

(2003) 04 KL CK 0044

In the High Court Of Kerala

Case No : O.P. No. 4069 of 2003 and connected cases

Varghese

APPELLANT

Vs

Sales Tax Officer

RESPONDENT

Date of Decision : 07-04-2003

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 17(2), 17(3), 17(4), 17(5A), 19(1)

Citation : (2003) 3 KLT 593

Hon'ble Judges : C.N. Ramachandran Nair, J

Bench : Single Bench

Advocate : S.K. Devi and K.P. Pradeep Payyannur, for the Appellant; Raju Joseph, Government Pleader, for the Respondent

Judgement

C.N. Ramachandran Nair, J.—The petitioners in all these Original Petitions are dealers under the Kerala General Sales Tax Act, hereinafter called the "Act" challenging constitutional validity of Section 17(5A) of the Act under which penalty is levied on them for evasion of tax. Section 17(5A) provides for penalty on a "dealer" who is originally assessed u/s 17(4) of the Act, accepting final tax-return and statutory declaration filed by him in support thereof and later when escaped tax is assessed by revising the assessment originally completed u/s 17(4) of the Act". The penalty provided u/s 17(5A) is mandatory in nature and is at three times the differential tax, that is the difference between the tax originally assessed u/s 17(4) and the tax reassessed under other provisions of the Act mainly Section 19(1) which provides for assessment of escaped tax by the assessing officer. In fact, a reassessment is contemplated under the Act when the assessing officer himself detects evasion of tax in the original assessment, in exercise of his power u/s 19(1) of the Act or when the Deputy Commissioner in exercise of suo motu revisional power u/s 35 of the Act passes orders directing revision of assessment. Besides these two situations proviso to Section 17(4) of the Act itself provides for scrutiny of assessments at random completed u/s 17(4) of the Act. The scheme of Section 17(5A) is levy of penalty consequent on revision of every assessment originally completed u/s 17(4) and

such penalty is automatic and is irrespective of the provisions of the Act under which original assessment is revised. Even though revision of assessment and consequent penalty after original assessment u/s 17(4) are possible under three provisions referred above, in the cases of the petitioners in this Court, the revised assessments are issued by the assessing officer after detection of evasion of tax on the basis of some material or other u/s 19(1) of the Act. The petitioners have also filed appeals against the revised assessments under which penalty u/s 17(5A) was also levied. Therefore if the appeals are followed in part or in full, petitioners will get consequential relief in penalty levied u/s 17(5A) also, because the penalty u/s 17(5A) is directly proportional to the differential tax which varies with changes in reassessment orders. However, the petitioners have approached this Court challenging the constitutional validity of Section 17(5A) on the ground that even if the reassessment is sustained in part or full, levy of penalty under the mandatory provisions of Section 17(5A) is arbitrary and discriminatory because in all other cases of evasion of tax under the Act, penalty is discretionary and the maximum penalty provided in the cases of any evasion of tax provided u/s 45A of the Act is only double the amount of tax as against the three times provided u/s 17(5A). In other words, according to the petitioners, even if additional levy of tax in reassessment proceedings is sustained in appeal, the same should not lead to automatic penalty at three times such tax u/s 17(5A). Therefore they are challenging the constitutional validity of Section 17(5A). Of course, in the alternative, they are also challenging the penalty orders on the ground that the provisions of Section 17(5A) are not attracted to the facts of their cases, assuming the Section is found valid by this Court.

2. In order to appreciate the scope of impugned section, I feel it is better to extract the Section in the judgment for easy reference. Therefore the impugned Section with allied provisions are extracted hereunder:

17(4). Notwithstanding anything to the contrary contained in Sub-sections (3) and (4A) the assessing authority shall accept the return for any year, the assessment relating to which has not been completed, along with the statements prescribed, which are in accordance with the provisions of the Act and rules made thereunder, submitted by any dealer, whose total turnover specified in the return submitted by him for the year for which the assessment relates does not exceed rupees fifteen lakhs or by a dealer having dealings only in goods which are completely exempted from tax or by a dealer having dealings only in non-taxable points of goods coming in the First, Second or Fifth Schedules or by a dealer the tax payable by him does not exceed rupees five thousand for the year irrespective of any limit in turnover and assess the dealer on the basis of such return:

Provided that every year out of the assessments relating to the preceding year to be completed under this sub-section, the Board of Revenue may select twenty per cent by random sampling for detailed scrutiny of the accounts and other

records and if the dealer is found to have not accounted any purchases or sales or otherwise attempt to evade payment of tax, the previous five years assessments of the dealer may be reopened and escaped turnover shall be assessed or levy of tax be made after following the procedure prescribed in Sub-section (3) of Section 17 and the limitation prescribed under any of the provisions shall not apply to such cases.

Provided further that where the return filed by any dealer falling under any of the categories referred to in this sub-section is not accompanied by any statement required by this Act or the rules made thereunder in support of any claim of exemption from, or reduction in, the rate of tax, the assessing authority shall, after due notice to the dealer, complete the assessment on the basis of the turnover conceded in the return, disallowing the claim for such exemption or reduction to the extent to which it is not proved.

17(5A). Where on re-opening of an assessment completed under Sub-section (4), in respect of any dealer, it is found that the amount of tax, if any, paid by such dealer is less than the amount of tax which he is liable to pay on such fresh assessment, the assessing authority shall direct such dealer to pay the difference between the amount of tax already paid by him and that arrived at on such fresh assessment, together with thrice the amount of such difference as penalty.

3. I have heard all the counsel appearing for the petitioners and also Special Government Pleader appearing for the respondents.

4. The provisions of Section 17(4) provided for assessment based on returns filed was in existence for quite a long time. Section 17(4) provides for assessments in the case of three categories of dealers (assesseees). They are (1) dealers whose total annual turnover does not exceed rupees fifteen lakhs; (2) assesseees having dealings only in goods which are completely exempted from tax or assesseees having dealings at non-taxable points of sale or purchase of goods coming under the First, Second or Fifth Schedule to the Act and (3) assesseees whose tax liability does not exceed rupees five thousand in a year, irrespective of any limit in turnover. Eventhough the petitioners have a case that the Commissioner of Commercial Taxes through circulars issued compelled the assessing officers to complete the assessments u/s 17(4) of the Act, the procedure for assessment contemplated under the relevant KGST Rules is optional in nature and in order to avail the benefit, the assesseees will have to comply with Rule 18A(1A) of the Kerala General Sales Tax Rules, which provides for filing of quarterly returns along with payment of tax. Further the annual return filed should be accompanied by statements in Form No. 21CC prescribed under the Rule. Until the assessment year 1992-93 option for assessment u/s 17(4) could have been exercised by the assesseees by following the procedure prescribed under Rule 18A as stated above. However, by an amendment by Act 13/93 with effect from 1.4.1993 the assesseees who have not opted for assessments u/s 17(4) had the option to request for such assessments in respect of those assessments pending completion by filing statements prescribed, that is Form No. 21CC with required

documents attached thereto. In fact Sub-rules (1B) and (1C) of Rule 18A which provided for the filing of application for permission for filing of returns for assessment u/s 17(4) and the assessing officer granting approval in the year itself, was omitted. Consequently, assessee could by filing Form No. 21CC in pending assessments exercise option for assessment u/s 17(4) and if the officer accepts it, he has to issue assessment order in the very same Form itself that is Form No. 21CC as provided under Sub-rule (1D) of Rule 18A, or if the officer does not accept it, he can reject the request under Rule 18A(2). Therefore the penalty provision namely, Section 17(5A) introduced from 1.4.1998 applies to assessments of earlier years, that is for years prior to 1998-99 also if those assessments were pending and assessee filed declarations in Form No. 21CC with documents accompanied thereto and opted for assessment u/s 17(4) after 1.4.1998, and when such assessments completed u/s 17(4) are revised leading to levy of higher amount of tax. Though the petitioners contend that penalty u/s 17(5A) cannot be levied for any year prior to 1998-99 as it was introduced with effect from 1.4.1998, the said argument is not tenable because those who exercised option for assessment u/s 17(4) in pending assessments after 1.4.1998 and whose assessments are so completed will necessarily and inescapably take the consequence of penalty u/s 17(5A) if the original assessments completed u/s 17(4) are revised leading to higher demand of tax.

5. The main contention raised by the petitioners relying on Article 14 of the Constitution of India is on the ground that Section 17(5A) is arbitrary and discriminatory for the reason that the tax evasion of any kind to any extent is subjected to penalty at the maximum of twice the amount of tax as provided u/s 45A of the Act that too at the discretion of the officer based on adjudication while the penalty provided u/s 17(5A) is automatic and is at three times the difference between the tax originally assessed u/s 17(4) and later revised u/s 19(1) or any other provision, without leaving any discretion to the assessing officer in regard to the levy or the extent thereof. In order to appreciate the contention, it has to be examined whether the petitioners belong to same class of assessee to whom penalty u/s 45A of the Act is provided for same offence, that is evasion of tax. I cannot agree with the argument of the petitioners because petitioners by opting for assessment u/s 17(4) constitute a separate class in themselves on whom the assessing officer has reposed confidence and assessments are completed accepting the returns and the statements filed in support thereof. In other words petitioners do not undergo the normal process of assessment which involves wherever required by the officer scrutiny of accounts, issuing of pre-assessment notice, filing of reply and contesting the proposal for assessment made by the assessing officer. Section 17(4) only visualises completion of assessment in terms of the claim made by the assessee who are presumed to be honest in the declarations made by them in the returns filed and the statements accompanying thereto, namely, Form No. 21CC and the documents attached thereto. In such cases it is mandatory for the assessing officer to complete the assessment without scrutiny, but after prima facie checking the returns and documents

furnished by the petitioners. The accounts are not called for, for verification and the officer accepts the claims of the assessee made in the returns at the time of completion of assessment u/s 17(4) of the Act. This class of assessee cannot be treated equally with other assessee who leave it to the officers to complete the assessment by scrutiny of the accounts and detailed examination of the claims made in the returns. So far as the assessee who do not opt for assessment u/s 17(4) are concerned, it is the responsibility of the assessing officer to scrutinize the returns of those assessee, compare the figures declared with reference to the Book-results by scrutiny of the books of accounts, and to complete the assessment in accordance with statutory provisions by issuing notice u/s 17(3) containing proposals for assessment even by rejecting the turnover declared and claims made by the assessee, and to make a proper assessment to protect the interests of the Revenue after giving opportunity to the assessee. On the other hand in the assessment contemplated u/s 17(4) there is no proper adjudication of the claims made by the assessee. The department completing assessing u/s 17(4) based on the return of the assessee and supporting declarations is at the risk and mercy of the assessee's honesty. In the latter category the provision for higher penalty u/s 17(5A) is an additional disincentive and a deterrent against assessee's making bogus claims and against filing untrue returns while availing benefit of assessment based on returns u/s 17(4). There can be no dispute that the assessment u/s 17(4) though applicable to specific categories of assessee is not mandatory but only optional and those who exercise such option and deriving the benefit or advantage of assessment based on their own returns and statements without scrutiny are only subjected to a higher penalty u/s 17(5A). The petitioners contended that through circulars 28/95 and 30/99 issued by the Commissioner of Commercial Taxes (old Board of Revenue) assessments u/s 17(4) were made mandatory for the categories of assessee covered u/s 17(4) and the Commissioner directed the assessing officers to complete the assessments u/s 17(4) and for failure threatened them with disciplinary proceedings and therefore the officers completed the assessments u/s 17(4) against the will of the assessee. This allegation is denied in the counter affidavit. The respondent's contention is that by circulars the officers were only directed not to deny the benefit of Section 17(4) assessments to those assessee who exercised option by filing from No. 21CC but to, complete such assessments u/s 17(4) itself, i.e., without going for scrutiny-assessments. Eventhough it is a settled position that circulars are binding on the assessing officers, I am unable to accept this contention because the assessment u/s 17(4) is possible only on the assessee furnishing a declaration and statement in Form No. 21CC in terms of Rule 18A(1A) of the Rules accompanied with the documents prescribed therein. The furnishing of declarations in Form No. 21CC under Rule 18A is the exercise of option even in pending assessments for completion of assessment u/s 17(4) and therefore the petitioners cannot contend that the assessments completed u/s 17(4) are forced on them and they did not exercise such an option. It is to be noted that the assessment order u/s 17(4) itself is issued in the copy of the Form No. 21CC furnished by the assessee as provided under Rule

18(1D) of the KGST Rules. I make it clear that penalty levied u/s 17(5A) in cases where original assessments are completed u/s 17(4) without the assessee opting for it by filing Form No. 21CC but completed by the officers following the circulars above referred are illegal and the assessing officers shall revoke such penalty orders. In the result, I hold that the petitioners who have exercised option u/s 17(4) that is assessment based on the returns and statements filed by them constitute a different class from the other assessee, whose assessments were completed after verification of accounts and after following the procedure prescribed u/s 17(2) or (3) of the Act. While in the case of those who opt for Section 17(4) assessments the assessee has to be careful in regard to their returns and statements filed in support thereof, because the assessing officer acts upon such declarations, while in the case of other assessee, it is for the officer to be careful in completion of assessments and the mere escapement of any tax in the latter cases does not lead to penalty and the assessee can be held responsible for evasion of tax and penalty only if the same is attributable to them. Therefore, the discrimination alleged by the petitioners and violation of Article 14 do not exist and I reject this contention.

6. The next contention raised by the petitioners is that mens rea is a necessary ingredient of penalty as is held by the Supreme Court in *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, and in the case of *Kantilal Babulal and Bros. v. S.T.O. 21 STC 174*. According to them the provision for automatic penalty without leaving any discretion to the officers and without establishing any guilt on the assessee provided u/s 17(5A) is arbitrary and unsustainable. Here again, I do not agree with the petitioners' contention because the requirement of mens rea wherever necessary is loaded by the legislature in the section itself. However, there is no bar against the legislature providing statutory offences which is done in many statutes. In such cases, the existence of certain situations will automatically give rise to presumption of violation of the provision leading to penalty. This Court also held in the *Gujarat Travancore Agencies'* case, reported in *Commissioner of Income Tax Vs. Gujarat Travancore Agency*, which was confirmed by the Supreme Court and reported in *Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam*, in the context of Income Tax Act holding that penalty is tenable without any mens rea being established if the statute so provides. All what Section 17(4) contemplates is that assessee who opt for a virtual self-assessment u/s 17(4) are entitled to the same and such claims will be allowed based on the return filed and statements filed by him in support thereof. The department by accepting his returns spares him from the agony of undergoing a regular assessment by production of books of accounts and establishing the correctness and completeness of the returns. However, any such assessee found to have evaded tax which will be presumed in the event of reassessment leading to determination of higher amount of tax, will be liable to a higher penalty which is three times the differential tax. Therefore, the penalty u/s 17(5A) is a statutory offence created without the requirement of mens rea loaded therein.

However, it has to be noted that Section 17(5A) operates in the reverse direction also because as and when reassessment is cancelled or modified the penalty automatically gets cancelled or reduced. Therefore it is not as if the assessee is without a remedy. If revised demand of tax contested in appeal is cancelled or reduced penalty levied u/s 17(5A) also goes along with the tax and there is no need to independently contest the levy of penalty. However, so far as the penalty levied u/s 45A is concerned, it is an independent proceedings and the reduction of tax assessed in appeal will not automatically lead to cancellation of penalty, but penalty has to be independently contested in revision before the revisional authorities. Though both the penalties u/s 17(5A) and Section 45A are for evasion of tax, they apply differently and one cannot be equated with the other in all respects. Therefore the contest against the validity of Section 17(5A) as arbitrary for want of requirement of mens rea as in Section 45A is devoid of any merit and the same is rejected.

7. Another contention raised by the petitioners is against the positioning of Section 17(5A) in the Chapter providing for assessment because according to the petitioners, penalty is a substantive provision and cannot form part of procedure for assessment. They have relied on the decision of the Supreme Court in *Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra*, . I do not think the validity of the legislation can be questioned for the reason that the provision is not appropriately positioned in the statute. It is clear from the scope of the impugned provision, as explained above, that it is only a part of assessment and penalty u/s 17(5A) fluctuates with the tax determined in revised assessment. Since there is no scope for adjudication and penalty u/s 17(5A) is a consequence of revised assessment leading to higher levy of tax, against the tax originally assessed u/s 17(4), I do not think there is anything inappropriate in providing for penalty u/s 17(5A) along with procedural provisions, and therefore, this contention is also turned down.

8. The next contention raised by the petitioner is that all assessments completed in these cases leading to penalty are assessments u/s 19(1) issued by the Officer. Section 19(2) provides for penalty in cases of evasion of tax on reassessment u/s 19(1). According to the petitioners penalty in the case of revised assessments u/s 19(1) has to be issued only u/s 19(2) of the Act. I cannot agree with this contention because Section 19(2) is only procedural and the substantive provision for penalty is either u/s 45A or u/s 17(5A) of the Act. If the reassessment contemplated is after a regular assessment u/s 17(2) or Section 17(3) or under any other provision, other than Section 17(4) of the Act, then penalty has to be considered u/s 45A. However, if the original assessment completed is u/s 17(4), then the Officer after completing reassessment u/s 19(1) has to apply only Section 17(5A) as that is the appropriate Section providing for penalty in such cases. In other words, levy of penalty u/s 17(5A) is mandatory and applies only in cases where original assessments are contemplated u/s 17(4) and it is immaterial whether reassessment is contemplated u/s 19(1) or reassessment as a scrutiny case under proviso to Section 17(4) or even a

reassessment pursuant to directions issued u/s 35. In this view of the matter, the petitioners' contention that Section 17(5A) cannot be applied to an assessment u/s 19(1) is without substance and is also rejected.

9. Even though Section 17(5A) does not suffer from the infirmities pointed out by the petitioners, I feel there are inherent infirmities in the orders issued u/s 17(5A) and challenged in these cases. In the first place, Section 17(4) originally provided a bar against assessment for any assessee for the year during which there was either levy of penalty or payment of compounding fee. However, this was removed by an amendment making those assessees on whom penalty was levied or who have paid compounding fee also eligible for assessment u/s 17(4). This assessment clearly pre-supposes that any assessee who files Form No. 21CC under Rule 18A(1A) with supporting documents opting for assessment u/s 17(4) after being subjected to penalty or compounding fee should be deemed to have included the turnover for the whole year including the turnover pertains to offence which either led to levy of penalty or payment of compounding fee. On scrutiny of Form No. 21CC and the supporting documents, it is open to the officer to accept the request of the assessee and complete the assessment u/s 17(4) or to reject the claim. If the officer either omitted to note the payment of compounding fee or levy of penalty on the assessee prior to completion of assessment u/s 17(4) based on Form No. 21CC filed, or if the Officer wants to verify as to whether the assessee even after payment of compounding fee or after levy of penalty included the turnover attributable to the same or whether the accounts in cases of such assessees were full and complete based on which return and Form 21CC were filed and assessment completed, then it is open to the Officer to call for the accounts and scrutinise the same and if the Officer is satisfied that there is escapement of turnover in the assessment completed u/s 17(4), the officer has to issue notice u/s 19(1) and proceed for assessment after following the procedure. An assessee who has paid compounding fee or has been subjected to penalty has to establish that inspite of such proceedings he has returned full turnover in the annual return and Form No. 21CC filed subsequently, based on which the assessment u/s 17(4) was completed. Under the scheme of Section 17(4), I feel an assessee who opted for and obtained assessment u/s 17(4) and who was subjected to penalty or who has paid compounding fee during the relevant year has the burden on him to establish before the Officer as and when demanded that the turnover returned for the assessment was full and complete. In other words, reassessment u/s 19(1) after Section 17(4) assessment in such cases can be completed by rejection of accounts and by estimation of turnover only after scrutiny of accounts and after establishing escapement of turnover in the original assessment. If after scrutiny of accounts, reassessment is made u/s 19(1) revising the tax originally assessed then of course the penalty u/s 17(5A) will follow.

10. The next limitation on Section 17(5A) that is to be found based on assessment u/s 17(4) is the limited responsibility left to the officer to complete the assessment based on Form No. 21CC and the documents attached thereto. It

is quite possible that tax returned by the assessee may not be correct on account of mistake committed by the assessee in making a wrong claim of exemption or on account of mis-classification of goods claiming exemption or remitting tax at lower rate than applicable. These are matters on which the assessing officer should request the assessee to make correction after prima facie scrutiny based on Form No. 21CC and the documents attached thereto and if there is any mistake in this regard regarding exemption wrongly claimed, or the rate of tax not correctly applied which the officer could have detected at the time of assessment u/s 17(4) after scrutiny of Form No. 21CC along with the supporting documents, the same will not justify a penalty u/s 17(5A). The assessment u/s 17(4) though means an assessment in terms of returns and statement of the assessee has to be consistent with the statute and the assessing officer has to scrutinize Form No. 21CC and make up for omissions and mistakes with the consent of the assessee and the assessee cannot be penalised for the omissions of the Officer at the stage of scrutiny of Form No. 21CC. However, an assessment in variation of return and Form No. 21CC is not contemplated u/s 17(4) and if the assessee does not agree on variations proposed by the officer while issuing assessment in Form No. 21CC, the Officer has to only reject the application under Rule 18A(2) of the Rules, and not to force an assessment u/s 17(4) on the assessee. Therefore no penalty could be levied u/s 17(5A) in respect of tax escaped from Section 17(4) assessment that could have been prevented on proper scrutiny by the Officer and that could be brought in by rectification of Section 17(4) assessment u/s 43 of the Act, even though reassessment was made unnecessarily u/s 19(1).

11. The next important aspect in regard to reassessment after completion of assessment u/s 17(4) is reassessment based on sales tax checkpost entries or the transport documents collected from the checkposts. It is very common that very many unscrupulous dealers are using names and addresses and sales tax registration numbers of very many other dealers in the State for transporting goods from outside Kerala to the State for unaccounted sales. Therefore it is unsafe to make assessment solely based on such checkpost documents or entries on the apparent consignees who may not be the actual consignees. In cases where the consignees deny the transactions entered in checkpost records, the statute itself prohibits assessment based on such checkpost records as provided u/s 30B(4) of the Act. Assessments in such cases are possible only after collecting evidence from the consignors or transporters and after identifying the actual consignees. Therefore no reassessment based on mere checkpost records which are denied by the assessee will be tenable and consequently penalty levied u/s 17(5A) also will not be sustainable. However, if the department collects evidence from the consignors or the transporters and establishes the transactions on the assessee who have been assessed originally u/s 17(4) then of course penalty u/s 17(5A) can be justifiably levied.

In the result, the Original Petitions are disposed of upholding the constitutional validity of Section 17(5A) but subject to the limitations stated above. The

Assessing Officers are directed to reconsider revised assessments-cum-penalty orders in the light of the above observations and following the specific directions given below within a period of two months from the date of receipt of a copy of this judgment, which will be produced by the petitioners, as soon as the same is received from this Court.

1. The penalty levied u/s 17(5A) should be revoked in cases -

(a) Where the assessee has not opted for assessment u/s 17(4) by filing Form No. 21CC but assessments were completed by the assessing officers following the circulars, 28/95 and 30/99 issued by the Commissioner of Commercial Taxes.

(b) Where reassessment was completed u/s 19(1) by making additions merely based on penalty levied or compounding fee paid, prior to filing of form No. 21CC and completion of assessment u/s 17(4) based on it.

(c) Where reassessment is completed merely based on checkpost entries or transport documents obtained from checkposts regarding transport of goods in the name of the assessee, which are denied by the assessee and not established by tracing transporter or consignor in terms of Section 30B(4) of the Act.

(d) Where tax demanded under reassessments completed u/s 19(1) has escaped assessment u/s 17(4) on account of wrong grant of exemption or assessment at lower rate on account of a mistake that could have been rectified u/s 43 of the Act instead of resorting to Section 19(1) proceedings.

2. In cases covered by Clause 1(a) above, it is open to the Officer to consider penalty u/s 45 A of the Act after following the procedure prescribed therein.

3. In cases covered by Clause 1(b), it is open to the officer to consider reassessment in accordance with the observations and directions contained in paragraph 9 above and if reassessment is made after establishing that the turnover has escaped assessment completed u/s 17(4) then the Officer has to demand penalty along with revised demand of tax u/s 17(5A) of the Act. If the assessee establishes in the course of re-assessment that in spite of payment of compounding fee or levy of penalty, the assessee returned full turnover making up for the prior omissions also in Form No. 21CC, then of course reassessment itself is not required and so much so levy of penalty u/s 17(5A) does not arise.

4. In cases covered by Clause 1(c) where revised assessments are completed merely based on checkpost declarations denied by the assessee, reassessments will stand set aside with freedom to the officer to collect evidence from the transporter or consignor and to make revised assessments in terms of Section 30B(4) and then levy penalty u/s 17(5A).

5. So far as situations covered by 1(d) are concerned, the question whether revised demand through reassessment completed u/s 19(1) could have been made by rectification u/s 43 to avoid penalty u/s 17(5A) is concerned, the Officer

will reconsider the issue and if found against, penalty u/s 17(5A) has to be levied subject to assessee's right of appeal against reassessment. However, if the Officer finds Section 17(4) order could have been rectified, he shall do so substituting Section 19(1) order and by deleting penalty levied u/s 17(5A).

Assessees aggrieved by orders issued by the officers as above are free to file fresh appeals or pursue appeals already filed on merits. If any petitioner has not filed appeal against re-assessment on account of pendency of OP and if appeal is filed within one month of receipt of this judgment, the Appellate Authority will entertain it as filed in time and dispose of the same on merits in the light of the findings and observations in this judgment.

The Original Petitions are disposed of as above.