IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION (STAMP) NO.93644 OF 2020

M/s. Yogi Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.93647 OF 2020

Jay Jalaram Construction Co. (Petroleum Division) … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.93649 OF 2020

M/s. Ratan Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.93646 OF 2020

M/s. Shree Sai Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.93648 OF 2020

M/s. Patel Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.94450 OF 2020

M/s. Shubham Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.94449 OF 2020

M/s. Ankur Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.94222 OF 2020

M/s. Haveli Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.94223 OF 2020

M/s. Sainath Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

WITH
WRIT PETITION (STAMP) NO.94113 OF 2020

M/s. Khanvel Petroleum … Petitioner
Versus
Commissioner of VAT,
Dadra & Nagar Haveli & another … Respondents

Mr. Rafiq Dada, Senior Advocate a/w. Ms. Nikita Badheka and Mr.Parth Badheka for Petitioner in Writ Petition (St.) Nos.94450/2020, 93649/2020 and 93647/2020.

Ms. Nikita Badheka a/w. Mr. Parth Badheka for Petitioner in Writ Petition (St.) Nos.93646 of 2020, 93648 of 2020 and 93644 of 2020.

Mr. Parth Badheka for Petitioner in Writ Petition (St.) No.94449 of 2020.

Mr. Vijaysinh Thorat, Senior Advocate a/w. Ms. Varsha Palav, Mr. Ajinkya Palav, Mr. Anuj Tiwari i/b. The Laureate for Petitioner in WP (St.) No.94223 of 2020.

Ms. Varsha Palav, Mr. Ajinkya Palav, Mr. Anuj Tiwari i/b. The Laureate for Petitioner in WPST/94222/2020.

Mr. V. Sridharan, Senior Advocate a/w. Ms. Smita Durve, Mr. Aman Anand, Ms. Parisha Shah, Mr. V. Thakar, Ms. Sneha Vani i/b. Mr. Arshil Shah for Petitioner in WPST/94113 of 2020.

Mr. H. S. Venegaonkar a/w. Mr. Saurabh Kshirsagar for Respondents in all the Petitions.

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.
Reserved on : MARCH 10, 2021
Pronounced on : MAY 21, 2021

JUDGMENT and ORDER : (*Per Ujjal Bhuyan, J.*)

Subject matter and reliefs sought for in all the writ petitions being identical, those were heard together and are being disposed of by this common judgment and order.

2. We have heard Mr. Rafiq Dada, Mr. Vijaysinh Thorat and Mr. V. Sridharan, learned senior counsel for the petitioners; and Mr. H. S. Venegaonkar, learned counsel for the respondents in all the writ petitions.

3. For the sake of convenience, we have divided the bunch of cases into three groups; one argued by senior counsel Mr. Dada, the other by senior counsel Mr. Thorat and the last group by Mr. Sridharan, learned senior counsel.

4. The group of cases argued by Mr. Dada comprises of the following:-

Writ Petition (St.) Nos.94450, 93644, 94449, 93648, 93646, 93649 and 93647 of 2020.

Of these, Mr. Dada argued the case of *M/s. Shubham Petroleum*, Writ Petition (St.) No.94450 of 2020 as the lead case.

4.1. Writ Petition (St.) No.94222 of 2020 and 94223 of 2020 were argued by Mr. Thorat, learned senior counsel.

4.2. Lastly, Writ Petition (St.) No.94113 of 2020, *Khanvel Petroleum Vs. Commissioner of VAT, Dadra & Nagar Haveli* was argued by Mr. V. Sridharan, learned senior counsel.

4.3. Since the facts and reliefs sought for in all the writ petitions are identical (besides all the petitioners are similarly placed, being retail petrol pump dealers in the union territory of Dadra and Nagar Haveli), the facts of *M/s. Shubham Petroleum Vs. Commissioner of VAT, Dadra & Nagar Haveli*, Writ Petition (St.) No.94450 of 2020 argued as the lead case are being referred to for the sake of convenience.

5. Petitioner is a proprietorship firm having its place of business at Khanvel Road, Village Kahdoli in the union territory of Dadra and Nagar Haveli. It is duly registered under the Dadra and Nagar Haveli Value Added Tax Regulations, 2005 (briefly “the VAT Regulations” hereinafter). Petitioner is carrying on the business of retail petrol pump dealership.

6. Deputy Commissioner (VAT), Dadra and Nagar Haveli, Silvassa (briefly referred to as the ‘Deputy Commissioner’) issued notice for audit of business affairs dated 25.09.2020 to the petitioner. By the said notice, it was stated that the Deputy Commissioner was satisfied that an audit of petitioner’s business affairs as a dealer was required to be undertaken for the period 2010-11, 2011-12 and 2012-13. Petitioner was, therefore, directed to attend office of Value Added Tax (VAT) Department on 03.10.2020 at 11:00 a.m. and to produce / cause to be produced the books of accounts and all evidence on which petitioner would rely in support of the returns filed by the petitioner, including tax invoices, if any, and in addition to produce or cause to be produced the following documents:-

i. 'C' Forms issued to the refinery;
ii. VAT returns;
iii. Assessment orders;
iv. Balance sheet; and
v. Audit report.

6.1. Petitioner was cautioned that in the event of failure to comply with the notice, audit of the business affairs for the period under consideration would be made to the best of judgment of the Deputy Commissioner without any further notice.

7. Upon receipt of the said notice, petitioner replied to the Deputy Commissioner *vide* letter dated 30.09.2020 stating that petitioner's outlet was already assessed for the period 2010-11, 2011-12 and 2012-13. Pointing out that petitioner's tax consultant is based at Vapi, Gujarat, petitioner stated that because of restrictions due to Covid-19 pandemic, some time would be required to trace out the papers. Therefore, time was sought for. However, without reference to the aforesaid reply of the petitioner, Deputy Commissioner informed the petitioner *vide* letter dated 05.10.2020 that time was extended till 12.10.2020 for production of documents in terms of the notice dated 25.09.2020.

8. On 12.10.2020, petitioner submitted the following documents to the Deputy Commissioner:-

i. Assessment orders for the three years;
ii. Audit report and balance sheet;
iii. Returns and *challans;*
iv. Summary statement of sale and purchase; and
v. 'C' Form, summary statement and photocopy.

9. Petitioner has stated that it had already been assessed for the financial years 2010-11 on 25.10.2013, 2011-12 on 25.10.2013 and 2012-13 on 22.01.2014.

10. However, Deputy Commissioner passed audit reports (orders) under section 58 of the VAT Regulations for the three financial years on 12.10.2020 (in some cases the date of the audit report / order is 13.10.2020; however, the contents of all the audit reports / orders are identical). By the said audit reports (orders), Deputy Commissioner came to the conclusion that information received from various refineries indicated differences with the returns furnished by the retailers for which the VAT Department had decided to conduct audit in respect of all petroleum dealers. Deputy Commissioner recorded that there was violation of sub-section (9) of section 86 and, therefore, the dealer is liable to pay tax and interest, besides payment of penalty.

11. After passing such audit reports (orders), Deputy Commissioner issued notice of default assessment of tax and interest under section 32 in Form DVAT - 24 as well as notice of assessment of penalty under section 33 in Form DVAT - 24A.

12. Aggrieved, the present writ petition has been filed for quashing of the audit reports (orders) dated 12.10.2020 passed under section 58 of the VAT Regulations as well as the notice for audit of business affairs dated 25.09.2020.

13. The challenge has been made primarily on the ground that such audit report / order is basically re-assessment but the time limit for assessment and re-assessment is four years as per section 34 of the VAT Regulations. Admittedly, the impugned notice as well as the impugned audit reports (orders) are beyond the limitation period of four years and, therefore, are without jurisdiction.

14. This Court while issuing notice on 29.10.2020 had directed that no coercive steps should be taken against the petitioner.

15. Respondents have filed affidavit in reply. At the outset, maintainability of the writ petition has been questioned. It is contended that the impugned orders and notice are amenable to challenge by way of statutory appeal under section 74(1)(b) of the VAT Regulations. Therefore, petitioner has an adequate and efficacious statutory alternative remedy for redressal of grievance. Without availing such alternative remedy, writ petition may not be entertained.

15.1. On merit, it is averred that in the year 2017, VAT Department of Dadra and Nagar Haveli had initiated a drive to collect revenue and to scrutinize the accounts of the dealers of petroleum products. In the course of the drive, VAT Department scrutinized the figures submitted by the petroleum dealers in Form DVAT-16. VAT Department found variation in the figures submitted by the petroleum dealers and in 'C' Forms issued by the VAT Department for the dealers. A list of 28 petroleum dealers has been furnished in the reply affidavit which includes the petitioner.

15.2. During the assessment for the years 2013-14 to 2015-16 carried out during the year 2017, it was found that the most of the dealers were indulging in the practice of evading VAT by manipulating the figures while submitting returns to the VAT Department for assessment.

15.3. Such evasion by the petroleum dealers caused alarm in the mind of the VAT Department which led to enquiry / investigation. VAT Department had called for information from various refineries *vide* office letter dated 09.06.2020 (*sic*) whereafter VAT Department received data from the oil refineries in the month of July, 2020 (though copy of the letter dated 09.06.2020 *(sic)* and replies of the refineries are stated to be annexed to the reply affidavit, those have not been annexed and were also not submitted before the Court even during the hearing). Be that as it may, during investigation, glaring facts of tax evasion by various petroleum dealers surfaced and, therefore, it was decided to conduct

audit of all the VAT registered petroleum dealers within the territory of Dadra and Nagar Haveli for the period 2010-13.

15.4. The said audit was conducted by the VAT Department and before final order was passed, proper opportunity was granted to the dealers. After issuance of notice and opportunity for furnishing details, final orders were passed on 12.10.2020 and 13.10.2020. Though a few dealers abided by the notice, the rest did not make any attempt of submitting response or documents which included M/s. Shubham Petroleum, the present petitioner. As per the orders passed under section 58 of the VAT Regulations, there is evasion of tax by the petroleum dealers which is sought to be recovered along with interest and penalty.

15.5. It is stated that VAT Department had found differences between purchase from the oil refineries and sale shown by the petitioners in their returns. After considering the figures submitted by the oil refineries, orders under section 58 have been passed following proper investigation, scrutiny of documents and upon due application of mind. The figure of recovery is more than Rs.106.74 crores.

15.6. On the contention of the petitioner that the impugned notice and orders are barred by limitation, it is stated that the impugned orders are orders of audit under section 58 of the VAT Regulations. Hence, section 34 would not be applicable. In so far audit under section 58 is concerned, there is no limitation period. VAT Department had initiated audit proceedings as discrepancies were found in the records of the oil companies and sale shown by the dealers in their returns.

15.7. Contending that the reports of audit under section 58 have been passed within the four corners of law, it is averred that for passing of report (order) under section 58 provisions of assessment or re-assessment cannot be invoked to introduce non-existent limitation.

15.8. In the circumstances, respondents submit that there is no merit in the writ petition and, therefore, the writ petition should be dismissed.

16. Except in Writ Petition (St.) Nos.94222 and 94223 of 2020, rejoinder affidavits have not been filed by the petitioners. Since rejoinder affidavits have been filed in the above two writ petitions, we may briefly refer to the same to complete the narrative.

17. On the question of maintainability of the writ petition as contended by the respondents, it is submitted that existence of an alternate remedy does not alter or affect exercise of writ jurisdiction of the High Court nor does it creates a legal bar for the High Court to exercise its writ jurisdiction. If the impugned notice and the consequential orders are without jurisdiction as in the present bunch of cases, the affected party can certainly invoke the writ jurisdiction of the High Court.

17.1. Referring to the drive undertaken by the VAT Department in the year 2017, it is stated that the same was without knowledge of the petitioner. Petitioner has not been informed about any such drive undertaken in the year 2017 till date. It is pointed out that the impugned notice and audit reports (orders) pertained to the financial years 2010-11, 2011-12 and 2012-13 and not for any other period including the year 2017.

17.2. Petitioner has denied that there was any variation in the figures submitted by it and in the figures incorporated in 'C' Forms issued by the VAT Department. In so far the period 2013-14 to 2015-16 is concerned, VAT Department had carried out assessments and had passed assessment orders dated 07.07.2017 for the financial years 2013-14, 2014-15 and 2015-16 assessing the tax payable by the petitioner at *nil* though interest and penalty were levied for late filing of returns and late payment of taxes. Upon receipt of the said assessment orders dated 07.07.2017 on

11.07.2017, petitioner paid Rs.12,35,212.00 on account of interest and penalty on 13.07.2017. There is no question of evasion of tax by the petitioner.

17.3. Allegations made by the respondents as to evasion of VAT by the petitioner by resorting to manipulation of figures has been strongly denied further stating that those allegations are vague and wild. Respondents have not produced any single document as regards the so called enquiry / investigation allegedly conducted by them. Copy of letter dated 29.06.2020 has not been served upon the petitioner; no such copy has been annexed to the reply affidavit nor submitted in the Court.

17.4. Referring to the contention of the respondents that many dealers did not approach the VAT Department after receipt of notice, it is stated that petitioner i.e., petitioners in Writ Petition (St.) No.94222 and 94223 of 2020 had filed written submissions on 12.10.2020 but that was not considered by the respondents while passing the audit reports (orders). Allegations made in the audit reports (orders) are incorrect and not borne out by facts.

17.5. Referring to section 48(6) of the VAT Regulations, it is submitted that there is a legal duty on the assessee to preserve and retain the accounts and records for a period of seven years after conclusion of events or transactions unless any proceeding in respect of any event or transaction is pending. Therefore, in the absence of any pending proceeding, no dealer including the petitioner is liable to preserve and retain accounts and records beyond the period of seven years. Admittedly, the notice dated 25.09.2020 calling upon the petitioner to produce documents was issued beyond the period of seven years.

17.6. Impugned notice and the consequential audit reports (orders) are in violation of sections 34 and 58 of the VAT Regulations read with sections 32 and 33 thereof. The impugned notice and the consequential

audit reports (orders) are, therefore, without jurisdiction being beyond the period of limitation. Respondent No.2 has abused the process of law. That being the position, writ petition is liable to be allowed with costs.

18. Mr. Rafiq Dada, learned senior counsel opening his arguments submits that the gravamen of discord in all the writ petitions arises from a notice for audit of business affairs for the periods 2010-11, 2011-12 and 2012-13 issued on 25.09.2020 calling for various documents for the purpose of audit. Despite providing the required details and documents in the case of petitioner M/s. Shubham Petroleum on 12.10.2020, best judgment orders under section 58 of the VAT Regulations were passed for all the three periods on the same day i.e., on 12.10.2020. He submits that all the notices and all the orders under section 58 are identically worded except variation in figures. Referring to section 58 of the VAT Regulations more particularly to sub-section (4) thereof, he submits that only two actions are possible after audit. Under section 58, Commissioner can either confirm the assessment if made or serve a notice for assessment if not made or re-assessment pursuant to sections 32 and 33 and that brings in section 34 which prescribes a period of limitation of four years for assessment and re-assessment. Every action of audit, enforcement and investigation must culminate in assessment or re-assessment. He, therefore, submits that the impugned notice and the resultant action are both barred by limitation being beyond the period prescribed in section 34 of the VAT Regulations. It is incorrect and untenable to state that audit provisions are independent and, therefore, not covered by any limitation under section 34.

18.1. Reverting back to section 58, learned senior counsel submits that it is not a stand alone section. A careful reading of this section would make it clear that provisions of assessment and re-assessment have been read into section 58. Limitation for assessment and re-assessment under sections 32 and 33 is found in section 34 which is four years from the date on which the return is furnished or the date on which assessment

under section 32 is made, whichever is earlier. This section however extends the time-limit by two additional years for the reasons specified therein. He submits that petitioner (*M/s. Shubham Petroleum*) was already assessed for the periods 2010-11 and 2011-12 on 25.10.2013 and for the period 2012-13 on 22.01.2014. Though for computing the period of limitation, the date of filing of return is to be considered being the date earlier in point of time, even if the dates of assessment are considered, the period of four years or the additional period of two years had long expired. Therefore, the actions contemplated under section 58 were already barred by limitation when the notice was issued on 25.09.2020.

18.2. Any notice under section 58 must comply with the rigours of limitation and other requirements as per sections 31 to 35. It is obvious that any order passed subsequent to a notice which is time barred would also be barred by limitation. Thus the impugned orders of audit dated 12.10.2020 are barred by limitation in terms of section 34.

18.3. Referring to section 48(6) of the VAT Regulations, learned senior counsel submits that duty is cast upon an assessee to preserve accounts and records for seven years after the conclusion of events and transactions and in the event any proceeding is pending then such accounts and records should be preserved till the final decision in such proceeding. In the instant case, no proceedings were pending against the petitioner. Therefore, the time-limit for preserving accounts and records i.e., seven years had also elapsed. In such circumstances, initiation of audit after the expiry of all periods of limitation would be wholly arbitrary and capricious, besides the entire proceeding under section 58 being barred by limitation under section 34 read with section 48(6). As a matter of fact, respondents in their reply affidavit have admitted in paragraph 12 that the time-limit for assessment and re-assessment under section 34 is four years but since the present is a case of audit under section 58, the aforesaid period of limitation under section 34 would not be applicable.

18.4. Another submission made by Mr. Dada is that the audit orders are purported to be based on enquiry made by the VAT Department in July, 2020 for the periods under consideration. However, this aspect was not stated in the impugned notice. Such information were also not made available to the petitioner. Though information received from the refineries were stated to be annexed to the reply affidavit of the respondents, the same was conspicuously not annexed; neither furnished to the petitioner nor produced before the Court. Therefore, not even a notional opportunity of rebutting the so called information on the basis of which the impugned notice was issued was provided to the petitioner. In such circumstances, there is clear breach of the principles of natural justice which has vitiated the impugned notice and the subsequent orders.

18.5. Mr. Dada has referred to sub-section (4) of section 38 which provides for refund arising out of audit under section 58 as well as section 39 which gives power to the VAT authority to withhold refund. This clearly shows that the legislative intent is that audit would be concluded by assessment or re-assessment.

18.6. Learned senior counsel submits that the lightening speed with which identical notices were issued on the same date to all the petitioners calling for details after nearly eight years and affording token formality of seven days to produce the same during the pandemic period followed by passing of identical orders in respect of the petitioner on the same date or on the next date makes it abundantly clear that the impugned notices and orders were passed with a pre-conceived notion; the notice was a mere formality. Such action is not only violative of the principles of natural justice but is also a serious miscarriage of justice.

18.7. Mr. Dada has placed reliance on the following decisions:-

a. *State of Punjab Vs. Shreyans Industries Limited,*

(2016) 4 SCC 769;

b. *Dhakeshwari Cotton Mills Limited Vs. Commissioner of Income Tax*, **AIR 1955 SC 65**; and

c. *Grasim Industries Vs. Collector of Customs*, **(2002) 4 SCC 297**.

19. Mr. Thorat, learned senior counsel representing the petitioners in Writ Petition (St.) Nos.94222 and 94223 of 2020 submits that without considering the request of the petitioners for further time for production of documents due to non-availability of employees in view of Covid-19 restrictions and also on account of the fact that documents sought for were very old, respondents passed three reports (orders) of audit for the years 2010-11, 2011-12 and 2012-13. As a matter of fact, petitioners had emailed written submissions on 12.10.2020 placing on record that it had regularly filed returns which were all assessed from the year 2005. It was also pointed out that there were no dues pending or outstanding against the petitioners. Despite best efforts, the old documents which were more than seven years old could not be traced out though these documents were already submitted by the petitioners to the VAT Department at the time of filing of returns. Therefore, certified copies of those documents were sought for but were not made available. In the written submissions, petitioners placed reliance on section 48(6) of the VAT Regulations as per which an assessee is required to retain and preserve accounts and records for a period of seven years. Petitioners also referred to section 58(1) of the VAT Regulations which speaks about assessment and re-assessment following audit and that if it is a case of assessment and re-assessment, section 34(1) would come into play which provides a limitation period of four years for making of assessment or re-assessment. However, without considering such written submissions, the impugned reports (orders) of audit were made.

19.1. Referring to the audit reports, Mr. Thorat submits that as mentioned therein, respondent No.2 had called for information from

various refineries for those three years *vide* letter dated 29.06.2020 and the information was allegedly made available to respondent No.2 *via* email dated 11.08.2020. Neither a copy of letter dated 29.06.2020 and email dated 11.08.2020 were made available to the petitioners. Those are not even being produced before the Court. Therefore, petitioners are not at all aware of the contents of letter dated 29.06.2020 and email dated 11.08.2020 on the basis of which the impugned notice dated 25.09.2020 was issued and consequential orders were passed. Thus, there is clear violation of the principles of natural justice which have rendered the impugned audit reports (orders) null and void.

19.2. Mr. Thorat submits that the audit contemplated under section 58 results into assessment, and if required, into re-assessment and confirmation of assessment already done. Therefore, sections 32 and 33 which deal with assessment and re-assessment will come into play for which limitation period is prescribed in section 34, which is four years. The impugned notice and orders of audit being beyond four years are clearly barred by limitation. Those are as such liable to be set aside and quashed.

20. Mr. Sridharan, learned senior counsel representing the petitioner in Writ Petition (St.) No.94113 of 2020 has referred to the scheme of assessment under the Income Tax Act, 1961 in order to understand assessment under the VAT Regulations. He has referred to sections 139, 142 and 143 of the Income Tax Act, 1961 (briefly “the Act” hereinafter) to contend that section 139 of the Act provides for furnishing of returns by the assessee. If the income tax officer is satisfied that the return is correct and complete, he shall assess the total income of the assessee under section 143(1) of the Act. If he is not satisfied, notice under section 143(2) is to be issued in response to which assessee can furnish necessary information / details. Additionally, the income tax officer can also seek further information / details. After hearing, the income tax officer shall pass an assessment order under section 143(3) of the Act.

He submits that similar provisions were also there in the Dadra and Nagar Haveli Sales Tax Regulations, 1978; but whether it is income tax law or sales tax legislation, as a matter of consistent legislative practice in all taxing statutes assessments have to be initiated or completed in a time bound manner and within the period of limitation prescribed.

20.1. Mr. Sridharan has referred to the White Paper published by the Empowered Committee of State Finance Ministers on State-level Value Added Tax which provides useful guidance on implementation of VAT. From the White Paper, he submits that authority had found that there was no need for compulsory assessment at the end of each year as was prevalent before introduction of VAT. Accordingly, the scheme provided that all returns filed by the dealer would be deemed to have been assessed. The scheme also provided for departmental audit of books of accounts etc. of the dealer within the time-limit specified. However, audit is nothing but scrutiny assessment which is well known in income tax legislation.

20.2. Mr. Sridharan has referred to sections 26, 27, 31, 32, 33 and 34 of the VAT Regulations which provide the broad scheme of assessment and re-assessment thereunder with section 34 providing for the time-limit for assessment and re-assessment. Referring to section 58 of the VAT Regulations, he submits that it is a provision related to audit of the affairs of the business of a dealer. This section empowers the Commissioner to call upon a dealer to produce the books of accounts and all other evidence on which the dealer relies in support of his returns or to produce such evidence as is specified in the notice. He submits that this section confers similar powers to the Commissioner as to an assessing officer in section 142 of the Act. Section 58 of the VAT Regulations is merely a procedural section dealing with powers of the Commissioner. Sub-section (4) of section 58 itself provides that after conducting the audit, the Commissioner may either confirm the assessment or serve a notice of assessment or re-assessment pursuant to

sections 32 and 33. Therefore, section 58 is not a substantive power of assessment or re-assessment but it merely grants certain powers to the Commissioner for enforcing production of evidence. The resultant assessment / re-assessment, if any, has to be conducted pursuant to sections 32 and 33 of the VAT Regulations and such proceedings would be subject to the period of limitation prescribed under section 34 of the VAT Regulations.

20.3. Contending that the provisions contained in the Delhi Value Added Tax Act, 2004 pertaining to assessment and audit are *pari materia* to the VAT Regulations, learned senior counsel has placed reliance on the following decisions of the Delhi High Court and the Supreme Court:-

a. *ITD - ITD CEM JV Vs. Commissioner of Trade and Taxes*, **Writ Petition (Civil) No.5231 of 2014** decided on **14.05.2015**;
b. *ITD - ITD CEM JV Vs. Commissioner of Trade and Taxes*, **(2016) 91 VST 218** (Delhi);
c. *H. G. International Vs. Commissioner of Trade and Taxes*, **(2018) 48 GSTR 220** (Delhi);
d. *S. S. Gadgil Vs. Lal & Co.*, **(1964) 53 ITR 231** (SC); and
e. *CIT Vs. Rao Thakur Narayan Singh*, **(1965) 56 ITR 243** (SC).

21. Responding to the submissions made by learned senior counsel for the petitioners, Mr. Venegaonkar, learned counsel for the respondents at the outset submits that the impugned orders of audit are appealable orders under section 74(1)(b) of the VAT Regulations. Since the petitioners have not availed the alternative remedy as provided under the statute, the writ court may not invoke its writ jurisdiction under Article 226 of the Constitution of India. On this ground itself, the writ petitions should be dismissed and the petitioners should be relegated to the appellate forum.

21.1. On merit he submits that section 58 of the VAT Regulations is a stand alone provision and is not controlled by section 34. Therefore, the limitation prescribed for assessment and re-assessment under section 34 cannot be read into section 58. Mr. Venegaonkar's further submission is that petitioners had committed fraud and thereby had deprived the State of its lawful revenue which was clearly borne out by the information furnished by the oil refineries. Analysis of such information revealed discrepancies in the facts and figures submitted by the petitioner at the time of filing returns and from the 'C' Forms submitted by the VAT Department. He submits that fraud vitiates all proceedings and when it is a question of fraud, question of limitation will not arise.

21.2. In support of his submissions, Mr. Venegaonkar has placed reliance on the following decisions:-

a. *P. P. Abdulla Vs. Competent Authority*, **(2007) 2 SCC 510**;
b. *Commissioner of Central Excise Vs. Kalvert Foods India Private Limited*, **(2011) 12 SCC 243**;
c. *Commissioner of Customs Vs. Candid Enterprises*, **(2002) 9 SCC 764**;
d. *Grasim Industries Limited Vs. Collector of Customs*, **(2002) 4 SCC 297**; and
e. A Canadian decision in *Girox Estate Vs. Trillium Health Centre* decided on **27.01.2005**.

21.3. Mr. Venegaonkar has referred to section 34 of the Gujarat Value Added Tax Act, 2003 which deals with audit assessment, more particularly to sub-section (8A) thereof and submits that the said provision is *pari materia* to section 58 of the VAT Regulations. While in the case of *H. Tribhovandas Vs. State of Gujarat* decided on **26.04.2018**, a Division Bench of the Gujarat High Court took the view that the notices issued under the said provision would have to be within the limitation period of five years as provided under section 35, however, another Division Bench subsequently in *Samay Sales Vs. State of*

Gujarat, **2018 SCC Online Gujarat 3925** opined that applying the limitation prescribed under section 35 to the proceedings under section 34(8A) would be re-writing section 34(8A) and to provide a limitation which is not there in the said section. Matter has been referred to the Full Bench.

21.4. Lastly, Mr. Venegaonkar has also placed reliance on the decision of the Supreme Court on the point of fraud in *Ram Chandra Singh Vs. Savitri Devi*, **(2003) 8 SCC 319**.

22. Mr. Dada in his reply submissions submitted that it was only at the time of filing reply affidavit that the respondents for the first time alleged that there was a fraud committed by the petitioner which was presumed on the basis of certain information received from the refineries. He submits that any allegation of fraud has to be averred and proved. A perusal of the impugned notice would make it abundantly clear that it did not allege fraud or even remotely mention any ingredient of fraud practised by the petitioner. The impugned orders of audit also do not mention fraud. When such an allegation of fraud is not there in the original notice, the same cannot be made in subsequent proceedings arising out of the notice. In support of his submissions, Mr. Dada has placed reliance on the following decisions:-

a. *Geo Tech Foundations and Construction Vs. Commissioner of Central Excise, Pune*, **(2008) 224 ELT 177 (SC)**;
b. *CCE Vs. Philips India Limited*, **(2010) 257 ELT 499**; and
c. *Larson & Toubro Limited Vs. CCE*, **(2007) 9 SCC 617**.

22.1. Referring to the two conflicting judgments of the Gujarat High Court i.e., **H. Tribhovandas** *(supra)* and **Samay Sales** *(supra)*, he submits that section 34(8A) of the Gujarat Value Added Tax Act, 2003 is not *pari materia* with section 58 of the VAT Regulations. Even then a close look at sub-section (8A) would show that it starts with the expression “during the course of any proceedings under this Act” which

may include a proceeding under section 35 of the said Act. The judgments in **H. Tribhovandas** *(supra)* and **Samay Sales** *(supra)* differed on the applicability of limitation and, therefore, it has been referred to the Larger Bench. According to the respondents, like sections 34(8A) and 35 of the Gujarat Value Added Tax Act, 2003 operating in different fields, section 58 on the one hand and sections 32, 33 and 34 on the other hand of the VAT Regulations operate in different fields. However, learned senior counsel asserts that it is not so and that, sections 58 and sections 32 and 33 are interlinked which would be clear from section 58(4) itself. Reference to Canadian judgment is totally uncalled for as the facts are completely unrelated. Reliance placed on **Ram Chandra Singh** *(supra)* is also misplaced. Allegation of fraud has been raised for the first time in the reply affidavit by the respondents and at the time of hearing.

23. Similarly, Mr. Thorat, learned senior counsel referring to the two conflicting decisions of the Gujarat High Court submits that one has to take into consideration that provisions of section 34(8A) of the Gujarat Value Added Tax Act, 2003 cannot be treated at par with the provisions of section 58 of the VAT Regulations. Referring to section 17 of the Contract Act, 1872, he submits that a bald allegation of fraud will not suffice; that too, without putting the affected party to notice. Fraud includes active concealment. In case of concealment, section 34 of the VAT Regulations itself provides for an extended period of limitation of six years for assessment or re-assessment which period had also expired in the present bunch of cases.

23.1. Mr. Thorat poses a question to himself as for what purpose the audit was made. If it was meant for assessment or re-assessment then the limitation period prescribed for assessment or re-assessment will *per force* apply. He submits that respondents have made a fundamental error in proceeding with the matter in as much as tax is on sale and not on purchase.

23.2. He asserts that section 58 is not a stand alone provision as is sought to be canvassed and has to be read with section 34 of the VAT Regulations. Therefore, the limitation provided in section 34 has to be read into section 58.

24. Mr. Sridharan, learned senior counsel summing up the submissions has contended that respondents want to put section 58 of the VAT Regulations on an exalted position which is not the intent and purport of the VAT legislation. Any such interpretation would be absurd.

25. Submissions made by learned counsel for the parties have received the due consideration of the Court.

26. On the basis of the pleadings and submissions made, the following issues can be culled out for consideration by the Court:-

(1) Whether the writ petitions should be entertained in view of availability of alternative remedy?

(2) Whether the petitioners committed fraud in depriving the respondents of their due revenue thereby enabling the respondents to invoke the jurisdiction under section 58 of the VAT Regulations unfettered by any limitation?

(3) Whether the impugned orders of audit dated 12.10.2020 and 13.10.2020 are in violation of the principles of natural justice?

(4) Whether the impugned notices dated 25.09.2020 and the consequential orders of audit dated 12.10.2020 and 13.10.2020 are beyond limitation and thus without jurisdiction?

(5) Whether the impugned notices dated 25.09.2020 and the consequential orders of audit dated 12.10.2020 and 13.10.2020 are liable to be interfered with by this Court or not?

Fraud

27. We take up issue No.(2) i.e., the issue relating to fraud for consideration as the first item.

28. In the affidavit in reply filed by the respondents it is stated in paragraph 2(iii) that the VAT Department found variation in the figures submitted by the petroleum dealers and in the 'C' Forms issued by the VAT Department to the respective dealers. VAT Department made an assessment for the years 2013-14, 2014-15 and 2015-16 and it was found that there was tax evasion of crores of rupees by the petroleum dealers. In paragraph 2(iv), it is stated that during such assessment made in the year 2017 it was found that most of the dealers were indulging in the practice of evading payment of VAT by manipulation of figures while submitting returns. Information collected from the oil refineries also revealed evasion of payment of tax by the petroleum dealers whereafter it was decided to conduct audit. VAT Department had initiated audit proceedings as discrepancies were found on a comparison of the records of the oil companies and sale shown by the dealers in their returns. Thus the petroleum dealers had wrongly caused loss to the public exchequer.

29. In the course of the hearing, Mr. Venegaonkar, learned counsel for the respondents developed on these averments and argued that it was a case of fraud committed by the petitioners leading to loss of revenue which is sought to be rectified by the impugned orders of audit. He submits that fraud vitiates all proceedings and no limitation can be put up as a defence in a case of fraud. He has placed reliance on the decision of the Supreme Court in **Kalvert Foods India Private Limited** (*supra*) to contend that in a case of clandestine removal of excisable goods, the period of limitation would have to be computed from the date of knowledge. On the above premise, he submits that since it is a case of fraud, limitation will run from the date of knowledge of fraud. Relying

upon **Candid Enterprises** (*supra*), he submits that section 17 of the Limitation Act lays down the cardinal principle that fraud nullifies everything. He also placed reliance on the decision of the Supreme Court in **Ram Chandra Singh** (*supra*) to contend that fraud vitiates every solemn act; misrepresentation itself amounts to fraud. Fraud and deception are synonymous. An act of fraud is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render a transaction *void ab initio*. Fraud is anathema to all equitable principles. Any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine. Writ jurisdiction is not available to a party who had committed fraud.

30. The concept of fraud or the effect of fraud was gone into in some detail by this Court in a recent decision dated **25.03.2021** in the case of *Essel Propack Limited Vs. Union of India*, **Writ Petition No.2958 of 2020**. After referring to the meaning of the word "fraud" in various dictionaries as well as the statutory definition of the said word in different statutes, this Court held that fraud has serious civil as well as criminal consequences. That apart, a finding of fraud is a stigma which is a reflection on the integrity of the concerned person or of the concerned corporate entity. It was held as under:-

> "17. In Oxford Advanced Learner's Dictionary, 8th Edition, 'fraud' has been defined to mean the crime of cheating in order to get money or goods illegally.
>
> 17.1. Black's Law Dictionary, 9th Edition defines 'fraud' to mean a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment; a misrepresentation made recklessly without belief in its truth to induce another person to act.
>
> 17.2. Section 25 of the Indian Penal Code, 1860 has defined the word 'fraudulently'. It says that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.
>
> 17.3. Under the Indian Contract Act, 1872, 'fraud' has been defined under section 17. As per this definition, fraud means and includes the acts mentioned thereunder committed by a

party to a contract or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to enter into the contract. The acts mentioned in section 17 includes active concealment of a fact by one having knowledge or belief of the fact. While we are in the Contract Act, we may also mention that misrepresentation is separately defined thereunder. As per section 18, representation means and includes- (1) the positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which without an intent to deceive gains an advantage to the person committing it or any one claiming under him by misleading another to his prejudice or to the prejudice of any one claiming under him; and (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

17.4. In so far the Companies Act, 2013 is concerned, section 447 deals with punishment for fraud. It says that without prejudice to any liability including repayment of any debt under the Companies Act, 2013 or any other law for the time being in force, any person who is found to be guilty of fraud shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud but which may extend to three times the amount involved in the fraud. As per the first proviso, where the fraud in question involves public interest, the term of imprisonment shall not be less than three years. As per explanation (i), fraud in relation to affairs of a company or any body corporate includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner with intent to deceive, to gain undue advantage from, or to injure the interests of the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

18. From a reading of the above meaning and definition of fraud, it is quite evident that fraud has serious civil as well as criminal consequences. To constitute the offence of fraud there must be intent to deceive. That apart, a finding of fraud is a stigma which is a reflection on the integrity of a person or of a corporate entity."

30.1. Reference was made to the decision of the Supreme Court in the case of *Bhaurao Dagdu Paralkar Vs. State of Maharashtra*, **(2005) 7 SCC 605**, which had deliberated upon the meaning of the expression

'fraud' and its impact and thereafter observed that it is a settled proposition of law that fraud vitiates every solemn act. An order or decree or benefit obtained by fraud is a nullity and that such an order, decree or benefit can be challenged at any time in any proceeding. Relevant portion in **Essel Propack Limited** (*supra*) is extracted hereunder:-

> "19. In *Bhaurao Dagdu Paralkar Vs. State of Maharashtra*, **(2005) 7 SCC 605**, Supreme Court dealt with the expression 'fraud' and its impact. It was held as under:
>
> > "9. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always call loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. …
> >
> > 10. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. …
> >
> > 11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations

> proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata."
>
> 20. It is a settled proposition of law that fraud vitiates every solemn act. An order or decree or benefit obtained by playing fraud is a nullity and such an order, decree or benefit can be challenged at any time in any proceeding."

30.2. Having noticed the above, this Court referred to the decision of the Supreme Court in *Harjas Rai Makhija Vs. Pushparani Jain*, **(2017) 2 SCC 797** which decision highlighted that there must be a specific allegation of fraud. When there is an allegation of fraud, it must be enquired into. It is only after evidence is led coupled with intent to deceive that a conclusion of fraud can be arrived at. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party fraudulent. Fraud has a definite meaning in law. It must be proved and not merely alleged and inferred. On the above basis, this Court held that to constitute fraud there must be an intent to deceive. When an allegation of fraud is made, it must be enquired into. Enquiry would necessarily mean granting reasonable opportunity of hearing to the party accused of committing fraud. Evidence must be led and thereafter fraud must be proved. No conclusion of fraud can be drawn on mere allegation and by way of inference. It was held thus:-

> 21. However, in *Harjas Rai Makhija Vs. Pushparani Jain*, **(2017) 2 SCC 797**, Supreme Court highlighted that there must be a specific allegation of fraud. When there is an allegation of fraud, it must be enquired into. It is only after evidence is led coupled with intent to deceive that a conclusion of fraud could be arrived at. A mere concealment or non-disclosure without intent to deceive or a bald allegation of fraud without proof and intent to deceive would not render a decree obtained by a party as fraudulent. To conclude in a blanket manner that in every

case where relevant facts are not disclosed, the decree obtained would be fraudulent would be stretching the principle to a vanishing point. Referring to the decision of the Supreme Court in **Bhaurao Dagdu Paralkar** (*supra*) and other cases, Supreme Court held that it is clear that fraud has a definite meaning in law. It must be proved and not merely alleged and inferred.

22. Takeaway from the above decision is that to constitute fraud there must be an intent to deceive. When an allegation of fraud is made, it must be enquired into. Enquiry would necessarily mean granting reasonable opportunity of hearing to the party accused of committing fraud. Evidence must be led and thereafter fraud must be proved. No conclusion of fraud can be drawn on mere allegation and by way of inference."

31. In so far the present case is concerned, we find that in the notice dated 25.09.2020, Deputy Commissioner expressed the satisfaction that audit of the petitioner's business affairs as a dealer was required to be undertaken for the period 2010-11, 2011-12 and 2012-13. Therefore, petitioner was asked to attend the office and to produce the necessary documents and evidence. The said notice dated 25.09.2020 reads as under:-

"File No. DC (VAT)/Petroleum/Audit/2020-21/832 Date:-25/09/2020

To
M/s. SHUBHAM PETROLEUM
Address:- SRY.NO.54/8/2/1, KHANVEL ROAD
VILLAGE-KAHDOLI
Tin:-26001000686

Notice for Audit of Business Affairs

Whereas I am satisfied that an audit of your business affairs as a dealer is required to be undertaken for the period 2010-11, 2011-12 and 2012-13.

You are hereby directed to attend at VAT department, 1st Floor, Udhyog Bhavan, Amli Silvassa on 03.10.2020 at 11.00 AM and produce / cause to be produced the books of accounts and all evidence on which you rely in support of returns filed by you (including tax invoices, if any) and in addition produce or cause to be produced the following documents:

1. C-Forms issued to Refinery
2. VAT Returns
3. Assessment orders

4. Balance Sheet and Audit Report.

Please take note that in the event of your failure to comply with this notice; the audit of the business affairs for the instant period would be made to the best of my judgment, without any further notice.

sd/- illegible.

(Dr. Apurva Sharma)
Deputy Commissioner (VAT)
Dadra and Nagar Haveli
Silvassa ”

31.1. From a perusal of the notice as extracted above, it is crystal clear that there was no allegation of fraud against the petitioner. All that was noted was that the Deputy Commissioner was satisfied that an audit of the business affairs of the petitioner was required to be undertaken for the period under consideration.

32. In the audit report (order) dated 12.10.2020 for the year 2010-11 passed under section 58 of the VAT Regulations which is identical to all the audit reports in this bunch of cases except difference in figures, it is stated that VAT Department had called for information for the financial years 2010-11, 2011-12 and 2012-13 from various refineries i.e., Indian Oil Corporation Limited, Bharat Petroleum Corporation Limited etc. who had supplied oil to retail outlets in Dadra and Nagar Haveli. It is stated that the information was sought for *vide* office letter dated 29.06.2020 and the information was received through email dated 11.08.2020. On comparison of the data received from refineries and the returns furnished by the retailers, differences were found. Therefore, VAT Department decided to conduct audit in respect of all petroleum dealers. It is stated that notice dated 25.09.2020 was issued, whereafter dealer had submitted the documents after seeking an adjournment. Thereafter Department had made audit of the business affairs of the petitioner for the period under consideration to the best of judgment without any further notice. On reconciliation of returns, tax deficiency of

Rs.25,25,695.00 was found, whereafter it was held as under:-

> " From the record as available with department during the audit, there is violation found under sub-section (9) of Section 86 of DNH VAT Regulation, 2005 and therefore dealer is liable to pay tax, interest of Rs.61,24,810/- (Rs. Sixty One Lakh Twenty Four Thousand Eight Hundred Ten only) for which Demand Notice in DVAT-24 is created and Penalty notice in DVAT-24A amounting to Rs.25,25,695/- (Rs. Twenty Five Lakh Twenty Five Thousand Six Hundred Ninety Five only) is also created."

32.1. From a careful perusal of the audit report / order of audit, we find that though the Deputy Commissioner stated that there were differences in the data received from the refineries and returns filed by the retailers leading to tax deficiency, no allegation of fraud is discernible; not to speak of any finding that petitioner had committed fraud thereby causing loss to Government revenue.

32.2. When the impugned notice did not allege fraud and no such finding of fraud being discernible in the order of audit, it is not open to the respondents to make such sweeping allegation of fraud in the oral hearing which is not backed up by adequate pleadings. In **Geo Tech Foundations and Construction** *(supra),* Supreme Court held that when an allegation has not been made in the original notice, the same cannot be made in subsequent proceedings arising out of the notice.

33. In the circumstances, we are unable to accept the contention advanced by Mr. Venegaonkar that petitioner had committed fraud causing revenue loss to the respondents.

Natural Justice

34. We may now take up the issue of violation of principles of natural justice.

35. We have already seen the notice for audit of business affairs dated 25.09.2020 whereby the Deputy Commissioner recorded his satisfaction that audit of the business affairs of the dealer was required to be undertaken for the period under consideration and accordingly had directed the petitioner to attend office and to produce documents and evidence.

36. In the audit report / audit order dated 12.10.2020, it is stated that VAT Department had called for information from various refineries *vide* office letter dated 29.06.2020 which were received through email dated 11.08.2020, whereafter the petitioner was directed to pay tax, interest and penalty.

37. In the reply affidavit filed by the respondents, the same has been referred to in paragraph 2(iv) with the further statement that copies of the letter and reply have been annexed to the reply affidavit but copies of neither the letter dated 29.06.2020 nor the email dated 11.08.2020 have been annexed to the reply affidavit. Those were also not filed in the Court in the course of the hearing. Learned counsel for the petitioners contended that copies of the same were not furnished to them as well.

38. It is a cardinal principle of the rules of natural justice that whatever materials are relied upon against an affected party, those are required to be made available to the affected party or at least the gist of the same is to be made available to enable it to put up an effective defence; otherwise, it will be a violation of the principles of natural justice. Way back in 1955, Supreme Court in **Dhakeshwari Cotton Mills Limited** (*supra*) held that it was necessary for the Tribunal to have disclosed to the assessee what information was supplied to it by the departmental representative. Tribunal did not give any opportunity to the assessee to rebut the material furnished to it by the departmental representative and that it declined to take all the materials that the assessee wanted to produce in support of its case. The result was that

assessee had not had a fair hearing.

39. It is evident from a perusal of the impugned order of audit that it was based on the information furnished by the oil companies through email dated 11.08.2020. Therefore, it was imperative on the part of the Deputy Commissioner to have furnished copy of the said email to the petitioner or at least the material information which would have enabled the petitioner to have properly defended its case. Failure to do so has resulted in violation of the principles of natural justice.

Limitation

40. We now take up the prime issue as to whether the impugned notices dated 25.09.2020 and the consequential orders of audit dated 12.10.2020 and 13.10.2020 are beyond limitation and thus without jurisdiction. For a proper adjudication of this issue, it would be apposite to briefly refer to the relevant provisions of the VAT Regulations.

41. The Dadra and Nagar Haveli Value Added Tax Regulation, 2005 (already referred to as the "VAT Regulations" hereinabove) has been promulgated to consolidate and amend the law relating to levy of tax on sales or purchases of goods in the Union Territory of Dadra and Nagar Haveli and to provide for matters connected therewith or incidental thereto.

42. Chapter V of the VAT Regulations deals with furnishing of returns. As per section 26, it is the duty of every registered dealer liable to pay tax under the VAT Regulations to furnish to the Commissioner such returns in the prescribed form for each tax period and by such date as may be prescribed. In addition to the returns specified in section 26, under section 27 the Commissioner may require any person, whether a registered dealer or not, to furnish him with such other returns as may be

specified. Section 28(1) says that if within four years of making of an assessment, any person discovers any mistake or error in any return furnished by him under the VAT Regulations and as a result of such mistake or error has paid less tax than due, he shall within one month after such discovery furnish a revised return and pay the balance tax with interest thereon. Sub-section (2) deals with a situation where as a result of such mistake or error any person pays more tax than due; in such a case, the limitation continues to remain four years of the making of the assessment and the remedy is filing of appeal under section 74.

43. Chapter VI comprising of sections 30 to 42 deals with assessment and payment of tax, interest and penalties and making refunds. As per section 30, the Commissioner shall direct any person to pay any amount of tax, interest or penalty or other amount due under the VAT Regulations after making of an assessment for such amount payable by such person.

44. Section 31 deals with assessment. Sub-section (1) says that where a return is furnished by a person as required under section 26 or section 27 and which contains the prescribed information accompanied by the relevant documents and such person has complied with the necessary requirements, an assessment of the tax payable of the amount specified in the return shall be deemed to have been made under the VAT Regulations on the day on which such return was furnished. As per sub-section (2), no assessment shall be deemed to have been made under sub-section (1) if the Commissioner has already made an assessment of tax in respect of the same tax period under any other provision of the VAT Regulations.

44.1. Thus, what section 31 provides is acceptance of return filed by the concerned person by the Commissioner which would be construed to be an assessment on the date when the return was furnished. However, if an assessment has already been made for the said tax period, no such

assessment shall be deemed to have been made under sub-section (1).

45. Section 32 deals with default assessment or best judgment assessment. As per sub-section (1), if any person has not furnished returns under the VAT Regulations or has furnished incomplete or incorrect returns or has furnished a return which is not accompanied by the documents required to be filed along with the return, or has furnished a return which is not in conformity with the provisions of the VAT Regulations, the Commissioner may for the reasons to be recorded in writing, assess or re-assess to the best of his judgment the amount of net tax due for any tax period or tax periods. Sub-section (2) says that where the Commissioner has made an assessment under sub-section (1), he shall serve upon the concerned person, a notice of assessment of the amount of any additional tax due for that tax period. Sub-section (3) deals with a situation where the Commissioner has made an assessment under sub-section (1) and subsequently, further tax is assessed as due. In such an eventuality, the further tax so assessed shall be payable on the same date when the tax is payable.

45.1. Thus, what section 32 provides for is that in a case where there is default by a person in furnishing return, the Commissioner may make assessment or re-assessment to the best of his judgment but before doing that, he must record in writing the reasons for doing so.

46. Assessment of penalty is provided for in section 33.

47. Section 34 is relevant and is extracted hereunder:-

> "34. (1) No assessment or re-assessment shall be made by the Commissioner after the expiry of four years from-
>
> (a) the date on which the person furnished a return under section 26 or sub-section (1) of section 28; or
>
> (b) the date on which the Commissioner made an assessment of tax under section 32,
>
> whichever is the earlier:

> Provided that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose material particulars on the part of the person, the assessment or re-assessment may be made by the Commissioner within six years from the dates specified in clause (a) or clause (b), as the case may be.
>
> (2) Notwithstanding anything contained in sub-section (1), the Commissioner may make an assessment of tax within one year from the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person."

47.1. From the above, it is evident that there is a clear bar of limitation in making assessment or re-assessment. No assessment or re-assessment shall be made after expiry of four years from the date on which the return is furnished by the registered dealer under section 26 or under sub-section (1) of section 28 or the date of making of assessment under section 32, whichever is earlier. As per the *proviso*, where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose material particulars on the part of the concerned person, the assessment or re-assessment may be made within six years from the dates as specified in sub-section (1). Therefore, what the *proviso* says is that in a case of concealment or omission or failure to disclose material particulars on the part of the concerned person, the limitation of four years gets extended by another two years, to six years.

47.2. Sub-section (2) of section 34 is not relevant for the present discourse.

48. Refund of tax paid in excess together with refund of penalty and interest is dealt with in section 38. Sub-section (4) says that where the Commissioner has issued a notice to the person under section 58 informing him that an audit, investigation or enquiry into his business

affairs shall be undertaken, the excess amount required to be refunded shall be carried forward to the next tax period as a tax credit in that period.

49. Section 39 empowers the Commissioner to withhold refund in certain cases. Sub-section (1) says that where a person is entitled to a refund and any proceeding under the VAT Regulations is pending against him or a notice under section 58 had been issued pursuant to which assessment or re-assessment is pending and the Commissioner is of the opinion that payment of refund may adversely affect the revenue which may not be possible to recover later, he may either withhold the refund or obtain a security equal to the amount to be refunded. However, for doing so, he must record his reasons in writing.

50. Chapter VIII deals with accounts and records. As per section 48(1) which forms part of Chapter VIII, every dealer and a person to whom a notice has been served to furnish returns under section 27 are under an obligation to prepare and retain sufficient records to allow the Commissioner to ascertain the amount of tax due and to explain all transactions. However, under section 48(6), every person required to prepare or preserve accounts and records shall retain the required accounts and records for seven years after the conclusion of the events or transactions which they record unless any proceedings in respect of any event or transaction is pending in which event the accounts and records shall be preserved till the final decision in those proceedings.

51. Before adverting to section 58, we may refer to section 86 which deals with imposition of penalty in the event of tax deficiency. As per sub-section (9), any person who knowingly furnishes a return which is false, misleading or deceptive in material particulars or omits any material particular or claims tax credit in excess of the tax credit to which he is entitled, shall be liable to pay by way of penalty a sum of ten thousand rupees or the amount of the tax deficiency whichever is higher.

52. That brings us to section 58 forming part of Chapter X dealing with audit, investigation and enforcement. Since the entire dispute centers around interpretation of section 58, the same is extracted hereunder:-

> "58.(1) The Commissioner may, serve on any person in the prescribed manner, a notice informing him that an audit of the affairs of his business shall be conducted and in a case where an assessment had already been concluded under this Regulation, reassessment may be made or assessment already made may be confirmed.
>
> *Explanation.*- A notice may be served notwithstanding the fact that the person may already have been assessed under section 31 or section 32 or section 33.
>
> (2) A notice served under sub-section (1) may require the person on whom it is served, to appear on a date and place specified therein, which may be at his 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 invoices, if any), or to produce such evidence as is specified in the notice.
>
> (3) The person on whom a notice is served under sub-section (1) shall provide all co-operation and reasonable assistance to the Commissioner as may be required to conduct the proceedings under this section at his business premises.
>
> (4) The Commissioner shall, after considering the return, the evidence furnished along with the returns, if any, the evidence acquired in the course of the audit, if any, or any information otherwise available to him, either-
>
> (a) confirm the assessment; or
> (b) serve a notice of the assessment or re-assessment of the amount of tax, interest and penalty, if any, pursuant to sections 32 and 33.
>
> (5) Any assessment pursuant to an audit of the affairs of the business of the person referred to in sub-section (1) shall be without prejudice to prosecution for any offence under this Regulation."

52.1. From a careful reading of section 58 of the VAT Regulations as extracted above, we find that as per sub-section (1), the Commissioner may serve on any person in the prescribed manner a notice informing him that an audit of the affairs of the business shall be conducted and in a case where an assessment had already been concluded, re-assessment may be made or the assessment already made may be confirmed. As per the *explanation*, it is clarified that a notice under sub-section (1) may be served notwithstanding the fact that the person may already have been assessed under section 31 or section 32 or section 33. Thus from the above, what is discernible is that notwithstanding that a person has already been assessed under sections 31, 32 or 33, the Commissioner may serve upon such person a notice informing him that an audit of his business affairs shall be conducted. Where an assessment had already been made, such a notice may either lead to re-assessment or confirmation of the assessment already made. Therefore, the natural corollary of sub-section (1) would be that in a case where assessment has not been made, such a notice of audit may lead to assessment. As already noticed, where assessment had already been made such a notice may lead to confirmation of the assessment made or may lead to re-assessment. This is made more explicit in sub-section (4). But before adverting to sub-section (4), we may mention that under sub-section (2), the noticee should attend the place specified and produce or cause to be produced books of accounts and such other evidence as may be specified in the notice or on which the person relies upon in support of his return. In terms of sub-section (3), the noticee is required to provide all co-operation and reasonable assistance.

52.2. Sub-section (4) makes it clear that the Commissioner shall after considering the returns and the evidence furnished along with the returns or the evidence acquired in the course of the audit or any information otherwise available to him either confirm the assessment or serve a notice of assessment or re-assessment of the amount of tax, interest and penalty, if any, pursuant to sections 32 and 33. Finally, as per sub-section

(5), any assessment made pursuant to an audit of the affairs of the business of the person shall be without prejudice to prosecution for any offence under the VAT Regulations.

52.3. Therefore, a conjoint reading of the various sub-sections of section 58 would reveal that there is a purpose for issuing a notice informing the person concerned that an audit of the affairs of his business shall be conducted.

52.4. The word ‘audit’ is not defined in the VAT Regulations. As per the Concise Oxford Dictionary, Indian Edition, 'audit' means an official inspection of an oraganization's accounts, typically by an independent body. Black's Law Dictionary, Eighth Edition has explained the word 'audit' to mean a formal examination of an individual's or organization's accounting records, financial situation or compliance with some other set of standards. As per Advanced Law Lexicon, 3rd Edition, 'audit' has been explained to mean to draw up or present an account; to make an official investigation and examination of accounts and vouchers; an examination of accounts in general; a formal or official examination and authentication of accounts; setting of accounts; the process of auditing accounts; the hearing and investigation had before an auditor; a systemic checking of account books, bills, vouchers and other relevant records in conformity with the norms set by an organization, whether business, social or charitable; the correctness of accounts and relevant reports is deemed to be authentic only after the completion of the audit.

52.5. Thus having regard to the meaning of the word 'audit' as is ordinarily understood since it is not a defined expression under the VAT Regulations and having regard to the scheme of section 58, it is quite evident that when a notice is issued to a person informing him that an audit of the affairs of his business shall be conducted, the same certainly has a legal significance. Such a notice of audit may lead to assessment if not done and if assessment had been done then either to confirm the

assessment or to make re-assessment if the result of the audit shows that despite the assessment already made there is tax deficiency and more tax is required to be paid. If that is the position then for making of assessment or re-assessment, we will have to fall back upon sections 31 and 32 for which limitation of four years is prescribed in section 34. Therefore, section 58 of the VAT Regulations cannot be construed or interpreted in isolation or as a stand alone provision. Having regard to the consequences following invocation of section 58, it has to be read with sections 31 and 32 of the VAT Regulations and consequently section 34.

53. In the instant case, the notice of audit pertains to three years i.e., 2010-11, 2011-12 and 2012-13. We find that for these years the assessments were already made on 25.10.2013. As per section 34, limitation period is four years from the date of filing the return or from the date of assessment, whichever is earlier, which is extendable for a further period of two years in a case of concealment or omission or failure to disclose material particulars. Since the assessments were made on 25.10.2013, certainly the returns were filed much before this date, and it is the earlier date, which is to be taken into consideration for determination of limitation. Even if the later date of 25.10.2013 is taken, the four year limitation period had expired on 25.10.2017. If we add two more years to this, the extended period of limitation had expired on 25.10.2019. The impugned notice of audit under section 58 of the VAT Regulations is dated 25.09.2020 which is certainly beyond the period of limitation. It goes without saying that when the notice is barred by limitation, any proceeding or order pursuant to such time barred notice would also be barred by limitation.

54. In **Shreyans Industries Limited** *(supra),* Supreme Court has held that once the period of limitation has expired, the immunity against being subject to assessment sets in and the right to make assessment gets extinguished. A valuable right also accrues in favour of the assessee

when the period of limitation expires.

55. Before proceeding to the next issue, it would be apposite to deal with the two decisions of the Gujarat High Court in **H. Tribhovandas** *(supra)* and in **Samay Sales** *(supra)* on which much reliance was placed by Mr. Venegaonkar. Section 34 of the Gujarat Value Added Tax Act, 2003 deals with audit assessment. As per sub-section (8A), during the course of any proceedings under the said Act, if the prescribed authority is satisfied that tax has been evaded or sought to be evaded or the tax liability has not been disclosed correctly or excess tax credit has been claimed by any dealer in respect of any period or periods, in such a case notwithstanding the fact that any notice for assessment has been issued under any other provisions of the said Act, the prescribed authority may after giving such a dealer a reasonable opportunity of being heard, initiate assessment of the dealer in respect of such transaction or claim. However, no limitation period is prescribed for an action under sub-section (8A).

55.1. Section 35 deals with turnover escaping assessment. As per sub-section (1), where a dealer has been assessed under sections 32, 33 or 34 for any year or part thereof and the Commissioner has reason to believe that the whole or any part of the taxable turnover of the dealer in respect of any period has escaped assessment or has been under-assessed etc., he may serve a notice on the dealer and after giving the dealer an opportunity of being heard and after making such enquiry as may be considered necessary, proceed to determine to the best of his judgment, the amount of tax due from the dealer in respect of such turnover. However, sub-section (2) makes it clear that no order shall be made under sub-section (1) after expiry of five years from the end of the year in respect of which or part of which the tax is assessable.

55.2. In **H. Tribhovandas** (*supra*), a Division Bench of the Gujarat High Court was examining challenge to a notice issued under section

34(8A) of the Gujarat Value Added Tax Act, 2003. In that case, already assessment was made. The Division Bench examined jurisdiction of the assessing authority to re-examine the issue *vis-a-vis* contours of the powers of the assessing authority under sub-section (8A) of section 34. Division Bench found that under section 35 a completed assessment can be reopened only within five years but no such time-limit is provided for exercising power under sub-section (8A) of section 34. It was in that context, view was taken that to hold that even in a case where period of limitation to re-assess under section 35 has expired, the revenue can still invoke powers under section 34(8A) would go against the principles of harmonious construction of statutory provisions. As a matter of fact, the Division Bench noticed that the impugned notice was issued well beyond five years' period. In such circumstances, the impugned notice was quashed on the ground of being beyond the prescribed period of limitation.

55.3. In the subsequent case of **Samay Sales** (*supra*), another Division Bench of the Gujarat High Court doubted the correctness of the decision rendered in **H. Tribhovandas** (*supra*) by opining that powers under section 34(8A) and under section 35 operate in different fields and under different circumstances. Applying the limitation prescribed under section 35 to proceedings under section 34(8A) would be re-writing section 34(8A) and to provide limitation which is not there in the said section. Therefore, the subsequent Division Bench while not agreeing with the view taken by the earlier Division Bench had requested the matter to be referred to a Full Bench on the question as to whether the period of limitation prescribed under section 35 can be made applicable with respect to proceedings under section 34(8A).

56. From a comparison of section 58 of the VAT Regulations and section 34(8A) of the Gujarat Value Added Tax Act, 2003, we find that the two provisions are not identical. Section 34(8A) of the Gujarat Value Added Tax Act, 2003 is not *pari materia* with section 58 of the VAT

Regulations. Therefore, decisions rendered by the Gujarat High Court in respect of section 34(8A) of the Gujarat Value Added Tax Act, 2003 cannot be pressed into service in support of the contention advanced by the respondents that section 58 of the VAT Regulations is a stand alone provision without providing for any limitation. That apart, there is a conflict of opinion within the Gujarat High Court as to whether the limitation prescribed in section 35 of the Gujarat Value Added Tax Act, 2003 can be read into section 34(8A) thereof. In any case, decisions of the Gujarat High Court at the most can have a persuasive value and are certainly not binding on this Court. For the reasons indicated above, we are of the view that be it the decision in **H. Tribhovandas** *(supra)* or **Samay Sales** *(supra)*, none have any relevance to the issue before this Court.

57. In view of the discussions made above, we have no hesitation in coming to the conclusion that the impugned notices dated 25.09.2020 and the consequential orders of audit dated 12.10.2020 and 13.10.2020 are beyond the period of limitation and are thus without jurisdiction.

Alternative Remedy

58. The fourth issue which we have framed pertains to the objection raised by the respondents that the writ petitions should not be entertained as the petitioners have not availed of the alternative remedy provided under the statute. In support of this contention, reference has been made to section 74 of the VAT Regulations which provides for appeal. As per sub-section (1), any person who is aggrieved by an assessment under the VAT Regulations or any other order or decision made under the said Regulations may prefer appeal before the hierarchy of authorities as mentioned therein.

59. We have already held the impugned notices dated 25.09.2020 to

be barred by limitation and consequently, the orders of audit dated 12.10.2020 and 13.10.2020 are also time barred. It is a settled proposition of law that question of limitation involves a question of jurisdiction. A plea of limitation is a plea of law which concerns the jurisdiction of the Court trying the proceeding. Consequently, when an impugned notice or an impugned order is held to be beyond limitation, needless to say it becomes a notice or an order which is without jurisdiction.

60. In *Whirlpool Corporation Limited Vs. Registrar of Trade Marks*, **(1998) 8 SCC 1**, Supreme Court has held that under Article 226 of the Constitution, the High Court has a discretion to entertain or not to entertain a writ petition. High Court has imposed upon itself certain restrictions, one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, viz., - (1) where the writ petition has been filed for the enforcement of any of the fundamental rights; or (2) where there has been a violation of the principles of natural justice; or (3) where the order or proceedings are wholly without jurisdiction or the vires of an act is challenged. It has been held as under:-

> "15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

* * * * *

> 20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spire of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

61. In the present case, we have already arrived at the conclusion that the impugned orders of audit were passed in violation of the principles of natural justice. We have also arrived at the conclusion that the impugned notices and the consequential orders of audit are barred by limitation and thus without jurisdiction. In such circumstances, question of relegating the petitioners to the appellate remedy simply does not arise. This issue is answered accordingly.

Relief

62. Thus having regard to the discussions made above and the conclusions reached on all the issues as framed above, we answer the final issue framed, namely, whether the impugned notices and the consequential orders are liable to be interfered with by this Court under Article 226 of the Constitution of India by holding that the impugned notices dated 25.09.2020 and the consequential orders of audit dated 12.10.2020 and 13.10.2020 are wholly unsustainable in law. Those are accordingly set aside and quashed.

63. Thus all the writ petitions are allowed. However, there shall be no order as to costs.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**