IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MR.JUSTICE HARISANKAR V. MENON

TUESDAY, THE 23RD DAY OF SEPTEMBER 2025 / 1ST ASWINA, 1947

OT.REV NO.32 OF 2023

AGAINST THE ORDER DATED 16.06.2023 IN RP NO.CT/4057/2016-R1/SGST OF COMMISSIONER OF STATE GOODS AND SERVICE TAXES, THIRUVANANTHAPURAM

REVISION PETITIONER/APPELLANT/ASSESSEE:

K.G.REJIMON, PROPRIETOR,
AGED 54 YEARS, M/S. THERMAL TECH ENGINEERS,
PULLUVAZHI P.O., PERUMBAVOOR, PIN – 683541.

BY ADVS.
SRI.P.S.SOMAN
SMT.T.RADHAMONY

RESPONDENT/REVENUE:

STATE OF KERALA, REPRESENTED BY ITS SECRETARY,
TAXES DEPARTMENT, GOVT. SECRETARIAT,
THIRUVANANTHAPURAM, PIN – 695001.

BY SRI.V.K.SHAMSUDHEEN, SENIOR GOVERNMENT PLEADER

THIS OTHER TAX REVISION (VAT) HAVING BEEN FINALLY HEARD ON 17.09.2025, THE COURT ON 23.09.2025 DELIVERED THE FOLLOWING:

C.R.

ORDER

Harisankar V.Menon, J.

This Other Tax Revision Petition, at the instance of an assessee under the provisions of the Kerala Value Added Tax Act, 2003 (hereinafter referred to as the 'Act'), seeks to challenge the *suo motu* steps initiated under Section 56 of the Act, cancelling an assessment completed in his favour, as confirmed by the Commissioner of Commercial Taxes.

2. The assessee is stated to be engaged in the trading of "thermic fluid heater", which, according to him, attracts tax at 4% under Entry 83(1)(f) of Schedule III to the Act. The assessment was of the year 2009-10 by an order dated 11.11.2013, imposing tax at the rate of 12.5% on the afore item, placing reliance on a clarification dated 12.08.2006 of the Commissioner of Commercial Taxes, as per which, the tax payable was at 12.5%. The assessment was challenged before the first appellate authority by filing KVATA No.99 of 2014 and

by the appellate order dated 31.01.2014, the first appellate authority noticed that the clarification relied on while finalizing the assessment has been *set aside* by this Court in the judgment dated 15.02.2008 in OTA No.3 of 2008, since there was no proper consideration of the issue by the Commissioner, directed the Commissioner to revisit the issue afresh.

3. Consequent to the remit as above, the assessing authority passed a fresh order dated 16.10.2015(Annexure-C), imposing tax at 4% with respect to the products dealt with by the assessee.

4. Later, the authority under Section 94 of the Act issued Annexure-D order dated 07.04.2016, holding that since "thermic fluid heaters" have not been specifically covered by any of the entries in Schedule III, the tax applicable would be at 12.5% as an RNR item under S.R.O.No.82/2006. Placing reliance on the proceedings of the authority under Section 94 as above, the Deputy Commissioner, Mattanchery initiated *suo motu* revisional steps to cancel the order dated 16.10.2015 in favour of the assessee, since, according to him, the afore order

was prejudicial to the interest of the revenue. After granting an opportunity to the assessee, the Deputy Commissioner issued Annexure-E order dated 03.09.2016 under Section 56(3) of the Act, cancelling the assessment order dated 16.10.2015 and remitting the matter for fresh consideration.

5. The *suo motu* revisional order as above was further challenged before the Commissioner of Commercial Taxes, essentially contending that the Deputy Commissioner did not have any jurisdiction to invoke the power under Section 56 of the Act. It is also contended that the assessment for the year 2009-10 cannot be finalised based on the clarificatory order passed by the authority under Section 94, dated 07.04.2016, relying on the judgment of the Division Bench of this Court in **Sreedhareeyam Ayurvedic Medicines (P) Ltd. and Ors. v. State of Kerala and Anr. [(2011) 19 KTR 561 (Ker)]**. The Commissioner, by his order dated 28.12.2020 (Annexure-F), rejected the revision petition filed by the petitioner. When the Commissioner's order was challenged by the petitioner-assessee, this Court, by Annexure-G order dated 25.11.2022

in O.T.Rev.No.22 of 2021, *set aside* the Commissioner's order and directed fresh consideration at his hands. On the basis of the afore remand, the Commissioner has issued Annexure-I order, rejecting the revision petition, confirming the exercise of *suo motu* powers by the Deputy Commissioner noticed as above.

6. It is in such circumstances that the captioned revision petition is presented by the revision petitioner-assessee.

7. Sri.P.S.Soman, the learned counsel for the revision petitioner-assessee, would contend that:

i. The exercise of the revisional power under Section 56(1) of the Act was erroneous insofar as the assessment was the subject matter of an appeal, and the order, which is now *set aside,* is the consequential order issued by the assessing authority. According to him, the proper remedy for the revenue was to challenge the first appellate order, as prescribed by the statute, and not to *set aside* the consequential order.

ii. Without prejudice to the above, he would contend that the commodity dealt by the revision petitioner was assessable only at the rate of 4% and the order issued by the Authority under Section 94 of the Act would not apply to

the case at hand. He submits that the item is falling under Entry 83(1) of Schedule III to the Act, and the findings to the contrary were without any justification.

iii. The clarificatory order (Annexure-D) dated 07.04.2016 can only have prospective operation.

8. *Per contra*, Sri.V.K.Shamsudheen, the learned Senior Government Pleader, would contend that:

i. The Deputy Commissioner is perfectly within his power to exercise the *suo motu* power insofar as the order dated 16.10.2015 passed by the assessing authority was against the clarificatory order issued by the authority under Section 94 of the Act. According to him, it is the error in the order dated 16.10.2015, which is sought to be rectified by the Deputy Commissioner.

ii. He would also seek to sustain the classification of the item as done in Annexure-D order dated 07.04.2016 by the authority under Section 94 of the Act.

9. We have considered the rival contentions and the connected records.

10. On an evaluation of the contentions raised as above and the impugned orders, the questions of law raised in this Other Tax Revision Petition are reframed as under:

i. Whether, in the facts and circumstances of the case, the exercise of the revisional power under Section 56 of the Act was justified?

ii. Whether, in the facts and circumstances of the case, the reliance placed on Annexure-D order dated 07.04.2016 for arriving at the tax payable by the revision petitioner was justified?

iii. Is the clarificatory order dated 07.04.2016 only having a prospective application?

11. The *suo motu* power exercised in the case at hand is with reference to the provisions of Section 56 of the Act. The afore provision reads as follows:

> **"Powers of revision of the Deputy Commissioner suo motu:-**
>
> (1)The Deputy Commissioner may, of his own motion, call for and examine any order passed or proceedings recorded under this Act by any officer or authority subordinate to him which in his opinion is prejudicial to the interest of the Revenue and may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such order thereon as he thinks fit.
>
> **Explanation:--** For the purpose of this section an order passed or proceedings recorded shall be deemed to be prejudicial to the interest of the revenue where the tax or other amount assessed or demanded is lower than what is actually due, either due to escapement of turnover or for

any other reason.

(2) The Deputy Commissioner shall not pass any order under sub-section(1) if,-

(a) the time for appeal against the order has not expired;

(b) the order has been made the subject matter of an appeal to the Deputy Commissioner (Appeals) or the Assistant Commissioner (Appeals) or the Appellate Tribunal or of a revision in the High Court; or

(c) more than four years have expired from the year in which the order referred to therein was passed.

(3) Notwithstanding anything contained in sub-section (2), the Deputy Commissioner may pass an order under sub-section (1) on any point which has not been decided in an appeal or revision referred to in clause (b) of sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or revision or before the expiry of the period of four years referred to in clause (c) of that sub-section, whichever is later.

(4) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard."

12. The learned counsel for the revision petitioner contends that the power under Section 56 of the Act cannot be exercised, since the order of assessment was the subject matter of an appeal, and it is the modified/consequential order of assessment dated 16.10.2015, which is *set aside,* exercising

the *suo motu* power. According to him, since the order dated 16.10.2015 is only a consequential order, the *suo motu* power cannot be exercised, and the revenue ought to have challenged the appellate order dated 31.01.2014.

13. However, we note that under Section 56 of the Act, the Deputy Commissioner (presently Joint Commissioner) is entitled to call for and examine any order passed or proceedings recorded under this Act by any officer or authority subordinate to him which, in his opinion, is prejudicial to the interest of the revenue and pass such orders thereon as he thinks fit after making the required enquiry in the matter. In the case at hand, the assessment was originally completed by the order dated 11.11.2013, levying the higher rate of tax by relying on the original clarification dated 12.08.2006. In the appeal filed, after noticing that the clarificatory order based on which the assessment was made, had already been *set aside* by this Court, the Appellate Authority issued the following directions:

"In the judgment dated 15-2-2008 In OTA No.2 of 2008,

> the Hon'ble High Court of Kerala set aside the clarification order passed by the Commissioner of Commercial Taxes and remitted back to the Commissioner Commercial Taxes to re-do the matter. So the clarification is not in force now. But there is no observation was made by the Hon'ble High Court in respect of the rate of tax of commodities covered by the clarification order. Considering facts and circumstances of the case, I am of view that it is only fair and reasonable to re-do the assessment. The appellant is directed to produce relevant documents connected with the case and the assessing authority directed to consider the case afresh in the light of above judgment. The appeal is disposed as modified as indicated above. Ordered accordingly."
>
> (Underlining supplied)

Thus, the Appellate Authority only directed a reassessment in the matter, directing the assessee to produce such other documents in support of the claim. It is to be noticed that there was no decision rendered as regards the tax payable by the assessee. True, the consequential order is the one dated 16.10.2015. However, the afore order does not appear to have addressed the issue afresh as directed by the Appellate Authority, as seen from the following observations:

> "M/s.Thermal Tech Engineers, Pulluvazhy.P.O, is an assessee

> on the rolls of this office bearing TIN: 32151392932. The original assessment of the dealer for the year 09-10 has been completed U/s. 25(1) of the Act vide this office proceedings read as Ist above. Aggrieved by this order the dealer preferred appeal before the Assistant Commissioner (Appeals), Ernakulam and the Appellate Authority directed to consider the case afresh in the light of the judgement dated 15-02-2008 in OTA No.2 of 2008, of the Hon'ble High Court of Kerala, and to modify the order accordingly. In the circumstances as per the direction of the Assistant Commissioner (Appeals), the original assessment of the dealer is modified as follows."

Thus, in spite of the positive directions issued, there was no effective reconsideration of the issue at the hands of the Assessing Authority while issuing the order dated 16.10.2015. The order is silent as regards the additional material, if any, produced by the revision petitioner-assessee. When that be so, the revision petitioner-assessee is not justified in contending that the *suo motu* power under Section 56 of the Act is not attracted, on account of the embargo under Section 56(2)(b). It is further to be noticed that Section 56 seeks to empower the Deputy Commissioner to exercise the *suo motu* power of revision as regards an "order passed" under the Act.

Here, it is not the order dated 11.11.2013 that is revised by the Deputy Commissioner under Section 56. Instead, it is the order dated 16.10.2015, which is cancelled as seen from Annexure-E order dated 03.09.2016.

14. The learned counsel for the revision petitioner-assessee sought to rely on the judgment of a Division Bench of this Court in OT.Rev.No.93 of 2022 dated 18.3.2025, in support of his submissions. However, we notice that the Division Bench in the afore case was considering a situation where the assessment was made, subject matter of an appeal, and the Appellate Authority has not only *set aside* the order of assessment but also directed the assessing authority to pass a modified assessment order based on the observations contained therein. It is in such circumstances that the Division Bench of this Court, in paragraph 7 of the judgment, found that *suo motu* power cannot be exercised to *set aside* the consequential assessment order, since the said order was one issued pursuant to the directions of the Appellate Authority.

15. However, as already noticed, the appellate order in the case at hand (Annexure-B) has not issued any positive directions and has only directed a revisit at the hands of the assessing authority. In such a situation, in our opinion, the revisional authority was justified in exercising the *suo motu* power under Section 56 of the Act.

16. The second issue arising for consideration is as regards the reliance placed on the proceedings of the Authority under Section 94 to exercise the *suo motu* power. Admittedly, the revision petitioner-assessee is stated to be engaged in the trading of "thermic fluid heater". The proceedings at Annexure-D specifically proceed to clarify the rate of tax with respect to the 'thermic fluid heater'. In that order, as regards the thermic fluid heater, it has been categorically found that the HSN Code of the product is 8419.89.90, not appearing in any of the Schedules to the Act, and hence assessable at the higher rate under S.R.O.No.82/2006.

17. We notice that, though the revision petitioner-assessee contends that the findings contained in Annexure-D

order were incorrect, apart from harping upon Entry 83 to Schedule III to the Act, no details of the item with specific reference to the HSN Code, etc., are made available before the assessing authority or the revisional authority, including the Commissioner. Though a detailed argument note is seen submitted before the Commissioner, the same is also silent about the HSN Code as regards the item dealt with by the revision petitioner-assessee. Unless and until the details of the product were presented, the revision petitioner-assessee could not have contended that the item is assessable with reference to Entry 83 to Schedule III of the Act. It is not in dispute that the entries in the various Schedules to the Act are geared to the HSN Code. It is only if a particular entry in the Schedule is not provided with an HSN Code, the question of application of "common parlance or commercial parlance" arises. Here, Entry 83 to Schedule III contains the HSN Code for each for the sub entries. When that be so, it was for the revision petitioner-assessee to have pointed out the HSN Code of the product dealt by him to support the classification thereunder.

However, such a course of action has not been adopted by the revision petitioner-assessee in the case at hand.

18. The petitioner-assessee further contends that he had relied on an expert opinion from a Chartered Engineer, and this ought to have been accepted. The opinion of the Chartered Engineer is dealt with by the Commissioner of State Tax in its order (Annexure-I) as under:

> "The expert opinion of the Chartered Engineer produced by the Petitioner to beef up his contentions has also been examined in detail. The report says that Thermic Fluid Heaters is technically and by utility, a Heat Exchanger. He has also pointed out that a Heat Exchanger Unit is not a Heater. Eventhough there are technical similarities between the different machines pointed out in the opinion of the Technical expert, the HSN code based classification followed to segregate the goods under different Schedules of the KVAT Act 2003 do not allow the goods in question to be included in Third Schedule of the Act taxable @ 4%. HSN based categorisation of goods and subsequent allocation of the same under various Schedules forms the basis of classification under the KVAT Act and accordingly no specific entry is seen for the goods in question in any of the Schedules to the KVAT Act 2003. Therefore they can only be classified under 12.5% category vide entry No.103 of SRO 82/2006."

As already noticed, the various entries in the Schedules to the Act are geared to the HSN Code. True, the expert opinion is to the effect that the thermic fluid heater is a "heat exchange unit". However, entry 83(1)(f) to the Schedule III reads as under:

THIRD SCHEDULE (4%)
[See Section 6(1)(a)]

Sl.No.	Description of Goods	HSN Code
1	2	3
	"83. Machinery of all kinds (other than those specifically mentioned in this schedule or in any other schedule,	
(1)	Machinery, plant or laboratory equipment, whether or not, electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilising, pasterurising, steaming, drying, evaporating, vapourising, condensing or cooling, other than machinery or plant of a kind used for domestic purposes instantaneous or storage water heaters non-electric."	
	…….. (f) Heat exchange units	8419.50

Thus, unless and until it is shown that the HSN Code of the product dealt with by the revision petitioner is the HSN Code

shown in Entry 83 (1)(f), the petitioner-assessee cannot succeed in his attempt. In the case at hand, a reading of the various orders does not show that the revision petitioner-assessee has relied on any HSN Code in support of his contention. Therefore, we are of the opinion that merely by referring to the opinion of the expert, the petitioner cannot succeed, even assuming that the commodity is a heat exchange unit. However, we notice that the issue has been directed to be revisited by the proceedings under Section 56 of the Act. Therefore, nothing prevents the petitioner-assessee from providing the details of the product with specific reference to the HSN Code, before the assessing authority, even when we hold the second question against the petitioner-assessee.

19. The last issue arising for consideration is with reference to the prospective operation of Annexure-D order dated 07.04.2016. The revision petitioner-assessee contends that the afore order can only apply prospectively with reference to the provisions of Section 94(2) of the Act. Section 94 (2) of the Act provides as under:

> "94(2) The Authority shall decide the question after giving the parties to the dispute a reasonable opportunity to put forward their case and produce evidence and after considering such evidence and hearing the parties pass orders within three months or within such time as may be extended by the Commissioner. Commissioner may considering the fact in issue decide whether such orders have prospective operation only."
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> (Underlining supplied)

Thus, with reference to the power to issue clarification under Section 94 of the Act, the Commissioner has been empowered to hold that clarificatory orders would only have prospective operation. In other words, the exercise of the power by the Commissioner under Section 94(2) of the Act is independent of the power of the authority to issue clarifications. The revision petitioner-assessee has raised this contention specifically before the Deputy Commissioner as well as the Commissioner, relying on a Division Bench judgment of this Court in **Sreedhareeyam Ayurvedic Medicines (pvt.) Ltd. and Ors.** (*supra*). However, the Commissioner, while issuing the impugned order at Annexure I, has brushed aside the afore plea, holding that it is only when there are conflicting

clarifications that retrospectivity is to be avoided. In our opinion, the afore finding of the Deputy Commissioner is not correct or legal.

20. In **Sreedhareeyam Ayurvedic Medicines (pvt.) Ltd. and Ors.** (*supra*), the Division Bench of this Court, with reference to the power under Section 94(2) of the Act, found as under:

> "15. The next question raised in the case is with respect to the retrospectivity of Ext.P9 which is given partial retrospectivity with effect from 01-04-2007. In this context, learned Government Pleader brought to our notice the amendment to Section 94(2) of the Act introduced by Finance Act, 2009 with effect from 01-04-2009, which gives power to the Commissioner to decide whether clarification would have prospective effect, in this case, the clarification was issued by the Commissioner with partial retrospectivity with effect from 04-04-2007. Learned counsel for the petitioner contended that the law is well settled in as much as the clarification gives statutory right to collect the tax at the rate clarified and if there is retrospective change, the assessee will not be able to collect tax for the product for the period prior to the new clarification. We are of the view that the later clarification over ruling the earlier clarification cannot have retrospective effect as the assessee's right under the Act to collect tax is denied. We, therefore declare

> that Ext.P9 issued on 23-12-2009 will have effect only from 01-01-2010 onwards. However, since the first clarification issued on 29-04-2006 was only on one item namely "Dhathri Hair Oil', we do not think other dealers or Appellants/Petitioners are entitled to the benefit of first clarification issued only to one assessee and so much so, they cannot claim relief entitled to the petitioner in W.P.(C) No.1121/2010. We also notice that even though large number of manufacturers engaged in production and marketing of hair oil went for clarification before the statutory authority and common orders were issued rejecting the contention that the product is an ayurvedic medicament, only few are contesting the same orders in appeal before this Court and the remaining manufacturers/dealers are paying tax at 12.5% on the same product. We have also noticed that the items are high value items which only the rich can afford and so much so, the principle of classification classifying luxury items at high rate of tax applies here also."

Similarly, the Apex Court also considered the same issue in **Reckitt Benckiser (India) Ltd. v. Commissioner, Commercial Taxes and Others [(2008) 15 VST 10 (SC)],** holding that:

> "We may also clarify that under the Act, the transactions which have taken place prior to April 7, 2006 will not be taken into account and the advance clarification will only apply for

the period April 7, 2006 onwards."

Therefore, there can be no doubt that the clarification can only apply prospectively.

21. In the case at hand, we notice that the clarificatory order was issued only on 07.04.2016, as evidenced by Annexure D. Under Section 30 of the Act, an assessee is entitled to collect the tax payable by him from the purchaser of the commodity. Hence, we are of the opinion that if the clarificatory order dated 07.04.2016 is provided with any retrospective operation, an assessee would be seriously prejudiced, since it will not be possible for him to collect the differential tax from his customer. This is especially so, since under the Act, the Commissioner had the power to declare that the clarification would not have prospective operation. The reason stated in the impugned order for not exercising the power does not appear to be legal. That being so, we are of the opinion that the clarification at Annexure-D can be made applicable only prospectively.

22. In the light of the afore, we answer the first two questions framed in paragraph 10 of this judgment in the affirmative and in favour of the revenue. The third question raised is also answered in the affirmative, in favour of the assessee.

Since the third question has been answered in favour of the assessee, the exercise of the revisional jurisdiction under Section 56 of the Act cannot be sustained. Hence, Annexure-E order of the Deputy Commissioner, confirmed by Annexure-I order of the Commissioner of State Tax, is *set aside*.

The Other Tax Revision Petition is disposed of as above.

Sd/-
MUHAMMED MUSTAQUE, JUDGE

Sd/-
HARISANKAR V. MENON, JUDGE

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APPENDIX OF OT.REV 32/2023

PETITIONER'S ANNEXURES:

ANNEXURE A	**COPY OF THE CLARIFICATION NO.C7-28881/06/CT DATED 12-08-2006 ISSUED BY THE COMMISSIONER.**
ANNEXURE B	**COPY OF THE ORDER OF THE1ST APPELLATE AUTHORITY IN KVATA 99/2014 DATED 31-01-2014.**
ANNEXURE C	**COPY OF THE REVISED ASSESSMENT ORDER NO. 32151392932/2009-10 DATED 16-10 2015 ISSUED BY THE ASSESSING AUTHORITY.**
ANNEXURE D	**COPY OF THE CLARIFICATION ORDER NO. C3-28881/06/CT DATED 07-04-2016 ISSUED BY THE AUTHORITY FOR CLARIFICATION.**
ANNEXURE E	**COPY OF THE SUO MOTU REVISION ORDER NO. M5-2156/SM/2016 DATED 03.09.2016 ISSUED BY THE DEPUTY COMMISSIONER, COMMERCIAL TAXES, MATTANCHERRY FOR THE YEAR 2009-10.**
ANNEXURE F	**TRUE COPY OF THE RP ORDER NO. CT/4057/2016-R1 DATED 28-12-2020 ISSUED BY THE COMMISSIONER.**
ANNEXURE G	**TRUE COPY OF THE ORDER IN O.T. REVN.NO.22 OF 2021 DATED 25-11-2022 OF THE HON'ABLE HIGH COURT.**
ANNEXURE H	**TRUE COPY OF THE HEARING NOTE DATED 28-4-2023 FILED BEFORE THE COMMISSIONER.**
ANNEXURE I	**COPY OF THE REVISION ORDER NO. CT/4057/2016-R1/SGST DATED 16-06-2023 ISSUED BY THE COMMISSIONER OF STATE TAX, SGST DEPARTMENT, THIRUVANANTHAPURAM.**