CASE NO.:
Appeal (civil) 1784 of 2007

PETITIONER:
M/s Binani Industries Ltd., Kerala

RESPONDENT:
Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and Ors

DATE OF JUDGMENT: 04/04/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
CIVIL APPEAL NOS. 1784 OF 2007
(Arising out of SLP (C) Nos. 157-158 of 2006)
WITH
(Civil Appeal Nos. 1785 /2007 @ SLP) Nos. 1035-39/2006
Civil Appeal Nos. 1786 /2007@ SLP) Nos. 1219-38/2006
Civil Appeal Nos. 1787 /2007@ SLP) Nos. 1462-63/2006
Civil Appeal Nos. 1788 /2007@ SLP) Nos. 1482-1501/2006
Civil Appeal Nos. 1789 /2007@ SLP) Nos. 1506-09/2006
Civil Appeal Nos. 1790 /2007@ SLP) No. 6197/2006
Civil Appeal Nos. 1791 /2007@ SLP) Nos. 6733/2006
Civil Appeal Nos. 1792 /2007@ SLP) Nos. 6884/2006
Civil Appeal Nos. 1793 /2007@ SLP) Nos. 9232/2006
Civil Appeal Nos. 1794 /2007@ SLP) Nos. 8862/2006
Civil Appeal No. 1369 of 2006
Civil Appeal No. 1370 of 2006

Dr. ARIJIT PASAYAT, J.

Leave granted in special leave petitions.

Challenge in these appeals is to the legality of the judgment rendered by a Division Bench of the Karnataka High Court holding that the Circular dated 23.10.1999 (Circular No.31/1999-2000) is valid and Circular No.5/1996-97 dated 12.4.1996 was inoperative.

Background facts in a nutshell are as follows:

Appellants are dealers registered under the Karnataka Sales Tax Act, 1957 (in short the 'Act'). Their business activities inter-alia include business of leasing machinery, equipment and motor vehicles.

Section 5-C of the Act deals with levy of tax on transfer of the right to use the goods which is treated as a transfer for the purpose of levy of sales tax within the State.

Originally the levy was on "taxable turnover". An amendment was brought in 1992 to the said provision substituting the expression "total turnover" for "taxable turnover". The same was questioned by several assessees. A Division Bench of the High Court by its judgment in Shetty Leasing India Pvt. Ltd. vs. Union of India and Ors. (1996 (100) STC 533) struck down the provision. On 1.4.1986, Section 5-C was again amended with retrospective effect restoring the original position i.e. substituting the expression "taxable turnover" for "total turnover". On 12.4.1996, a Circular was issued in terms of Section 3-A of the Act providing that the goods which have suffered tax under Section 5 of the Act

cannot be again taxed in terms of Section 5-C. In other words, where the goods have suffered tax on the actual sale cannot attract levy of tax again. The circular, as noted above, was issued under Section 3-A of the Act read with Rule 6(4) of the Karnataka Sales Tax Rules, 1957 (in short the 'Rules'). Subsequently, on 23.10.1999 another Circular was issued stating that the earlier Circular did not reflect the actual position in law and, therefore, there was no bar on the transaction being taxed in terms of Sections 5 and 5-C. On 1.4.2000 Section 5-C was amended by insertion of a proviso which in essence re-iterated the view expressed in the Circular dated 12.4.1996.

Keeping in view the directions contained in the Circular of 23.10.1999 re-assessment proceedings were initiated and/or action in terms of Section 21 for revision was initiated. Both these actions related to completed assessments.

A learned Single Judge while dealing with challenge to Circular dated 23.10.1999 held that the Circular of 12.4.1996 did not indicate the correct position in law and, therefore, there was no bar in the Circular dated 23.10.1999 clarifying the position and indicating the correct position. However, it was held that the revenue was bound by the incorrect Circular. Therefore, for the assessment years 1996-97 to 1999-2000 till the date of the subsequent Circular, no action could be taken against the assessees. But the position prior to that i.e. from 1.4.1986 till 31.3.1996 the assessees were not entitled to any relief. This view was taken primarily on the ground that even incorrect circular binds the revenue. The Division Bench held the incorrect circular does not bind the revenue and that the law declared by this Court has a binding effect.

Learned counsel for the appellants submitted that both the orders of the learned Single Judge and the judgment of the Division Bench do not take into effect of the proviso which is in essence a legislative declaration of a clarificatory nature. The proviso in terms recognizes the correctness of the Circular dated 12.4.1996. In any event, there could not have been any re-opening of the assessment because of mere change in opinion of the Commissioner. When two opinions were expressed in the two circulars it is nothing but a change in the opinion and it is impermissible for the revenue to re-open the complete assessment on the basis of the subsequent Circular.

The fact that the proviso was by way of a clarification is clear from the fact that at the first instance only 12 days after Section 5-C was amended, the Circular was issued. In essence, the principle of contemporaneous expression applies to the facts of the case. The Circular dated 23.10.1999 is in essence review of the earlier Circular which is impermissible in law. The Circular itself states that those are "revised instructions" and, therefore, cannot have any retrospective force and in any event cannot permit re-opening of complete assessment either by way of re-assessment proceedings or by exercise of revisional powers.

In response, learned counsel for the revenue submitted that the true nature of the proviso has been kept in view. The High Court's conclusions are irreversible. There is no question of proviso being clarificatory in nature. According to him, the proviso can be applicable with effect from the date of introduction because that would determine the taxable event for the assessment year in question and the subsequent

period.

It is stated that the Circular was not binding on the assessing authorities and they could take their independent view.

At this juncture, it would be necessary to take note of Sections 5-C, 12-A and 21. They read as follows:

"5-C. Levy of tax on the transfer of the right to use any goods: Notwithstanding anything contained in sub-section (1) or sub-section (3) of Section 5, but subject to sub-sections (5) and (6) of the said Section, every dealer shall pay for each year a tax under this Act on his (taxable turnover in respect of the transfer of the right to use any goods mentioned in column (2) of the Seventh Schedule for any purpose (whether or not for a specified period) at the rates specified in the corresponding entries in column (3) of the said Schedule.

Provided that no tax shall be levied under this section if the goods in respect of which the right to use is transferred, have been subjected to tax under section 5.

12-A. Assessment of escaped turnover: -(1) If the assessing authority has reason to believe that the whole or any part of the turnover of a dealer in respect of any period has escaped assessment to tax or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable under this Act or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, notwithstanding the fact that the whole or part of such escaped turnover was already before the said authority at the time of the original assessment or re-assessment but subject to the provisions of sub-section (2), at any time within a period of eight years from the expiry of the year to which the tax relates, proceed to assess or re-assess to the best of its judgment the tax payable by the dealer in respect of such turnover after issuing a notice to the dealer and after making such enquiry as it may consider necessary.

(1-A) In making an assessment under sub-section (1) the assessing authority may, if it is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under sub section (1), a penalty not exceeding (an amount equivalent to the tax due) the tax so assessed:

Provided that no penalty under this sub-section shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

(2) In computing the period of limitation for assessment of the escaped turnover under this Section, the time during which an assessment

has been deferred on account of any stay order granted by any Court or other authority in any case, or by reason of the fact that an appeal or other proceeding is pending before the Appellate Tribunal or the High Court or the Supreme Court, shall be excluded:

Provided that nothing contained in this Section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made, shall apply to an assessment or re-assessment made on the assessee or any person in consequence of, or to give effect to, any finding, direction or order made under Sections 20, 21, 22, 22A, 23 or 24 or any judgment, or order made by the Supreme Court, the High Court, or any other Court.

21. Revisional powers of Joint Commissioners.:

(1) The Deputy Commissioner may of his own motion call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by an Commercial Tax Officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of such order or as to the regularity of such proceeding in so far as it is prejudicial to the interests of the revenue and may pass such order with respect thereto as he thinks fit.

(2) the Joint Commissioner may of his own motion call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer not above the rank of a Deputy Commissioner, for the purpose of satisfying himself as to the legality or propriety of such order or as to the regularity of such proceeding in so far as it is prejudicial to the interests of the revenue and pass such order with respect there to as he thinks fit.

(3) In relation to an order of assessment passed under this Act, the power under sub-- sections (1) and (2) shall be exercisable only within a period of four years from the date on which the order was passed.

(4) No order shall be passed under sub-section (1) or sub-section (2) enhancing any assessment, unless an opportunity has been given to the assessee to show cause against the proposed enhancement.

(5) The power under this Section shall not be exercisable in respect of matters subjected to appeal under Section 20.

(6) Every order passed in revision under this Section shall subject to the provisions of Sections 22 to 24 and 25-A be final.

Explanation: For the purposes of this section, 'record' shall include all records relating to any proceedings under this Act available at the time of examination by the Joint Commissioner."

A copy of the Budget speech introducing the amendment was placed on record by learned counsel for the parties. The Finance Minister's speech shows that the proviso was intended to provide additional benefit or relief. The proviso appears to have been introduced as a clarificatory measure. There is no mention as to the date after which benefit can be granted in respect of the goods which have suffered tax. Therefore, the assessment period concerned as sought to be introduced by the revenue has no foundation. The proviso clearly states that once the goods have suffered the tax they would not be subject to tax again. As observed by this Court in Zile Singh v. State of Haryana and Ors. (2004 (8) SCC 1) for the purpose of determining that the proviso is clarificatory or not, the date when it is introduced is relevant. Paras 11 to 21 of the judgment are relevant and they read as follows:

11. According to the appellant, the disqualification imposed by Section 13-A(l)(c) of the First Amendment remained in operation only for a period of one year and would have in ordinary course ceased to operate on the expiry of the period of one year from 5-4-1994. The citizens were justified in arranging their affairs including the enlargement of their families keeping in view the provision of law as it stood. However, the Second Amendment Act effective from 4-10-1994 made a difference. On that day, the legislature specifically provided that a person having more than two children on or after the expiry of one year shall stand disqualified. This period of one year, in the submission of the appellant, should be calculated from 4-10-1994 and not 5-4-1994 and if that be done the birth of the child on 13-8-1995 would not attract the disqualification.

12. This plea of the appellant raises a few interesting questions, such as, the nature of the amendment i.e. whether it is at all retrospective in operation, and if not, whether the provision as amended by the Second Amendment applies to the appellant.

13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only - "nova constitutio futuris formani imponere debet non praeteritis" \027 a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at p. 438.) It is not necessary that an express provision be made to make a statute retrospective and the presumption

against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p. 440).

14. The presumption against retrospective operation is not applicable to declaratory statutes\005\005. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of Attorney General v. Pougett (Price at p. 392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the Attorney General, said: (ER p. 134)

"The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable. occasioned the amendment made by the subsequent Act: but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act:" (Price at p. 392)

17. Maxwell states in his work on Interpretation of Statutes (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it" (p. 225), if the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary secundum materiam" (p. 226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).

18. In a recent decision of this Court in National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India (2003 (5) SCC 23) it has been held:

"that there is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to he subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as: (i) the words used must expressly provide or clearly imply retrospective operation; (ii) the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional: (iii) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is only one of the methods to leave actions unsustainable under the un-amended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent".

19. The Constitution Bench in Shyam Sunder v. Ram Kumar (2001 (8) SCC 24) has held: (SCC p. 49, para 39)-

"Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or to explain a previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed, invariably it has been held to be retrospective. Mere absence of use of the word 'declaration' in an Act explaining what was the law before may not appear to be a declaratory Act but if the court finds an Act as declaratory or explanatory, it has to be construed as retrospective." (p. 2487).

20. In Bengal Immunity Co. Ltd. v. State of Bihar (1955 (2 SCR 603), Heydon case was cited with approval. Their Lordships have said: (SCR pp. 632-33)

"It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon case was decided that-

'\005\005.for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered-

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth, and

4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico'."

21. In Allied Motors (P) Ltd. v. CIT (1997 (3) SCC 472) certain unintended consequences flowed from a provision enacted by Parliament. There was an obvious omission. In order to cure the defect, a proviso was sought to be introduced through an amendment. The Court held that literal construction was liable to be avoided if it defeated the manifest object and purpose of the Act. The rule of reasonable interpretation should apply.
"A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole." (SCC pp. 479-80, para 13)

The Budget Speech speaks of the goods "already been subjected to tax under the Act" and does not even by implication state that in order to be entitled to the benefit the goods ought to have been taxed after a particular date. It is purely on the event of goods having suffered tax once or in other words the taxable event having taken place once.

The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406), Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd. and Ors. (1994 (5) SCC 672).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146)

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (Per Lord Wrenbury in Forbes v. Git [1922] 1 A.C. 256).

A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St James, 9 B. & C. 836).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in Re Barker, 25 Q.B.D. 285).

A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See Jennings v. Kelly [1940] A.C. 206).

The above position was highlighted in Ali M.K. & Ors. v. State of Kerala and Ors. (2003 (11) SCC 632) and Union of India v. Sanjay Kumar Jain (2004 (6) SCC 708)

The stand of the revenue does not appear to be very consistent. Though in the counter affidavit before the High Court it was stated that the Circular is not binding on the authorities, it is conceded by learned counsel for the State Government that it is in fact binding on the department officials. The Circulars read as follows:

"COMMISSIONER OF COMMERCIAL TAXES
CIRCULAR No. 5/96-97 dated 12.4.1996

Sub: Salient features of the Amendments effective from 1.4.1996- reg.

Ref:- 1. Govt. Notification No. DPAL 15 LGN 96, Dated 21.3.1996 published in Karnataka Gazatte Extraordinary Part IV Section 2B, dated 21.3.1996.

2. Govt. Notifications No. FD35 CSL 96 (1 to 25) dated 30.03.96

3. Govt. Notifications No. FD 85 CET 96 (1 to 3) dated 30.03.96.

4. Govt. Notifications No. FD 4 CRC 96 dated 30.03.96

As per the Karnataka Taxation laws (Second Amendment) Act, 1996, amendments are effected to provisions of the below mentioned Acts;

i) Karnataka Tax on Luxuries Act, 1979.
ii) Karnataka Tax on Professions, Trades, Callings and Employments Act, 1976.
iii) Karnataka Entertainments Tax Act, 1958.
iv) Karnataka Agricultural Income Tax Act, 1957.

v) Karnataka Sales Tax Act, 1957.
2. Salient features of the amendments are explained hereunder for guidance and compliance. (Specific mention is made about the amendments which are introduced with retrospective effect and in all other cases, the amendments take prospective effect, i.e., w.e.f. 1.4.1996):

xx xx xx xx

Amendment of Section 5-C- Levy of tax on the transfer of the right to use any goods.

16. Section 5-C in force prior to this amendment prescribed 'total turnover" as the basis for levy of tax. The High Court of Karnataka in the judgment rendered in the case of M/s Shetty Leasing (India) Ltd. Vs. Union of India 100 STC 533, had struck down Section 5-C as beyond the competence of State Legislature. The amendment now introduced substitutes the whole of Section 5-C with retrospective effect from 01.4.86 so as to overcome the aforesaid judgment. The newly substituted section prescribes ''taxable turnover' as the basis for levy of tax. Assessments, if any, completed adopting the basis of 'taxable turnover' for levy of tax, stand automatically validated by the validation Clause at Section 7 of the Amendment Act. In all such cases, it would be in order for the assessing authorities to pursue action for realization of the taxes levied by issuance of simple notices, without going in for rectifications, re-assessments or revisions.

17. Computation of taxable turnover for the purposes of Section 5-C now substituted, would have to be in accordance with the provisions of Rule 6(4) of KST Rules, 1957. Accordingly, among other things, where goods e.g. motor vehicles, machinery, etc. specified in Second Schedule are purchased from registered dealers in Karnataka and are given on lease, such lease involving transfer of the right to use the KST suffered goods would be eligible for exemption in terms of clause (i) of sub rule (4) of Rule 6.

18. All the 15 categories of goods specified in the Seventh Schedule are made liable to tax at the uniform rate of 4%".

"No. RFD. CR.53/97-98

Office of the Commissioner of Commercial Taxes in Karnataka,
Bangalore \027 560 009
dated 23.10.1999

COMMISSIONER OF COMMERCIAL TAXES
CIRCULAR No. 31/99-2000

Sub: KST Act, 1957 \027 Amendment of Section 5-C by Karnataka Taxation Laws (Amendment Act 1996) - certain instructions -reg.

Ref: Commissioner of Commercial Taxes Circular No. 5 of 1996-97 dated April 1996.

In Commissioner of Commercial Taxes Circular No. 5 of 1996-97, dated 12 April, 1996, while explaining the salient features of the amendments effected to the provisions of Karnataka Sales Tax Act, 1957 by Karnataka Taxation laws (Second Amendment) Act, 1996 at paras 16 and 17, the position of law relating to Section 5-C of the Karnataka Sales Tax Act, 1957 as amended by the said Amendment Act was stated to be as follows:

"16. Section 5-C in force prior to this amendment prescribed "total turnover" as the basis for levy of tax. The Hon'ble High Court of Karnataka in the judgment rendered in the case of M/s Shetty Leasing (India) Ltd. Vs. Union of India 100 STC 533 had struck down Section 5-C as beyond the competence of State legislature. The amendment now introduced substitutes the whole of Section 5-C with retrospective effect from 01.4.1986 so as to overcome the aforesaid judgment. The newly substituted section prescribes 'taxable turnover' as the basis for levy of tax. Assessments, if any, completed adopting the basis of 'taxable turnover' for levy of tax, stand automatically validated by the validation clause at section 7 of the Amendment Act. In all such cases, it would be in order for the assessing authorities to pursue action for realization of the taxes levied by issuance of simple notices, without going in for rectification, re-assessments or revisions.

17. Computation of taxable turnover for the purpose of Section 5-C now substituted, would have to be in accordance with the provisions of Rule 6(4) of Karnataka Sales Tax, 1957. Accordingly, among other things, where goods e.g. motor vehicles, machinery etc., specified in second schedule are purchased from registered dealers in Karnataka and are given on lease, such lease involving transfer of the right to use the KST suffered goods would be eligible for exemption in terms of clause (i) of sub-rule (4) of Rule 6."

2. On a review of the said circular, it is noticed that the position or law explained therein in respect of section 5-C does not state the correct position of law for the following reasons:

(i) There is a distinction between a contract of sale as defined in section 4 of the Sale of Goods Act, 1930 and a transfer of the right to use goods for any purposes. While in a transaction of 'sale' as defined under Sale of Goods Act, there

is transfer of ownership in goods and in a transaction involving transfer of the right to use goods, there is no such transfer of ownership in goods. Consequent to insertion of clause 29-A (d) to Article 366 of the Constitution of India by 46th Amendment to the Constitution, Karnataka Sales Tax Act, 1957 was amended w.e.f. 01.4.1996 to treat the transfer of the right to use goods as deemed sale for the purposes of levy of tax on such transaction.

(ii) Section 5-C of the Karnataka Sales Tax Act, 1957 is an independent charging section. Section 5-C contemplates levy of tax on taxable turnover in respect of transfer of the right to use any goods specified in Seventh Schedule of the Act for any purposes (whether or not for specified period). There is nothing in Section 5-C to indicate that the goods which are subject to tax on their transfer of the right to use (lease) cannot be subject to tax under section 5-C when right to use such goods are again transferred after the expiry of the specified period for which it was hired earlier. Therefore, the levy under the said provision is multipoint in nature. The very goods when leased out more than once, such transaction attract levy every time they are leased out.

(iii) As the Section 5-C starts with non-obstante clause namely "notwithstanding anything contained in sub section 91 or sub-section (3) of Section 5", the goods, in respect of which right to use goods is transferred, even though have been subjected to tax under the said sub-sections of Section 5, they shall be liable to tax under Section 5-C. In other words, the goods which have suffered tax under Section 5 are not excluded from the purview of Section 5-C when right to use of such goods are transferred.

In view of the above, the following revised instructions are issued:
(i) Section 5-C was substituted retrospectively w.e.f. 01.4.1986 by amending Karnataka Taxation Laws (Second Amendment) Act, 1996. The newly substituted section 5-C provides for levy of tax on the 'taxable turnover' in respect of transfer of the right to use any goods specified in seventh schedule to the Act for any purposes (whether or not for specified period).

(ii) The tax under section 5-C shall be levied on taxable turnover in respect of transfer of right to use any goods

specified in the schedule notwithstanding that such goods have already been subjected to tax under any of the provisions of the Act including section 5-C.

(iii) In determining the taxable turnover for the purposes of section 5-C the amounts for which the goods whose right to use in transferred has been purchased from another registered dealer liable to pay tax under sub-section 91 or sub-section (3) of Section 5, shall not be deducted from the total turnover determined.

(iv) Assessments, if any completed before 01.4.1996 adopting the basis of 'taxable turnover' for levy of tax stand automatically validated by the validation clause at section 7 of the Amendment Act.

(v) Assessments if any completed by allowing the deductions of the amounts relatable to goods purchased from another registered dealer liable to tax, such assessments shall be referred to the concerned Joint -Commissioner of Commercial Taxes (Admn.), immediately for initiating action section 21 to revise the assessment order in accordance with these instructions.

(vi) Where any order passed under Section 21 or appeal order under Section 20 is contrary to instructions issued in this circular, such orders shall be referred to the Commissioner immediately for initiating action under section 22-A.

Sd/-
(V. MADHU)
Commissioner of Commercial Taxes".

A bare reading of the Circular dated 23.10.1999 shows that it was a review of the earlier Circular and that the Commissioner was of the view that the position of law explained in the earlier Circular did not state the correct position in law and, therefore, the revised instructions were issued. There was a direction to the concerned Joint Commissioner to immediately initiate action under Section 21 to revise the assessment orders. It was further stated that if any order passed under Section 21 or appeal order under Section 20 was contrary to the instructions issued, the same were to be referred to him for initiating action under Section 22-A of the Act. This leaves no manner of doubt that the subordinate officers had no option but to comply with the directions given.

The notices issued under Section 12-A of the Act initiating the assessment proceedings clearly show that they were on the basis of the instructions issued.

As observed by this Court in Commissioner of Trade Tax, U.P. and Anr. v. Kajaria Ceramics Ltd. (2005 (11) SCC 149) there are various Circulars, some are binding and some are not binding. Though strong reliance was placed by learned counsel for the revenue on Addl. Commissioner (Legal) and Anr. v. Jyoti Traders and Anr. (1999 (2) SCC 77) a close reading of the decision shows that it does not support the stand of the revenue and on the contrary support the stand of the appellants.

Particular reference may be made to paragraphs 22 and 25 which read as follows:

"22. In Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. S.G. Mehta, ITO (AIR 1963 SC 1436) in its assessment to income tax for the year 1952-53, the appellant, a company had been granted under the provisions of the finance Act, 1952, a rebate on a portion of its profits of the previous year, that is, 1951 which it had not distributed as dividends to its shareholders. In the next assessment year 1953-54, the appellant used a part of the aforesaid undistributed profits for declaring dividends. As the law then stood, nothing could be done by the Revenue Authorities to withdraw the rebate earlier granted on the ground of the profits being utilized in declaring dividends in a later year. From 1.4.1956, however, there was a change in the law as sub-section (10) of section 35 of the Income Tax Act, 1922 was brought into force then. By an order made on 27-3-1958, under the sub-section, the aforesaid rebate was withdrawn and the appellant was called upon to refund it. The appellant then applied to the High Court at Bombay for a writ to quash the order of 27-3-1958 on the ground that sub-section (10) was not applicable to the facts of this case. That application was dismissed by the High Court. The appeal in the Supreme Court was against this decision of the High Court at Bombay dismissing the application. Now sub-section (10) of Section 35 of the Income Tax Act was enacted by the Finance Act of 1956. That sub-section, insofar as it is necessary to state for the purpose of this case, provided that where in any of the Assessment Years 1948-49 to 1955-56, a rebate of income tax was allowed to a company under the Finance Act prevailing in that year on a part of its total income

"and subsequently the amount on which the rebate of income tax was allowed as aforesaid is availed of by the company, wholly or partly, for declaring dividends in any year ... the Income Tax Officer shall re-compute the tax payable by the company by reducing the rebate originally allowed".

The sub-section in substance permits a rebate duly allowed in any year before it came into force to be withdrawn if "subsequently" the amount on which the rebate was allowed "is availed of'" for declaring dividends in any year. The appellant contended that the sub-section did not apply unless the amount on which the rebate was granted was availed of for declaring dividends after the sub-section had come

into force, that is, after 1-4-1956 and, therefore, it did not apply to the present case. It was said that if it were not so, the sub-section would be given a retrospective operation and the rule was that it was to be presumed that a statute dealing with substantive rights was not to have operation. This Court, per majority (3:2), held that sub-section (10) of Section 35 was intended to have a retrospective operation and was applicable to the present case. Sarkar, J. who was in majority, in his concurring judgment, observed as under:

"There is no dispute that by sub-section (10) the legislature intended to penalise a case where subsequent to its enactment, the amount on which rebate had been granted was utilised in declaration of dividends. Now is there any reason to think that the legislature did not want to impose the penalty also on those who had earlier utilised the amount in declaration of dividends? There was no special merit in these latter cases. And I also think that they formed the majority of the cases. The grant of rebate having been stopped after March 31, 1956, there was no occasion to provide for cases of such grant thereafter. All these circumstances lead me to the view that the intention of the legislature was to penalise the cases of utilisation of amounts on which rebate had been granted in payment of dividends which had happened before the sub-section came into force. The remedy which the sub-section provided would largely fail in any other view. The general scope and purview of the sub-section and a consideration of the evil which it was intended to remedy lead me to the opinion that the intention of the legislature clearly was that the sub-section should apply to the facts that we have in this case".

25. The two decisions in the cases of Ahmedabad Manufacturing & Calico Printing Co. Ltd. and Biswanath Jhunjhunwalla are more closer to the issue involved in the present case before us. They laid down that it is the language of the provision that matters and when the meaning is clear, it has to be given full effect. In both these cases, this Court held that the proviso which amended the existing provision gave it retrospectivity. When the provision of law is explicit, it has to operate fully and there could not be any limits to its operation. This Court in Biswanath Jhunjhunwalla case said that if the language expressly so states or clearly implies, retrospectivity must be given to the provision. Under Section 34 of the Income Tax Act, 1922, it is the service of the notice which is the sine qua non, an indispensable requisite, for the initiation of assessment or reassessment proceedings where income had escaped assessment. That is not so in the present case. Under sub-section (1) of Section 21 of the Act before its

amendment, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer according to law. Sub-section (2) provided that except as otherwise provided in this section, no order for any assessment year shall be made after the expiry of 4 years from the end of such year. However, after the amendment, a proviso was added to sub-section (2) under which the Commissioner of Sales Tax authorises the assessing authority to make assessment or reassessment before the expiration of 8 years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion. The proviso came into force w.e.f. 19-2-1991. We do not think that sub-section (2) and the proviso added to it leave anyone in doubt that as on the date when the proviso came into force, the Commissioner of Sales Tax could authorise making of assessment or reassessment before the expiration of 8 years from the end of that particular assessment year. It is immaterial if a period for assessment or reassessment under sub-section (2) of Section 21 before the addition of the said proviso had expired. Here, it is the completion of assessment or reassessment under Section 21 which is to be done before the expiration of 8 years of that particular assessment year. Read as it is, these provisions would mean that the assessment for the year 1985-86 could be reopened up to 31-3-1994.

Authorisation by the Commissioner of Sales Tax and completion of assessment or reassessment under sub-section (1) of Section 21 have to be completed within 8 years of the particular assessment year. Notice to the assessee follows the authorisation by the Commissioner of Sales Tax, its service on the assessee is not a condition precedent to reopen the assessment. It is not disputed that a fiscal statute can have retrospective operation. If we accept the interpretation given by the respondents, the proviso added to sub section (2) of Section 21 of the Act becomes redundant. Commencement of the Act can be different than the operation of the Act though sometimes, both may be the same. The proviso now added to sub-section (2) of Section 21 of the Act does not put any embargo on the Commissioner of Sales Tax not to reopen the assessment if the period, as prescribed earlier, had expired before the proviso came into operation. One has to see the language of the provision. If it is clear, it has to be given its full effect. To reassure oneself, one may go into the intention of the legislature in enacting such provision. The date of commencement of the proviso to Section 21(2) of the Act does not control its retrospective operation. Earlier the assessment/reassessment could have been completed within four years of that particular assessment year and now by the amendment adding the proviso to Section 21 (2) of the Act it is eight years. The only safeguard being that it is after the satisfaction of the Commissioner of Sales Tax. The proviso is operative from 19-2-1991 and a bare reading of the proviso shows that the operation of this proviso relates and encompasses back to the previous eight assessment years. We need not refer

to the provisions of the Income Tax Act to interpret the proviso to Section 21(2) the language of which is clear and unambiguous and so is the intention of the legislature. We are, thus, of the view that the High Court was not right in quashing the sanction given by the Commissioner of Sales Tax and notices issued by the assessing authority in pursuance thereof."

The issues can be looked at from a different angle. Undisputedly, the 1996 Circular was binding on the revenue authorities as is spelt out in the case of 12.4.1996 and 23.10.1999 Circulars. The assessments were completed on the basis of 12th April, 1996 Circular. Merely because the Commissioner changes his view/opinion and according to him it was review of the earlier decision that cannot have any effect on any assessment which has been completed on the basis of the 1996 Circular.

That being so, the question of re-opening the assessment by mere change of opinion is entirely impermissible.

Though these aspects need not be taken note of in view of the conclusion that the proviso was clarificatory in nature and operated with effect from the date Section 5-C was amended i.e. 1.4.1986 yet this is an additional factor to set aside the High Court’s judgment.

It is stated by a long line of decisions that reopening of assessment is not permissible by mere change of the opinion in the assessing officer. Here it has not been disputed that the Circular dated 23.10.1999 was on account of change of opinion of the Commissioner that too while reviewing the earlier Circular. It could not be brought to our notice as to which provision permitted the review.

Learned counsel for the State submitted that the power is inherent because the authority can correct his own mistaken impression about the interpretation. Prima facie, the plea is without substance and can not be accepted. That question is of academic interest in view of what has been stated above. The judgments of the learned Single Judge as affirmed by the Division Bench are indefensible, need to be set aside which we direct. The appeals are allowed. Costs made easy.