK 0078

In the High Court Of Kerala

Case No : WP (C). Nos. 5723, 16678, 31619 of 2010, 1482 of 2012 and 28865 of 2013

N.C. Gardens and Beach Resort

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 28-10-2014

Acts Referred:

Citation : (2014) 4 KHC 540 : (2014) 4 KLJ 714

Hon'ble Judges : A.K. Jayasankaran Nambiar, J

Bench : Single Bench

Advocate : K.T. Shyamkumar and Harish R. Menon, Advocate for the Appellant;
Liju V. Stephen, Government Pleader, Advocate for the Respondent

Judgement

A.K. Jayasankaran Nambiar, J.—As the issue involved in all these writ petitions is the same, they are taken up together for consideration and disposed by this common judgment.

2. The issue involved in all these writ petitions is the liability to the charge of luxury tax, under the Kerala Tax on Luxuries Act, 1976, (hereinafter referred to as "the Luxury Tax Act", for short), of amounts collected by the assessee, a resort hotel, by way of entry ticket charges and video/camera permit charges, while permitting customers, who are not residents at the hotel, to access the park and beach that is maintained by the hotel. The assessment years under consideration are assessment years 2001-2002 to 2010-2011. The luxury tax assessment of the assessee for the year 2001-2002 was initially completed, without taking into account the aforementioned charges that were collected by the assessee, for the purposes of the levy. The assessment was completed by an order dated 06.10.2005. Thereafter, by a notice dated 06.02.2008, the Commissioner of Commercial Taxes sought to suo motu revise the assessment order dated 06.10.2005 by invoking powers under Section 8 of the Luxury Tax Act. While the assessee objected to the steps taken by the Commissioner of Commercial Taxes for suo motu revision, inter alia, on the ground that the said

proceedings were initiated beyond the period of limitation, the said objections were overruled and by an order dated 23.07.2009, the Commissioner directed the Assessing Officer to pass fresh orders of assessment after taking into consideration the charges received by the assessee towards entry ticket charges and video/camera permit charges. The impugned order of the Commissioner is produced as Ext. P4 in W.P. (C). No. 5723 of 2010 and is impugned therein by the petitioner assessee. In the said writ petition, Ext. P7 assessment order and Ext. P8 penalty order passed by the assessing authority, pursuant to Ext. P4 order of the Commissioner, are also impugned.

3. For the assessment years 2002-2003 to 2004-2005, the luxury tax assessments pertaining to the assessee were completed without taking into account the charges collected by the assessee towards entry ticket charges and video/camera permit charges. It is seen that the said charges were not included by the assessee while filing its returns for the purposes of the Luxury Tax Act. The assessee contends however that the details regarding the charges collected had been made available to the Assessing Officer at the time of assessment. The assessments that were completed for the said years were subsequently reopened in terms of Section 6(5) of the Luxury Tax Act and revised orders were passed against the assessee in respect of the said years. Taking into account the revised orders passed for the aforesaid years, while completing the assessments pertaining to the assessee for the years 2005-2006 and 2006-2007, the Assessing Officer included the aforementioned charges while completing the assessments for those years. Thus the assessee was served with assessment orders for the period from 2002-2003 to 2006-2007 (five assessment years) which completed the assessments on it by including the entry ticket charges and video/camera permit charges for the purposes of luxury tax assessment. The assessee, thereafter, preferred an appeal against the assessment orders for the aforementioned years and the First Appellate Authority partly allowed the appeal by holding that, while the disputed charges collected by the assessee would not strictly fall within the purview of charges for luxury provided in the hotel, 50% of the said charges would, nevertheless, have to be included in the charges on which tax had to be levied in terms of the Act. Both the assessee and the Department preferred appeals against the orders of the First Appellate Authority before the Appellate Tribunal. The Appellate Tribunal considered all the appeals against the orders of assessment, as well as the orders of penalty that had been passed in the meanwhile, and by a common order dated 08.09.2009 allowed the appeals preferred by the assessee and rejected the appeals preferred by the Department. This common order of the Tribunal is produced as Ext. P13 in W.P. (C). No. 16678 of 2010, filed at the instance of the State of Kerala, and impugned therein.

4. For the assessment year 2007-2008, when pre-assessment notices were served on the assessee proposing to levy tax on the aforementioned charges, the proposal was objected to by the assessee. The objections were, however, overruled by the Assessing Officer, who proceeded to complete the assessments

by levying tax even on the aforementioned charges and further, also imposed a penalty on the assessee. The assessment order and the penalty order, passed against the assessee for the year 2007-2008, are produced as Exts. P4 and P5 in W.P. (C). No. 31619 of 2010 and impugned therein by the petitioner assessee.

5. W.P. (C). No. 1482 of 2012 is preferred by the petitioner assessee aggrieved by the assessments that were completed against him by including the aforementioned charges in the amounts on which luxury tax was levied. The assessment order is produced as Ext. P4 in the said writ petition and impugned therein. Similarly, in W.P. (C). No. 28865 of 2013, the assessment years in question are 2009-2010 and 2010-2011. The petitioner assessee, in the said writ petition, impugns Exts. P5 and P8 assessment orders for the years 2009-2010 and 2010-2011 as well as Ext. P9 penalty order for the year 2010-2011.

6. The common issue that arises in all the writ petitions is whether the levy of luxury tax under the Luxury Tax Act will be attracted to the charges collected by the assessee, by way of entry ticket charges and video/camera permit charges issued by them to customers who sought to enter their premises for the purposes of accessing the park and beach that were maintained by the assessee. The assessing authority was of the view that the said charges should also be included in the amounts that would be subjected to the levy of luxury tax. The first appellate authority took the view that it is only those charges, that were collected from persons who were in occupation of rooms in the hotel, that would attract the levy of luxury tax under the Luxury Tax Act, and not charges that were collected from persons who were not in occupation of any room in the hotel. In a further appeal, the appellate tribunal, that considered the matter for the assessment years 2002-2003 to 2006-2007, was also of the same view. It is the correctness of this view that is called in question in the various writ petitions.

7. I have heard Sri. K.T. Shyamkumar, the learned counsel appearing on behalf of the petitioners in W.P. (C). No. 31619 of 2010, W.P. (C). No. 1482 of 2012, W.P. (C). No. 28865 of 2013 and W.P. (C). No. 5723 of 2010 and Sri. Liju V. Stephen, the learned Government Pleader appearing on behalf of the official respondents, as also on behalf of the State Government that is the petitioner, in W.P. (C). No. 16678 of 2010.

8. Before considering the issue regarding the applicability of the levy to the charges collected by the assessee, it would be apposite to notice the relevant provisions under the Act that deal with the levy and collection of luxury tax:--

"2. Definitions.--In this Act, unless the context otherwise requires:--

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(e) "hotel" means a building or part of a building where residential accommodation is by way of business provided for a monetary consideration and includes a lodging house.

Explanation.--A guest house run by the Government or a company or a

corporation established by or under any law or any other agency shall be deemed to be a hotel within the meaning of this clause;

(ee) "luxury" means a commodity or service that ministers comfort or pleasure;

(f) "Luxury provided in a hotel, house boat, hall, auditorium, kalyanamandapam or place of like nature" means accommodation for residence or use and other amenities and services provided in a hotel or a house boat or hall or auditorium or kalyanamandapam or place of like nature the rate of charges of accommodation for residence and other amenities and services provided excluding charges of food and liquor is one hundred and fifty rupees per day or more.

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4. Levy and collection of luxury tax.--(1) Subject to the provisions of this Act, there shall be levied and collected a tax, hereinafter called the "luxury tax", in respect of any luxury provided.-

(i) in a hotel, house boat, hall, auditorium or kalyanamandapam or including those attached to hotels, clubs, kalyanamandapam and places of the like nature which are rented for accommodation for residence or used for conducting functions, whether public or private, exhibition,

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(2) Luxury tax shall be levied and collected.-

(a) In respect of a hotel, for charges of accommodation for residence and other amenities and services provided in the hotel, excluding food and liquor.--

(i) at the rate of [seven and a half per cent] [per room] for hotels, in respect of rooms where the gross charges of accommodation for residence and other amenities and services provided is [above rupees two hundred and upto five hundred] per day.

(ii) at the rate of [twelve and a half per cent] for hotels in respect of rooms where the gross charges of accommodation for residence and other amenities and services provided is [above rupees five hundred per day].

[Provided that no luxury tax shall be payable, for such charges received in respect of service rendered outside the hotel premises, such as vehicle hire, boat hire and trekking.

Provided further that the hire charges received in respect of house boats owned or possessed with right to use it by the hotels shall be liable to tax under the Act.]

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(c) In respect of a convention centre, hall, kalyanamandapam, auditorium

including those attached to hotels, clubs or places of the like nature, for the charges for accommodation, amenities and services provided excluding food and beverages.--

(i) at the rate of ten per cent where the gross charges of accommodation and other amenities and services provided is above rupees three thousand and up to rupees ten thousand per day;

(ii) at the rate of fifteen per cent where the gross charges of accommodation and other amenities and services provided is above rupees ten thousand and up to rupees twenty thousand per day;

(iii) at the rate of twenty percent where the gross charges of accommodation and other amenities and services provided is above rupees twenty thousand per day."

9. It will be apparent from a perusal of the said provisions that the term "luxury provided in a hotel" refers to accommodation for residence or use and other amenities and services provided in a hotel, the rate of charges of accommodation for residence and other amenities and services provided, excluding charges of food and liquor, in which is Rs. 150/- per day or more. The term "luxury" is defined as meaning a commodity or service that ministers comfort for pleasure. In terms of Section 4 of the Act, in respect of the luxury provided in a hotel, the luxury tax has to be levied and collected, in respect of a hotel, for charges of accommodation for residence and other amenities and services provided in the hotel, excluding food and liquor, in the manner provided under Clauses (i) and (ii) of Section 4(2)(a) of the Act. Clauses (i) and (ii) of the said provision reads as under:

"4. Levy and collection of luxury tax.--(1) Subject to the provisions of this Act, there shall be levied and collected a tax, hereinafter called the "luxury tax", in respect of any luxury provided.-

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(2) Luxury tax shall be levied and collected.--

(a) In respect of a hotel, for charges of accommodation for residence and other amenities and services provided in the hotel, excluding food and liquor.--

(i) at the rate of [seven and a half per cent] [per room] for hotels, in respect of rooms where the gross charges of accommodation for residence and other amenities and services provided is [above rupees two hundred and upto five hundred] per day.

(ii) at the rate of [twelve and a half per cent] for hotels in respect of rooms where the gross charges of accommodation for residence and other amenities and services provided is [above rupees five hundred per day].

[Provided that no luxury tax shall be payable, for such charges received in respect of service rendered outside the hotel premises, such as vehicle hire, boat

hire and trekking.

Provided further that the hire charges received in respect of house boats owned or possessed with right to use it by the hotels shall be liable to tax under the Act.]

10. While interpreting the said provision, in the context of a case that involved the issue as to whether charges collected for ayurvedic treatment, laundry services and for boating arrangements made by a hotel where the customers were accommodated, would attract the levy of luxury tax under the Act, a Division Bench of this Court in *Brunton Boatyard Vs. State of Kerala*, observed as under:--

"4. Section 2(ee) defines "luxury" to mean a commodity or service that ministers comfort or pleasure. Sub-section (2) of S. 4 provides for levy of luxury tax at rates classified on the rates of charges for accommodation for residence and other amenities and services excepting those which are excluded. This, however, is put at rate applicable per day per room. The definition of "luxury provided in a hotel" in S. 2(f) means accommodation for residence and other amenities and services provided in a hotel. When these terms are taken together, the mere prescription that the rate would be per day per room cannot be held to mean that luxury tax is leviable only on rate of charges for accommodation for residence and other amenities and services attached to that room. This will give a restrictive construction for the term "other amenities and services" and would pin down the luxury tax levy to be confined to the charges for accommodation and amenities and services which would be offered for enjoyment irrespective of the requirement of the customer concerned. In our view, that is not the manner in which the said provision stands. The rate of charges for accommodation for residence is one of the components while other amenities and services enjoyed by the customer would also be luxury provided in a hotel, though that may vary from room to room, depending upon customer's violation and requirement. While that event would not be certain, but would be dependent upon the consumption and enjoyment of the luxuries as may be made available, that is not a ground to exclude any particular amenity or service from the purview of the terms "luxury" and "luxury provided in a hotel" as defined in the Act. No such exclusion is possible merely on the plea that it is not part of the accommodation for residence and is not such amenity or service as is intricately connected with the accommodation for residence. The statutory provisions in hand do not attempt any such restrictive construction. The term "luxury provided in a hotel" is defined to mean accommodation for residence and other amenities and services provided in a hotel excluding the items mentioned in S. 2(f). The use of the conjunction "and" after the phrase "accommodation for residence" clearly spells out the legislative intent that the amenities which fall into the net of that provision are not those merely confined to providing attendant services in connection with the requirement of an occupant of the hotel for residence. Again, the use of the conjunction "and" between the words "amenities and services"

amplifies to bring within its ambit all commodities or services that minister comfort or pleasure. Therefore, all amenities and services provided in a hotel as well as accommodation for residence amount to luxury for the purpose of S. 2(ee) and would fall within the term "luxury provided in a hotel" as defined in S. 2(f) of the Act."

11. It is clear, therefore, that while interpreting the provisions of Section 4(2), regarding the manner in which the tax is to be levied and collected, and in particular Clauses (i) and (ii) of Section(4)(2)(a), one has to bear in mind the observations of the Division Bench that the term "Luxury provided in a hotel" is defined to mean accommodation for residence and other amenities and services provided in a hotel, excluding the items mentioned in Section 2(f). Further, as observed by the Division Bench, the use of the conjunction "and" after the phrase "accommodation for residence" clearly spells out the legislative intent that the amenities which fall into the net of that provision are not those confined to providing attendant services in connection with the requirement of an occupant of the hotel for residence and, therefore, all amenities and services provided in a hotel, as well as accommodation for residence, amount to luxury for the purposes of Section 2(ee) and would fall within the term luxury provided in a hotel as defined in Section 2(f) of the Act. When viewed in the backdrop of the observations of the Division Bench, the reference to the charges, levied by hotels for accommodation for residence and other amenities in respect of rooms, in clauses (i) and (ii) of S. 4(2)(a), can only be seen as one that is intended to identify the category of hotels for the purposes of levying the rate prescribed in Clauses (i) and (ii). In otherwords, given that it is not only the accommodation in room for residence that is the subject matter of charge of luxury tax on hotels under the Act, and that other amenities provided in the hotel would also attract the levy of tax under the Act, the computation provisions under the Act must be read in a manner that would encompass both these aspects of luxury that are subjected to tax under the Act. Thus read, the rates of 7 = % and 12 = % that are prescribed in Clauses (i) and (ii), should be taken as applicable to charges collected by hotels which charge the specified amounts per day on rooms let out to customers. The rate of tax is that indicated in Clauses (i) and (ii) and the room charges, that are levied by the hotel in question to a particular customer in respect of a room, is provided for only for the purposes of identifying the category of hotels for the purposes of fixing the rate that would apply. In my view, this is the only way in which the provision can be read so as to make it workable in the light of the interpretation provided to the Section by the Division Bench decision referred to above. In the view that I have taken, the charges collected by the assessee in all these writ petitions, towards entry charges and video/camera permit charges, would attract the levy of luxury tax at the appropriate rate. W.P. (C). No. 16678 of 2010, preferred by the State Government challenging the orders of the appellate Tribunal pertaining to the assessment years 2002-2003 to 2006-2007, must therefore succeed on this ground. The respondent assessee, however, does have a case that, in respect of

the assessment years 2002-2003 to 2004-2005, the re-opening of the concluded assessments by invoking the power under Section 6(5) of the Luxury Tax Act was illegal in that, in the guise of exercising a power to bring to tax amounts that had escaped assessments to tax or had been under assessed at a lower rate in any year, the authorities had effectively exercised a power of review, which was not permissible in terms of the Act. The contention of the assessee, in other words, is that the Act enables only a reassessment and not a review and, insofar as the original assessment order had been passed after considering the material produced by the assessee and taking a conscious decision not to include the entry ticket charges and video/camera permit charges in the amounts on which the tax was levied, it was not open to the authorities under the Luxury Tax Act to review the said order consequent to a change of opinion. The decision of the Supreme Court in the case of *Binani Industries Ltd., Kerala Vs. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and Others*, is also relied upon by the assessee. It is relevant to note that the said contention of the assessee also found favour with the Appellate Tribunal which allowed the appeals preferred by the assessee for the assessment years 2002-2003 to 2004-2005. What is to be noted, however, is that while filing the returns for the period in question, the assessee had not included the said charges in the return filed for the purposes of assessment. No doubt, the assessee would contend that the books of accounts and other records were made available before the Assessing Officer at the time of assessments. There was, however, no express mention of the exclusion of these charges, in the assessment order passed by the assessing authority at the first instance and, therefore, no material to suggest that the assessing authority had considered the matter and decided to exclude the said amounts while completing the assessments on the petitioner. In that view of the matter, I do not think it is open to the assessee to contend, at a later point in time when proceedings were initiated under Section 6(5) of the Act, that the authorities were acting on the basis of a change of opinion. In the absence of an inclusion of the charges in question in the returns filed by the assessee, it could not be said that the Assessing Officer had considered the issue of inclusion of the said charges in the amounts on which tax had to be levied while completing the assessment. I am of the view that the proceedings initiated under Section 6(5) of the Act were nothing but proceedings for reassessment, as contemplated under that Section and did not amount to a review of an earlier order passed by the assessing authority. Thus W.P. (C). No. 16678 of 2010 filed by the State of Kerala, impugning the order of the Tribunal, must succeed on this ground also.

12. Counsel for the respondent in W.P. (C). No. 16678 of 2010 would point out that the Appellate Tribunal, while considering the appeals against the orders of assessment and penalty, preferred by the assessee, had decided the appeals in favour of the assessee on the issue of liability to tax on the charges collected by them. The Appellate Tribunal had not, therefore, thought it fit to decide upon the incidental issues, that were raised by the assessee in the appeals preferred by him, regarding the quantification of the tax amount and penalty imposed on the

assessee. It is his contention that if the writ petition of the State Government is to be allowed then the matter would have to be remanded to the Appellate Tribunal to consider those issues that were not considered by the Appellate Tribunal while disposing the appeals. Taking note of the said submission by counsel for the petitioner, I feel that while setting aside the order of the Appellate Tribunal, to the extent it finds against the State Government on the issue of leviability of tax under the Act on the charges collected by the assessee, the matter will have to be remanded to the Appellate Tribunal for a decision on the aspect of quantification of the tax amount, as also the penalty amount, in the appeals preferred by the assessee. The matter relating to assessment years 2002-2003 to 2006-2007 is therefore relegated back to the Tribunal for a decision on the quantification of tax and penalty on the assessee, in the appeals preferred by the assessee for the said years. Resultantly, W.P. (C). No. 16678 of 2010 is allowed as above.

13. As regards W.P. (C). No. 5723 of 2010, Ext. P4 order of the Commissioner of Commercial Taxes, to the extent it rejects the objections of the petitioner with regard to the delay in initiating proceedings under Section 8 of the Luxury Tax Act, is impugned by the petitioner assessee. Ext. P7 assessment order and Ext. P8 penalty order, passed by the Assessing Officer consequent to Ext. P4 order of the Commissioner of Commercial Taxes, are also impugned in the writ petition. The power of revision under Section 8 of the Luxury Tax Act is one that is available to the Commissioner of Commercial Taxes to be exercised either suo motu on an application. It is true that under Section 8, there is no specific time limit that is provided for the purposes of exercise of jurisdiction in terms of the said Section. The question then arises as to whether, the Commissioner of Commercial Taxes can exercise the powers under Section 8 of the Act at any time without any limit thereto. This issue has been considered by the Division Bench of this Court in the decision reported in Tissan J. Thachankary Vs. State of Kerala, wherein at paragraph 12 it is stated as follows:

"12. It is not in dispute that S. 8(1) does not provide any specific period of limitation for exercising suo motu revisional power. But as held by the Division Bench in Suppan Chettiar's case, the revisional authority cannot make the re-assessment. The assessment and re-assessment can be made only by the assessing authority who has to exercise its powers under S. 6 of the Act. An assessment under normal circumstance becomes final after the period specified under S. 6(5) of the Act which is five years from the end of the assessment year. Since the case relates to the assessment year 2002-2003, the assessment can be re-opened only on or before 31.03.2008. Apparently, Ext. P2 is issued only on 30.05.2009 and notice was issued to exercise the power under S. 8(1) only on 10.12.2008. Hence the writ appeal deserves to be allowed quashing Ext. P2 and all further proceedings pursuant to it."

14. A reading of the said judgment would clearly indicate that, while in the absence of an express provision of limitation for the exercise of jurisdiction under

the Section, a reasonable period of limitation has to be read in to the said provision, the Division Bench considered the provisions of Section 6(5) of the Act, which provided for an outer limit of five years from the expiry of the year to which the tax relates for the purposes of reassessment, to read in a five year period of limitation for the exercise of jurisdiction under Section 8 of the Act as well. No doubt, the learned Government Pleader would bring to my notice a decision of the Supreme Court in the case of the State of Jharkhand and Others etc. Vs. Shivam Coke Industries, Dhanbad, etc., , wherein the Supreme Court, while considering a case where the High Court had interpreted a statutory provision relating to the exercise of revisional power, which did not provide for a period of limitation for the exercise of the said power, held that the period of limitation prescribed under the Limitation Act could not be read into the provisions of the statute under consideration. While the facts in the said case were different, and the statute under consideration was also a different one, the Division Bench decision referred to above considers the very same statute and provision as is the subject matter of the present writ petition. I am of the view, therefore, that I should follow the decision of the Division Bench that interprets the very Section that falls for consideration in the instant writ petition as well. Resultantly, I quash Ext. P4 order of the Commissioner of Commercial Taxes passed in purported exercise of the suo motu revision power, under Section 8 of the Luxury Tax Act, after a period of five years from the end of the year to which the assessment related namely, 2001-2002. The notice invoking the power under Section 8 was issued only on 06.02.2008 whereas the five year period referred to above expired on 31.03.2007. It is, therefore, that I find Ext. P4 order as one passed in excess of jurisdiction and, therefore, illegal. As a result of the quashing of Ext. P4 order, Exts. P7 and Ext. P8 orders that are impugned in the writ petition, being consequential orders passed by the assessing authority based on Ext. P4 order of the Commissioner of Commercial Taxes, must also be quashed and I do so. Resultantly, W.P. (C). No. 5723 of 2010 is also allowed.

15. As regards W.P. (C). No. 31619 of 2010, W.P. (C). No. 1482 of 2012 and W.P. (C). No. 28865 of 2013, these writ petitions pertain to the assessment years 2007-2008, 2008-2009, 2009-2010 and 2010-2011 respectively. Exts. P4 and P5 orders passed by the assessing authority in respect of the assessment year 2007-2008 are impugned in W.P. (C). No. 31619 of 2010. Insofar as I have already found that the levy of luxury tax on the charges collected by the assessee is valid, the challenge against the said orders on this ground cannot succeed. Resultantly, W.P. (C). No. 31619 of 2010, to the extent it impugns Ext. P4 assessment order and Ext. P5 penalty order on the aforesaid ground, is dismissed. The petitioner is relegated to the alternate remedy of filing an appeal before the Appellate Tribunal against the assessment and penalty orders passed against him for this year if he is aggrieved by any computational mistake that has been occasioned in the said orders. As far as W.P. (C). No. 1482 of 2012 is concerned, Ext. P4 assessment order for the year 2008-2009 is impugned by the petitioner. For the same reasons as apply to W.P. (C). No. 31619 of 2010, the

said writ petition is also dismissed leaving it open to the petitioner to resort to the alternate remedy of filing an appeal to the Appellate Tribunal against Ext. P4 assessment order if he is aggrieved on account of any computational error in the assessments. W.P. (C). No. 28865 of 2013, which pertains to the assessment years 2009-2010 and 2010-2011, and where Exts. P5 and P8 assessment orders and Ext. P9 penalty order have been impugned, is also dismissed for the reasons stated in connection with W.P. (C). No. 31619 of 2010. Resultantly, the petitioner is free to challenge the assessment and penalty orders before the Appellate Tribunal if he is aggrieved by any computational errors that have been occasioned in the said orders.

Thus W.P. (C). No. 16678 of 2010 and W.P. (C). No. 5723 of 2010 are allowed and W.P. (C). No. 31619 of 2010, W.P. (C). No. 1482 of 2012 and W.P. (C). No. 28865 of 2013 are dismissed.