GAHC010158642021

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/5223/2021

M/S VISHAL UDYOG
A PROPRIETORSHIP CONCERN HAVING ITS PLACE OF BUSINESS AT SOLAPARA ROAD, PALTAN BAZAR, MANIPURI BASTI, KAMRUP (M) ASSAM, REPRESENTED BY ITS PROPRIETOR SHRI MANOJ SAH, AGED ABOUT 49 YEARS, S/O LATE DAROGA SAH, RESIDENT OF MANIPURI BASTI , DERI SINGH LANE, HOUSE NO. 30, GUWAHATI 781007, KAMRUP (M) ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM, FINANCE (TAXATION) DEPARTMENT,DISPUR GUWAHATI 781006

2:THE COMMISSIONER OF TAXES
KAR BHAWAN
BISHNU PRASAD RAVA FLYOVER
DISPUR
GANESHGURI
GUWAHATI 781006
ASSAM

3:THE DEPUTY COMMISSIONER OF TAXES
ZONE C
KAR BHAWAN
G.S ROAD
DISPUR
GUWAHATI 781006
ASSAM

4:THE SUPERINTENDENT OF TAXES
UNIT C
GUWAHATI

KAR BHAWAN
G.S ROAD
DISPUR
GUWAHATI 781006
ASSA

Linked Case : WP(C)/5299/2021

M/S VISHAL UDYOG
A PROPRIETORSHIP CONCERN HAVING ITS PLACE OF BUSINESS AT SOLAPARA ROAD
PALTAN BAZAR
MANIPUR BASTI
IN THE DIST. OF KAMRUP (M) IN THE STATE OF ASSAM AND REP. BY ITS PROPRIETOR SRI MANOJ SAH
AGED ABOUT 49 YEARS
S/O- LT. DAROGA SAH
R/O- MANIPURI BASTI
DERI SINGH LANE
H.NO. 30
GHY-07
KAMRUP (M)
ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY ITS COMM. AND SECY. TO THE GOVT. OF ASSAM
FINANCE (TAXATION) DEPTT.
DISPUR
GHY-06

2:THE COMMISSIONER OF TAXES
KAR BHAWAN
BISHNU PRASAD RAVA FLYOVER
DISPUR
GANESHGURI
GHY-06
ASSAM
3:THE DY. COMMISSIONER OF TAXES
ZONE-C
KAR BHAWAN
G.S.ROAD
DISPUR
GANESHGURI

GHY-06
ASSAM
4:THE SUPERINTENDENT OF TAXES
UNIT-C
GHY
KAR BHAWAN
G.S.ROAD
DISPUR
GANESHGURI
GHY-06
ASSAM

Linked Case : WP(C)/5219/2021

M/S VISHAL UDYOG
A PROPRIETORSHIP CONCERN HAVING ITS PLACE OF BUSINESS AT
SOLAPARA ROAD
PALTAN BAZAR
MANIPURI BASTI
DIST- KAMRUP(M)
STATE- ASSAM AND REPRESENTED BY ITS PROPRIETOR- SRI MANOJ SAH
AGED ABOUT 49 YEARS
S/O (L) DAROGA SAH
R/O MANIPURI BASTI
DERI SINGH LANE
HOUSE NO. 30
GUWAHATI-781007
KAMRUP(M)
ASSAM

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY ITS COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM
FINANCE (TAXATION) DEPARTMENT
DISPUR
GUWAHATI-781006

2:THE COMMISSIONER OF TAXES
KAR BHAWAN
BISHNU PRASAD RAVA FLYOVER
DISPUR
GANESHGURI
GUWAHATI-781006
ASSAM

3:THE DEPUTY COMMISSIONER OF TAXES
ZONE-C
KAR BAHWAN
G.S. ROAD
DISPUR
GANESHGURI
GUWAHATI-781006
ASSAM
4:THE SUPERINTENDENT OF TAXES
UNIT-C
GUWAHATI
KAR BHAWAN
G.S. ROAD
DISPUR
GANESHGURI
GUWAHATI-781006
ASSAM
5:THE CERTIFICATE OFFICER (TAXATION)
KAMRUP
GUWAHATI
KAR BHAWAN
GS ROAD
GUWAHATI-781006
ASSAM

For the Petitioner(s) : Mr. D. Saraf, Advocate

For the Respondent(s) : Mr. B. Choudhury, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (CAV)

Date : 16-10-2023

1. The three writ petitions are taken up for disposal by this common judgment and order taking into account that the issues involved in the three writ petitions are similar.

2. Before further proceeding to adjudicate the dispute involved, this Court finds it relevant to detail out the facts involved in the three writ petitions infra.

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3. The Petitioner herein is a proprietorship concern having its TIN No.18770028579 registered under the Assam Value Added Tax Act, 2003. The petitioner carries on its business in CC Fabric, Canvas and Bag Materials, PVC Cloth and Polythene Sheet etc. under the name and style M/S Vishal Udhyog. From the facts narrated in the writ petition, it transpires that the Petitioner had filed the Annual Return of Turnover in the prescribed format i.e. Form-14 in respect of its sales and purchase transactions for the Financial Year 2013-2014 before the Respondent No.4 i.e. the Superintendent of Taxes, Unit-C, Guwahati.

4. It has been stated in the writ petition that pursuant to the filing of the return by the Petitioner, the Respondent No.4 completed scrutiny assessment of the same under Section 33 of the Assam Value Added Tax Act, 2003 (for short "the Act of 2003") wherein it was determined by the Respondent No.4 that the Petitioner was liable to pay interest of 286 and penalty of Rs.2,000/-. On the basis of the same, the Petitioner paid a sum of Rs.2,286/- vide Challan No.117 dated 04.01.2016. The further case of the Petitioner is that on 11.05.2017, the Respondent No.4 had issued a notice under Section 36 of the Act of 2003 to the Petitioner. The contents of the said notice are relevant for the purpose of instant dispute. The said notice which was enclosed as Annexure-E to the writ petition is in Form-20. In the said notice, the Respondent No.4 informed the Petitioner as regards the period from 2012-13 to 2014-15 and that his return has been selected for audit assessment under Sub-Section (1) of Section 36 of the Act of 2003 and it has become necessary to make an assessment under Sub-Section (5) of that Section in respect to the

aforesaid periods. Under such circumstances, the Petitioner was asked to (i) appear in person or through an authorized agent; (ii) produce evidence or have it produced any support of returns; and (iii) produce or cause to be produced accounts, registers, invoices or other documents which the Petitioner was required to maintain and furnish declarations and certificates which the Petitioner was required to furnish under the Act of 2003 or the Rules made thereunder relating to aforesaid period along with any other relevant evidence on which the Petitioner may wish to rely in support of the returns filed by the Petitioner or any objection which the petitioner may wish to raise in relation to these proceedings at Unit-C, Guwahati on 26.05.2017 at 11:00 AM. It was further mentioned in the said notice that in the event, there was a failure without sufficient cause to comply with the notice, the Petitioner would render itself liable to be assessed to the best of the judgment without further notice.

5. It is the further case of the Petitioner that the Petitioner appeared before the Respondent No.4 at Guwahati through his son and authorized representatives whereafter he was directed to produce purchase invoice etc. The Petitioner thereupon produced all the relevant invoices/books of accounts/registers in respect of return filed by the Petitioner for the Assessment Year 2013-14. It is the specific case of the Petitioner that in the last part of July, 2019, he received a demand notice dated 27.12.2018 from the Respondent No.4 which was issued on 01.07.2019 whereunder an amount of Rs.22,599/- was demanded from the Petitioner in respect of the return filed for the Assessment Year 2013-14 out of which, balance tax payable was assessed to Rs.17,599/- and penalty payable was assessed at Rs.5,000/-. Thereupon, the Petitioner applied before the Respondent No.4 for issuance of a certified copy of the assessment order dated 21.12.2017 for the year 2013-14 vide a

communication dated 03.09.2019 which was not issued to the Petitioner for more than two years from the date of the application. The Petitioner received the certified copy of the assessment order dated 21.12.2017 on 20.09.2021.

6. At this stage, this Court finds it relevant to take note of that from a perusal of the assessment order dated 21.12.2017, it reveals that the Respondent No.4 had not allowed any Input Tax Credit to the Petitioner on the purchases made by the Petitioner.

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7. The instant writ petition relates to the financial year 2014-15. For the sake of brevity and to avoid prolixity, this Court is not repeating the facts which are similar to the facts which have already been mentioned while dealing with the facts in WP(C) No.5223/2021. However, the relevant facts for the purpose of the instant case are that the Petitioner submitted its return in the prescribed format i.e. in Form-14 in respect to the sales and purchase in the financial year 2014-15 before the Respondent No.4. Subsequent to the filing of the return for the financial year 2014-15, the Respondent No.4 completed scrutiny assessment of the same under Section 33 of the Act of 2003 wherein it was determined by the Respondent No.4 that the Petitioner had paid an excess tax of Rs.25/- only and the Petitioner was liable to pay interest of Rs.670/- and penalty of Rs.2,000/-. Accordingly, the Petitioner was directed to pay an amount of Rs.2,670/- which was duly paid by the Petitioner on 08.06.2016 vide challan No.117.

8. As already stated hereinabove, the notice which was issued on 11.05.2017 was for the period from 2012-2013 to 2014-2015. It is the case of

the Petitioner that pursuant to the notice dated 11.05.2017, the Petitioner appeared through his son as well as the authorized representatives and produced all the relevant invoices/books of accounts/registers in respect of the return filed by the Petitioner for the Assessment Year 2014-15 to the satisfaction of the Respondent No.4.

9. Similar to the Assessment Year 2013-14, the Petitioner received in the last part of July, 2019, a demand notice dated 24.06.2019 from the Respondent No.4 which was issued on 01.07.2019. In the said demand notice, it transpires that the Respondent No.4 had raised the demand to the extent of Rs.4,21,294/- from the Petitioner in respect of the return filed for the Assessment Year 2014-2015 out of which balance tax payable was assessed at Rs.2,18,287/- and interest payable was assessed at Rs.2,03,007/-. The Petitioner thereupon applied for the certified copy of the assessment order dated 24.06.2019 and received the same on 20.09.2021. A perusal of the said assessment order dated 24.06.2019 shows that the Respondent No.4 had not allowed any Input Tax Credit to the Petitioner on the purchases made by the Petitioner. Further to that, as stated in the writ petition, the Respondent No.4 had erroneously calculated negative profit margin of taxable goods i.e. Schedule-II and Schedule-V items by taking closing stocks in a misconceived manner and thereby rejected the Petitioner's self-assessment under Section 35 of the Act of 2003 and proceeded for assessment with best judgment by enhancing the turnover of sales in Schedule-II goods by Rs.24,00,000/- and the turnover of sales in Schedule-V goods by Rs.4,00,000/-.

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10. This writ petition pertains to the Assessment Year 2012-13. From a

perusal of the writ petition, it reveals that the Petitioner submitted his annual return in the prescribed format i.e. in Form-14 for the Financial Year 2012-13 before the Respondent No.4. The Respondent No.4 after receipt of the return filed by the Petitioner completed scrutiny assessment of the same under Section 33 of the Act of 2003 wherein it was determined by the Respondent No.4 that the Petitioner was liable to pay interest of Rs.1,461/-. As stated above, the notice dated 11.05.2017 was for the period from 2012-13 to 2014-15. For the sake of brevity as well as to avoid prolixity, this Court is not repeating the contents of the said notice. Be that as it may, the Petitioner through his son as well as the authorized representatives produced all the relevant invoices/books of accounts/registers in respect of the return filed by the Petitioner for the Assessment Year 2012-13 to the satisfaction of the Respondent No.4.

11. During the end of August, 2019 the Petitioner received a demand notice dated 21.12.2017 from the Respondent No.4 which was issued on 10.08.2019 whereby the Petitioner was informed that the Respondent No.4 had raised the demand to the extent of Rs.23,480/- in respect of the return filed for the Assessment Year 2012-13 out of which the balance tax payable was assessed at Rs.18,480/- and the penalty payable was assessed at Rs.5,000/-. The Petitioner thereupon applied for the certified copy of the assessment order dated 21.12.2017. The said certified copy was furnished to the Petitioner on 20.09.2021. It is the case of the Petitioner that vide the assessment order dated 21.12.2017, the Respondent No.4 had enhanced the turnover of the Petitioner with his best judgment and arbitrarily rejected the petitioner's self-assessment under Section 35 of the Act of 2003 and proceeded for assessment with the best judgment by enhancing the turnover of the Petitioner.

12. The edifice of the case set out by the Petitioner in the three writ petition is that the Respondent No.4 could not have exercised the power under Section 37 of the Act of 2003 without issuance of notice as mandated under Section 37(1) of the Act of 2003. It is the further case of the Petitioner in respect to the Assessment Years 2012-13 and 2013-14, the impugned assessment orders were passed in violation to Section 39 of the Act of 2003 inasmuch as the said assessment orders were passed beyond the period of limitation.

13. From the record, it reveals that all these writ petitions were filed in the last week of September, 2021. On 05.10.2021, this Court issued notice in all the three writ petitions. Taking into account the ground taken as regards the non-compliance to Section 37(1) of the Act of 2003, this Court directed no coercive action be taken against the Petitioner pursuant to the assessment orders impugned in the instant three writ petitions.

14. This Court at this stage finds it relevant to take note of that although notice was issued as far back as on 05.10.2021, the Respondent Authorities have chosen not to file any reply. On 09.08.2023, when the instant writ petition was listed before this Court, it was submitted by the learned counsel appearing on behalf of the Respondent Authorities that as the issue involved in the three writ petitions relates to question of law and the interpretation of the Act of 2003 and the Rules framed thereinunder, the records would be produced before this Court and no affidavit would be filed. Taking into account the said stand, this Court therefore directed to list the three writ petitions on 17.08.2023 for final disposal.

15. Mr. D. Saraf, the learned counsel appearing on behalf of the Petitioners submitted that the impugned assessment orders are liable to be set aside

inasmuch as the impugned assessment orders were passed without issuance of the mandatory notice in terms with Section 37(1) of the Act of 2003. He further submitted that even assuming for argument sake that the impugned assessment orders were under Section 36(5) of the Act of 2003, then also such assessment could have been made only after issuance of notice upon the Petitioners as it is the mandate of proviso to Section 36(5) that the Assessing Authority cannot rely on any evidence collected by him without affording a reasonable opportunity of being heard before any adverse inference is drawn. The learned counsel further explained the powers under Section 36(5) to make assessment and under Section 37 of the Act of 2003. The learned counsel submitted that as the Petitioner had submitted his return and the scrutiny assessment were already done, Clause (a) and (c) of Section 36(5) would not be applicable. As regards Clause (b) of Section 36(5), it is the submission of the learned counsel for the Petitioner that the assessment to be made is only the amount of tax due from the dealer by setting aside the self assessment made under Section 35 of the Act of 2003. The learned counsel submitted that while in Section 36(5)(b) of the Act of 2003, the assessment would be in respect of the amount of tax due from the dealer but in Section 37, the best assessment is carried out of the assessee as would be apparent from a perusal of Section 37(1) itself. The learned counsel drew the attention to the impugned assessment orders for the Assessment Year 2012-13 and 2014-15 and submitted that it would clearly show that the Assessing Authority had exercised the power under Section 37 of the Act of 2003 as the assessee was assessed by increasing the turnover and as such, the non-compliance with the mandatory notice as mandated under Section 37(1) of the Act of 2003 vitiates the impugned assessment order for the period 2012-13 and 2014-15. The

learned counsel further drawing the attention of this Court to the assessment order pertaining to the period ending 2013-14 submitted that the perusal of the said order would also show that the said assessment order was passed for non-compliance to a notice dated 11.05.2017 which was issued under Section 36 and as such, the power which was being exercised has to be in terms with Section 37(1) of the Act of 2003. Further to that, the imposition of penalty which has been done in the impugned assessment order for the period ending 2013-14 could not have been done without issuance of any notice.

16. The learned counsel for the Petitioner further made an additional submission in respect to the impugned orders pertaining to the Assessment Year 2012-13 and 2013-14 submitting inter alia that the impugned assessment orders for the period ending 2012-13 and 2013-14 are beyond the period of limitation inasmuch as Section 39 of the Act of 2003 stipulates that no assessment under the preceding provisions of the Act of 2003 shall be made after the expiry of 5 years from the end of the year to which the assessment relates. The learned counsel appearing on behalf of the Petitioner submits that in respect to the assessment orders which are the subject matter of WP(C) No.5223/2021 and WP(C) No.5299/2021, the assessments even assuming arguendo were done under Section 36 of the Act of 2003 for the period ending 2012-13 and 2013-14, the same ought to have been done by 31/03/2018 and 31/03/2019 respectively. In the instant cases, it was pointed out that for the Assessment Year 2012-13, the notice was issued on 10.08.2019 and for the assessment year 2013-14, the notice was issued on 02.07.2019. The learned counsel for the Petitioner therefore submitted that as notices of demand were issued on 10.08.2019 for the Assessment Year 2012-13 and on 02.07.2019 for the assessment year 2013-14, the same have to be construed that the said

assessment orders were passed beyond the period prescribed under Section 39 of the Act of 2003. In that regard, the learned counsel has drawn the attention of this Court to two judgments of the Supreme Court in the case of ***Assistant Transport Commissioner, Lucknow Vs. Nand Singh*** *reported in* ***(1979) 4 SCC 19*** and ***State of Andhra Pradesh Vs. M. Ramakishtaiah and Company: Khetmal Parekh*** *reported in* ***1994 (93) STC 406.***

17. Mr. B. Choudhury, the learned Standing counsel for the Finance and Taxation Department submitted that in the notice dated 11.05.2017, it was duly mentioned that if the Petitioner failed to appear and produce the evidence, the Petitioner would render itself liable to be assessed to the best of the judgment of the Assessing Authority without further giving notice to the Petitioner. Under such circumstances, it is the submission of the learned Standing counsel of the Finance and Taxation Department that no further notice was required as contemplated under Section 37(1) of the Act of 2003. On the question of limitation, it was mentioned that the assessment orders for the period ending 2012-13 and 2013-14 were duly passed on 21.12.2017 however, the records does not reflect as to why there was no notice issued to the Petitioner till 10.08.2019 for the Assessment Year 2012-13 and 02.07.2019 for the Assessment Year 2013-14.

18. In the backdrop of the pleadings, materials on records as well as the above noted respective contentions, let this Court deal with the relevant provisions of the Act of 2003. Chapter-V of the Act of 2003 relates to Returns, Assessment, Recovery and Refund of Tax. Section 29 relates to periodical returns and payment of tax. In terms with Sub-Section (1) of Section 29, every registered dealer and every dealer liable to pay tax, shall furnish a correct and

complete tax return in such form for such period, by such dates and to such authority as may be prescribed. The prescription is seen in Rule 17 of the Assam Value Added Tax Rule, 2005 (for short "the Rules of 2005"). In the instant case as from the statements made in the writ petitions, it is seen that the Petitioner has submitted its returns for the Assessment Years 2012-13, 2013-14 and 2014-15 in Form 14. Section 30 relates to Return Defaults.

19. Section 33 stipulates Scrutiny of Returns whereby in respect to such registered dealer or dealers to whom notice has been issued by the Prescribed Authority under Section 29 shall be subject to scrutiny by the Prescribed Authority to verify the correctness of the calculation, application of correct rate of tax and interest and input tax credit claimed therein and full payment of tax and interest payable by the dealer during that period. In terms with Sub-Section (2) of Section 33, if a mistake is detected as a result of such scrutiny made, the Prescribed Authority shall serve a notice in the prescribed form on the dealer to cure the defects and to make payment of the extra amount of tax along with interest as per the provisions of the Act of 2003, if it is so payable, by a date specified in the said notice. Thereupon, the dealer has to correct the defects and submit a new correct and complete return within the period specified in the notice with the evidence of payment of extra amount of tax and interest. As already stated while discussing the facts involved in each of the returns for the Assessment Years 2012-13, 2013-14 and 2014-15, the scrutiny of returns were made by the Respondent No.4 and the Petitioner thereupon had corrected the said defects and submitted new correct and complete return within the period specified in the notice with the evidence of payment of due amount of tax and interest as directed.

20. Section 34 relates to Provisional Assessment. The Provisional Assessment can be made by the Prescribed Authority for the period of default to the best of his judgment in circumstances when a dealer fails to furnish a tax return before the due date or if the tax return furnished by the dealer appears to the Prescribed Authority to be incorrect and incomplete or if the dealer fails to furnish a correct and complete return with evidence of the payment of tax and interest, if any, under Sub-Section (2) of Section 33 of the Act of 2003. It is a mandate under Section 34 that prior to initiating any proceedings for provisional assessment, the dealer has to be given a reasonable opportunity of being heard. It is however relevant to take note of that in terms with Sub-Section (4) of Section 34, the power conferred upon the Prescribed Authority under Section 34 shall not prevent the Prescribed Authority from making an audit assessment under Section 36 or best judgment assessment under Section 37 and any tax, interest or penalty paid against provisional assessment shall be adjusted against tax, interest and penalty payable on such assessment under Section 36 or 37 of the Act of 2003.

21. Section 35 of the Act of 2003 relates to Self-Assessment. A perusal of the said provision shows that the amount of tax due from a dealer liable to pay tax may be assessed separately for each year during which the dealer is so liable. In terms with Sub-Section (2) of Section 35, if a dealer had filed all the tax returns and the annual return or revised return in the prescribed manner and within the prescribed time and had paid the tax payable accordingly to such returns or revised returns and also interest if any, the returns or revised returns so filed shall be accepted and his assessment shall be deemed to have been made for the purpose of Sub-Section (1) subject to the adjustment of any arithmetical error apparent on the face of the said return. The proviso to Sub-

Section (2) of Section 35 stipulates that the assessment made under Sub-Section (2) of Section 35 of every such registered dealer who is required to furnish audit report under Section 62 shall be deemed to have been made if such dealer had furnished the audit report along with the annual return.

22. Section 36 relates to Audit Assessment. The said section being relevant for the purpose of deciding the instant dispute is quoted hereinbelow:

"*36. Audit assessment.- (1) Where-*

(a) a registered dealer is selected for audit assessment by the Prescribed Authority on the basis of any criteria or on random basis; or

(b) the Prescribed Authority is not satisfied with the correctness of any return filed under section 29; or bonafides of any claim of exemption, deduction, concession, input tax credit or genuineness of any declaration, evidence furnished by a registered dealer in support thereof; or

(c) the Prescribed Authority has reasons to believe that detailed scrutiny of the case is necessary; or

(d) a provisional assessment under section 34 has been made,

The Prescribed Authority may, notwithstanding the fact that the dealer may already have been assessed under section 34 or section 35, serve on such dealer in the prescribed manner a notice requiring him to appear on a date and place specified therein, which may be in the business premises or at a place specified in the notice, to either attend and produce or cause to be produced the books of account and all evidence on which the dealer relies in support of his returns including tax invoice, if any, or to produce such evidence as specified in the notice. For this purpose, the Prescribed Authority may also undertake tax audit of stock-in-trade of the dealer.

(2) The dealer shall provide full co-operation and assistance to the Prescribed Authority to conduct the proceedings under this section at his business premises.

(3) If the proceedings under this section are to be conducted at the business premises of the dealer and it is found that the dealer or his authorized representative is not available or is not functioning from such premises, the

Prescribed Authority shall assess to the best of his judgment the amount of tax due from him.

(4) If the Prescribed Authority is prevented by the dealer from conducting the proceedings under this section, the Prescribed Authority may demand, a sum not exceeding the amount of tax so assessed, by way of penalty.

(5) The Prescribed Authority shall, after considering all the evidence produced in course of the proceedings or collected by him either-

(a) confirm the self assessment under section 35; or

(b) set aside the self assessment under section 35 and assess the amount of tax due from the dealer; or

(c) assess the amount of tax due from the dealer, if no assessment has been made under section 35:

Provided that if the Prescribed Authority proposes to rely on any evidence collected by him, the dealer shall be afforded a reasonable opportunity of being heard before any adverse inference is drawn."

23. From a perusal of the said section, it reveals that notwithstanding the fact that the dealer may already have been provisionally assessed under Section 34 or had submitted the self-assessment under Section 35, the Prescribed Authority may serve on such dealer in the prescribed manner a notice under the circumstances as envisaged under Clause (a) to (d) of Sub-Section (1) of Section 36. From a perusal of the Clause (a) to (d) of Sub-Section (1) of Section 36, it reveals when such notice can be issued. A notice can be issued where a registered dealer is selected for audit assessment by the Prescribed Authority on the basis of any criteria or on random basis [clause (a)]; or where the Prescribed Authority is not satisfied with the correctness of any return filed under Section 29; or bonafides of any claim of exemption, deduction, concession, input tax credit or genuineness of any declaration, evidence furnished by a registered dealer in support thereof [clause (b)]; or

where the Prescribed Authority has reasons to believe that detailed scrutiny of the case is necessary [clause (c)]; or where a provisional assessment has been made under Section 34 of the Act of 2003. The Rule relevant in respect to Section 36 of the Act of 2003 is Rule 22 of the Rules of 2005 and the prescribed form in Form 20.

24. At this stage, if this Court takes note of Rule 22 of the Rules of 2005, it would reveal the various categories stipulated in Clauses (i) to (xi) in respect to which audit assessment under Section 36 of the Act of 2003 can be initiated. In terms with Sub-Rule (2) of Rule 22, the notice is required to be served upon the dealer as required under Sub-Section (1) of Section 36 shall be in Form-20.

25. A perusal of the notice issued in the instant case on 11.05.2017 would show that the said notice was issued in Form-20. Taking into account its relevance, the contents of the said notice is quoted hereinunder:

"***ASSAM VALUE ADED TAX RULES, 2005***

FORM-20

[See Rule 22(4)]

NOTICE UNDER SECTION 36 OF THE ASSAM VALUE ADDED TAX ACT, 2003

To

Name Shri/M/s Vishal Udyog

Address Solapara Guwahati

TIN No.18770028579

Whereas the returns(s) filed by you for the period from 2012-13 to 2014-15 has/have been selected for audit assessment under sub-section (1) of section 36 of the Assam Value Added Tax Act, 2003 and it has become necessary to make an assessment under sub-section (5) of that section in respect of the above mentioned period.

So, you are hereby required to-

(i) appear in person or through an authorized agent; and

(ii) produce evidence or have it produced in support of the returns;

(iii) produce or cause to be produced accounts, registers, invoices or other documents which you are required to maintain and furnish declarations and certificates you are required to furnish under the Assam Value Added Tax Act, 2003 or the rules made thereunder relating to the aforesaid period along with any other relevant evidence on which you may wish to rely in support of the returns filed by you or any objection which you may wish to raise in relation to these proceedings at Unit-C (Place) Guwahati (time) 11.00 AM (Date) 26/5/17.

Please take notice that in the event of your failure without sufficient cause to comply with this notice, you will render yourself liable to be assessed to the best of my judgment without further notice to you.

Signature_____

Prescribed Authority

Seal of Prescribed Authority"

26. Before further proceeding, this Court finds it relevant to observe that though Sub-Section (1) of Section 36 as well as Sub-Rule (1) of Rule 22 of the Rules of 2005 categorically stipulates that the categories of cases wherein audit assessment proceedings can be initiated but a perusal of the said Form i.e. Form-20 or even the notices which were issued to the Petitioner on 11.05.2017 do not contain the stipulation as to why or under what categories, the dealer to whom the notice issued, the audit assessment proceedings had been initiated.

27. Sub-Section (2) of Section 36 stipulates that the dealer shall provide full co-operation and assistance to the Prescribed Authority to conduct the proceedings under this Section at his business premises. Sub-Section (3) of

Section 36 stipulates that if the proceedings under Section 36 are to be conducted at the business premises of the dealer and it is found that the dealer or his authorized representative is not available or is not functioning from such premises, the Prescribed Authority shall assess to the best of his judgment the amount of tax due from him. Sub-Section (4) of Section 36 stipulates that if the Prescribed Authority is prevented by the dealer from conducting the proceedings under Section 36, the Prescribed Authority may demand, a sum not exceeding the amount of tax so assessed, by way of penalty. Sub-Section (5) of Section 36 empowers the Prescribed Authority after considering all the evidence produced in course of the proceedings or collected by him either to confirm the self assessment under section 35 or set aside the self assessment under Section 35 and assess the amount of tax due from the dealer or assess the amount of tax due from the dealer, if no assessment has been made under Section 35. The proviso to Sub-Section (5) of Section 36 stipulates that if the Prescribed Authority proposes to rely on any evidence collected by him, the dealer shall be afforded a reasonable opportunity of being heard before any adverse inference is drawn.

28. Therefore, a perusal of said Section stipulates that issuance of a notice in Form-20 in respect to those categories coming within the ambit of Sub-Rule (1) of Rule 22 and subject to the stipulations contained in Clauses (a) to (d) of Sub-Section (1) of Section 36. The notice which would be issued in Form-20 shall specify the date and place which may be in the business premises or at a place specified in the notice, to either attend and produce or cause to be produced the books of accounts and all evidence on which the dealer relies in support of his returns including tax invoice, if any, or to produce such evidence as specified in the notice. It is very pertinent herein to mention that while Sub-

Section (3) of Section 36 empowers the Prescribed Authority to assess to the best of his judgment the amount of tax due from the dealer, Sub-Section (5) of Section 36 only stipulates the power either to confirm the self assessment under Section 35 or to set aside the self assessment under section 35 and assess the amount of tax due from the dealer or assess the amount of tax due from the dealer, if no assessment has been made under Section 35.

29. This Court further finds it relevant to observe that in Sub-Section (1) of Section 34 power has been conferred upon the Prescribed Authority to provisionally assess to the best of his judgment. Power has been conferred under Section 36(3) to the Prescribed Authority to assess to the best of judgment. However, the same phraseology does not appear in Section 36(5).

30. Section 37 deals with Best Judgment Assessment. In terms with Sub-Section (1) of Section 37, if the conditions stipulate in Clauses (a) to (d) of Sub-Section (1) of Section 37 are fulfilled, the Prescribed Authority shall issue a notice to the dealer in the prescribed form and in the prescribed manner, so as to give him a reasonable opportunity of being heard, assess him to the best of his judgment. The prescription in respect to best judgment assessment can be found in Rule 23 of Rules of 2005 which merely states that the notice required to be served on the dealer as required Sub-Section (1) of Section 37 shall be in Form 21. The said Form being relevant is quoted hereinbelow:

"***ASSAM VALUE ADED TAX RULES, 2005***

FORM-21

[See Rule 23]

NOTICE UNDER SECTION 37 OF THE

ASSAM VALUE ADDED TAX ACT, 2003

To

Name Shri/M/s _____

Address _____

TIN No._____

WHEREAS :

(a) you, being a registered dealer, have failed to furnish the annual return for the period from _____ to _____ and have thereby rendered yourself liable to be assessed to the best of my judgment under Sub-Section (1) of Section 37 of the Assam Value Added Tax Act, 2003;

OR

(b) you have knowingly furnished incomplete or incorrect annual return for the period from _____ to _____;

OR

(c) You have failed to comply with the terms of notice issued under Section 36 for audit assessment;

OR

(d) you have failed to maintain any account or you have maintained the accounts which are not in accordance with the provision of this Act or the rules framed thereunder;

So, you are hereby required to -

(i) appear in person or through an authorized agent; and

(ii) produce evidence or have it produced in support of the returns;

(iii) produce or cause to be produced accounts, registers, invoices or other documents which you are required to maintain and furnish declarations and certificates you are required to furnish under the Assam Value Added Tax Act, 2003 or the rules made thereunder relating to the aforesaid period along with any other relevant evidence on which you may wish to rely in support of the returns filed by you or any objection which you may wish to raise in relation to these proceedings at _____ (Place) _____ (time) _____ (Date).

2. Please take notice that in the event of your failure without sufficient cause to comply with this notice, you will render yourself liable to be assessed to the best of my judgment without further notice to you.

Signature_____

Prescribed Authority

Seal of Prescribed Authority"

31. At this stage, this Court finds it relevant to take note of that there is a marked difference between Form-20 and Form-21. While in Form 20, it has

been mentioned that the return filed by an assessee for a particular period have been selected for audit assessment without assigning why but in Form 21, why the notice was issued is mentioned i.e. the conditions stipulated in Sub-Clause (a) to (d) of Section 37(1). Therefore, from a conjoint reading of both the notices i.e. Form-20 and Form-21, it is clear that while issuing a notice for the purpose of an audit assessment under Section 36, Form-20 is silent as regards the satisfaction of Clauses (a) to (d) of Sub-Section (1) of Section 36 or the various categories mentioned in Sub-Rule (1) of Rule 22 of the Rules of 2005. Whereas in the Notice issued in Form-21, the dealer/assessee knows why such notice is issued. The above analysis would show when a notice is issued under Section 36 in Form-20, the dealer or the assessee is completely at dark as to why the prescribed authority have initiated audit assessment proceedings. Under such circumstances, if any adverse steps are taken in terms with Sub-Section (5) of Section 36, the principles of natural justice has to be followed. The failure to adhere to the same by giving a reasonable opportunity of being heard at a time of exercising power under Section 36(5) which are adversarial to the interest of the dealer/assessee violates the principles of natural justice.

32. This Court further finds it very pertinent that Sub-Section (5) of Section 36 only empowers the Prescribed Authority to either confirm the self assessment under Section 35 or set aside the self assessment made under Section 35 and assess the tax amount from the dealer or assess the amount of tax due from the dealer if no assessment has been made under Section 35. Therefore, as per Section 36(5), what can be assessed by the Prescribed Authority other than confirming the self assessment is only the amount of tax due and nothing more.

33. On the other hand, from a perusal of Sub-Section (1) of Section 37, the Prescribed Authority assesses the dealer to the best of his judgment. The difference in the phraseology employed by the Legislature which can be seen in Section 36(3) and Section 36(5) that the assessment would be made of the amount of tax due from the dealer whereas in Section 34 and in Section 37, the Prescribed Authorities had the authority to assess the dealer to the best of his judgment. This phraseology further makes it clear that the Prescribed Authority while exercising power under Section 36 can only assess on the basis of the turnover of the dealer which have already been ascertained whereas in the case of Section 34 and 37, the Prescribed Authority can not only assess the tax due from the dealer but also assess the turnover of the dealer. This aspect of the matter is clear from a reading of Clauses (a) to (d) in Sub-Section (1) of Section 36 with that of Clauses (a) to (d) of Sub-Section (1) of Section 37. In the backdrop of the above, let this Court deal with the facts of the instant cases.

34. In respect to the Assessment Years ending 2012-13 and 2014-15, it would be seen that the Respondent No.4 had determined the turnover or in other words enhanced the turnover and on the basis of which had made the assessment. This power was not available to the Respondent No.4 under Section 36 of the Act of 2003 though such power was available under Section 37 of the Act of 2003. But in order to take steps to exercise the power under Section 37, notice under Sub-Section (1) of Section 37 has to be issued. Admittedly, there was no notice issued under Sub-Section (1) of Section 37 in respect to the Assessment Year 2012-13 and 2014-15 for which the assessment order dated 21.12.2017 impugned in the WP(C) No.5299/2021 and the assessment order dated 24.06.2019 which have been impugned in WP(C)

No.5219/2021 are set aside and quashed.

35. Now coming to the assessment order dated 21.12.2017 for the Assessment Year 2013-14, it would be seen that from a perusal of the assessment order, there is no enhancement of the turnover. Be that as it may, from a perusal of the impugned assessment order dated 21.12.2017 shows that the notice was issued on 11.05.2017 and the dealer failed to comply with the terms of the notice and as such assessment proceedings were taken up on the basis of the information available in his possession. The reason why the assessment proceedings was taken up was for non-compliance to the notice under Sub-Section (1) of Section 36 as is self-evident from the impugned assessment order. The said being one of the conditions for initiating proceedings under Section 37, it is the opinion of this Court that the Respondent No.4 ought to have issued the notice under Sub-Section (1) of Section 37 and thereupon ought to have completed the said assessment. Even otherwise also, a perusal of the assessment order reveals that the Assessing Officer i.e. the Respondent No.4 have taken into consideration certain materials which were in his possession. It is not known as to how the Respondent No.4 could have proceeded with the assessment even under Section 36(5)(b) without giving the Petitioner a reasonable opportunity as is mandated in the proviso to Section 36(5). Under such circumstances, the assessment order dated 21.12.2017 also stands vitiated for non-compliance to Section 37(1) of the Act of 2003 as well as also the proviso to Section 36(5) of the Act of 2003.

36. This Court had already decided that the impugned assessment orders dated 21.12.2017, 21.12.2017 and 24.06.2019 are bad in law and stands

vitiated for non-compliance of notice. However, this Court further finds it relevant to take note of the second submission made by the learned counsel appearing on behalf of the Petitioner wherein it was mentioned that the assessment orders both dated 21.12.2017 for the Assessment Year 2012-13 and 2013-14 respectively are also bad in law in view of the provisions of Section 39 of the Act of 2003. Taking into account the importance of Section 39 to the issue involved, the same is quoted hereinunder:

> "***39. No assessment after five years***.- *No assessment under the foregoing provisions of this Act, shall be made after the expiry of five years from the end of the year to which the assessment relates:*
>
> *Provided that in case of offence under this Act for which proceedings for prosecution has been initiated, the limitation as specified in this sub-section shall not apply."*

37. From a perusal of the above quoted Section, it would show that the assessments which are carried out under the provisions of Sections 34, 35, 36 and 37 have to be completed within 5 years from the end of the year for which the assessment relates. Both the assessment orders dated 21.12.2017 relates to the period 2012-13 and 2013-14. Under such circumstances, for the Assessment Year 2012-13, the last date for completion of the assessment was 31.03.2018 and for the Assessment Year 2013-14, the last date for completion of the assessment was 31.03.2019. The impugned assessment orders dated 21.12.2017 on the face of it are within the period stipulated in Section 39 of the Act of 2003. But the question which arises is as to whether the non-communication of the assessment orders to the Petitioner with the prescribed period would render the Assessment Orders for the Assessment Year 2012-13 and 2013-14 fatal?

38. At this stage, this Court further finds it relevant to take note of that though there is no requirement under the provisions of the Act of 2003 for providing a copy of the assessment order to the dealer or the assessee, however, on the basis of the assessment carried out, demand notices are issued. Unless the demand notices are issued or made known to the assessee vide the permissible mode, the assessee would have no knowledge that the assessment had been done. This Court finds it relevant at this stage to take note of the two judgments referred to by the learned counsel for the Petitioner i.e. case of ***Assistant Transport Commissioner, Lucknow (supra)*** and ***M. Ramakishtaiah and Company (supra)***. In the case of ***Assistant Transport Commissioner, Lucknow (supra)***, it was observed that the order must be made known either directly or constructively to the party affected by the order so as to enable him to prefer an appeal if he so likes. It was further observed that it is plain and simple that mere writing an order in the file kept in the Office of the Taxation Officer is no order in the eye of law in the sense of affecting the rights of the parties for whom the order is meant. The order must be communicated either directly or constructively in the sense of making it known, which may make it possible for the authority to say that the party affected must be deemed to have known the order. It was further observed that the order would become effective against the person affected when it comes to the knowledge of the person either directly or constructively, otherwise not. Paragraph No.2 of the said judgment is quoted hereinunder:

> "***2.*** *In our opinion, the judgment of the High Court is right and cannot be interfered with by this Court. Apart from the reasons given by this Court in the earlier judgment to the effect that the order must be made known either directly or constructively to the party affected by the order in order to enable him to prefer an*

appeal if he so likes, we may give one more reason in our judgment and that is this : It is plain that mere writing an order in the file kept in the Office of the Taxation Officer is no order in the eye of law in the sense of affecting the rights of the parties for whom the order is meant. The order must be communicated either directly or constructively in the sense of making it known, which may make it possible for the authority to say that the party affected must be deemed to have known the order. In a given case, the date of putting the order in communication under certain circumstances may be taken to be the date of the communication of the order or the date of the order but ordinarily and generally speaking, the order would be effective against the person affected by it only when it comes to his knowledge either directly or constructively, otherwise not. On the facts stated in the judgment of the High Court, it is clear that the respondent had no means to know about the order of the Taxation Officer rejecting his prayer until and unless he received his letter on October 29, 1964. Within the meaning of S. 15 of the U. P. Motor Vehicles Taxation Act that was the date of the order which gave the starting point for preferring an appeal within 30 days of that date."

39. In the case of ***M. Ramakishtaiah and Company (supra)***, the Supreme Court was dealing with a case whereby the Deputy Commissioner was required to pass the order within four years of the order of assessment. The Deputy Commissioner though had stated that he had passed the order on 06.01.1973 but it was served upon the assessee only on 21.11.1973. Under such circumstances, the assessee raised a contention that the order was in fact made after the expiry of four years but was antedated and therefore it was bad. The Supreme Court in the said judgment observed that the order of the Deputy Commissioner though stated to have been made on 06.01.1973 but it was served upon the Assessee on 21.11.1973 i.e. precisely ten and half months later. There being no explanation from the Deputy Commissioner why it was so delayed, the Supreme Court observed that if there had been a proper

explanation, it would have been a different matter but in absence of any explanation whatsoever, it would be presumed that the order was not made on the date it purports to have been made and it could have been made after the expiry of the prescribed period. Paragraph No.2 of the said judgment being relevant is quoted hereinbelow:

> "***2.*** *This appeal is preferred against the judgment of the Andhra Pradesh High Court allowing the tax revision case filed by the respondent-assessee under section 22 of the Andhra Pradesh General Sales Tax Act. The order of assessment was made in the month of September, 1969. That order was sought to be revised by the Deputy Commissioner under sub-section (2) of section 20 of the Act. After hearing the respondent, the Deputy Commissioner passed orders prejudicial to the assessee. The Deputy Commissioner says that he passed the said orders on January 6, 1973, but it was served upon the assessee only on November 21, 1973. According to section 20, an order in revision must be passed within four years of the order of assessments In this case, service of the order is after the expiry of four years from the date of the order of assessment. In the circumstances, the assessee raised a contention that the order was in fact made after the expiry of four years but was ante-dated, and therefore, it is bad. The High Court accepted this submission but on a different reasoning. The High Court was of the opinion that every order must be communicated within a reasonable period and since the order of the Deputy Commissioner in this case was not so communicated, the High Court declared that the respondent-assessee shall not be bound by it. This was done by the High Court following its decision in T.R.C. No. 1 of 1976 pronounced on the same day [against which judgment Civil Appeal No. 1014 of 1977 (in this batch) has been filed]. We are of the opinion that the theory evolved by the High Court may not be really called for in the circumstances of the case. We are of the opinion that this appeal has to be dismissed on the ground urged by the assessee himself. As stated above, the order of the Deputy Commissioner is said to have been made on January 6. 1973, but it was served upon the assessee on November 21, 1973, i.e., precisely 10½ months*

later. There is no explanation from the Deputy Commissioner why it was so delayed. If there had been a proper explanation, it would have been a different matter. But, in the absence of any explanation whatsoever, we must presume that the order was not made on the date it purports to have been made. It could have been made after the expiry of the prescribed four years' period. The civil appeal is accordingly dismissed. No costs."

40. In the instant case, it would be seen that though the period as stipulated under Section 39 ended on 31.03.2018 and 31.03.2019 for the assessment years 2012-13 and 2013-14, but the notice of demands were issued in the month of July and August, 2019. There is no mention by way of affidavit or even from a perusal of the records as to why there was a delay in issuance of the said notice for more than two long years. Under such circumstances, this Court taking into account the judgment of the Supreme Court more particularly in the case of ***M. Ramakishtaiah and Company (supra)*** is further of the opinion that the impugned assessment orders for the Assessment Years 2012-13 and 2013-14 cannot be presumed to have been passed on 21.12.2017 as the same could have been made after the expiry of the period prescribed. For this reason also, the assessment orders for the period 2012-13 and 2013-14 are set aside.

41. In view of the above, all the assessment orders i.e. 21.12.2017, 21.12.2017 and 24.06.2019 along with the demand notices dated 10.08.2019, 02.07.2019 and 01.07.2019 are all set aside and quashed.

42. With above observations and directions, all the three writ petitions stands allowed.

JUDGE

Comparing Assistant