

M/S. KANPUR EDIBLES PVT. LTD.

v.

COMMISSIONER, TRADE TAX, U.P.

(Civil Appeal No. 6276 of 2008)

OCTOBER 24, 2008

**[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]**

U.P. Sales Tax Act, 1948 – ss. 10-B and 21 – Notices for re-assessment of assessment order u/s.21(1) – Cancellation of – Notices u/s.10-B for revision of cancellation order – Order of assessment by Commissioner holding notices to be within limitation – Set aside by tribunal, however, reversed by High Court – Justification of – Held: Not justified – Revisional authority substituted original orders of assessment in garb of testing legality or propriety of order cancelling notices u/s. 21(1) – Such course has no legal basis – Revisional authority was not empowered to make order of assessment – Expression ‘with respect thereof’ makes it clear that for testing legality or propriety of the order, an order was to be passed with respect thereof – More so, original orders could not be varied after limitation period – Thus, order of High Court set aside.

For assessment years 1997-98 and 1998-99, orders of assessment were passed on 27.02.1999 and 17.06.2000 respectively. On 21.08.2001 notice was issued for re-assessment in terms of s.21 of the U.P. Sales Tax Act, 1948. By order dated 29.05.2003 the notice was cancelled. On 31.01.2006 and 08.02.2006 notices were issued u/s.10-B for revision of order dated 29.05.2003. The appellant raised objections regarding the period of limitation which were rejected. In appeal, the tribunal set aside the order of the Commissioner and held that the notice u/s.10 was issued beyond the period of limitation. Respondent-Department filed Revision. High Court set aside the order of the tribu-

A nal. It held that the order of the Commissioner u/s.10-B was within the period of limitation and thus, the order passed by the tribunal for assessment years was contrary to law. Hence the present appeal.

Allowing the appeals, the Court

B HELD: 1.1 Explanation III to sub-Section (1) of s. 21 of the U.P. Sales Tax Act, 1948 makes the position clear that an order of assessment or re-assessment which was in existence at the point of time the notice was issued, continues to be effective unless it is varied by an order of assessment or re-assessment made u/s. 21 in pursuance of that notice. If it is not varied it goes without saying that it continues to be operative and effective. The period for making assessment or re-assessment is provided in sub-section (2) of Section 21. The maximum period available for making assessment or re-assessment is 4 years from the end of the assessment year in question. That is no exception to this position because sub-section (2) of section 21 itself provides that such assessment or re-assessment may be made under any provision of the Act which includes Section 10-B. [Para 8] (1247-A, B, E, F)

F 1.2 The power of revision by the Commissioner or such officer not below the rank of Deputy Commissioner as may be authorized in this behalf by the State Government by the notification, can be exercised by calling for and examining the records relating to any order other than an order mentioned in Section 10A passed by any officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of such order. The Commissioner or the authorized officer is empowered to pass such order with respect thereof as he thinks fit. The crucial expressions in Section 10B(1) are "for the purpose of satisfying himself as to the legality or propriety of such order" and "with respect thereof". [Para 8] (1247-F, G, H; 1248-A)

H 1.3 In the instant case, what the revisional authority

was empowered to test was the legality or propriety of the order cancelling the notices issued u/s. 21(1) by order dated 29.5.2003. Such an exercise cannot encompass an order of assessment. It is of significance to note that the original orders have not been varied and could not have been varied after the period of limitation. What could not have been directly achieved has been attempted to be done in an indirect manner. If the revisional authority was of the view that the order dated 29.5.2003 was not legal, then that order would have been varied if it was found that order lacked legality or propriety. The expression "with respect thereof" makes the position clear that for testing the legality or propriety of the order dated 29.5.2003 if any order was to be passed that had to be passed with respect thereof. What the revisional authority has done is to substitute the original orders of assessment in the garb of testing the legality and/or propriety of the order cancelling the notices. Such a course is not countenanced and has no legal basis. Therefore, the High Court was not justified in interfering with the order of the Tribunal. The impugned orders of the High Court are set aside. [Para 8] (1248-A to E)

M/s Kundan Lal Srikishan, Mathura (U.P.) v Commissioner of Sales Tax, U.P. and Anr (1987) 1 SCC 684; The Deputy Commissioner of Commercial Taxes v. M/s H.R. Sri Ramulu 1977 (1) SCC 703 – referred to.

CASE LAW REFERENCE

(1987) 1 SCC 684 Referred to. Para 5

(1977) 1 SCC 703 Referred to. Para 5

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 6276 of 2008

From the final Order dated 14/5/2007 of the High Court of Judicature at Allahabad in Trade Tax Revision No. 214/2007

A

WITH

C.A. Nos. 6277, 6278 and 6279 of 2008

B Shail Kr. Dwivedi, A.A.G., Shanti Bhushan, Sunil Gupta, K.G. Bhagat, Vineet Bhagat, Ehraz Zafar, Narendra Sharma, Satya Priya Kamra, Debasis Misra, Krishnan Venugopal, Arvind Verma, Ravindra Kumar, Manoj Kr. Dwivedi and Gunnam Venkateswara Rao for the Appearing Parties.

The Judgment of the Court was delivered by

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DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. These four appeals involve common issues and, therefore, are disposed of by this common judgment.

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3. Challenge in each case is to the judgment of learned Single Judge of Allahabad High Court holding that the order passed by the Commissioner of Trade Tax, U.P. under Section 10-B of the U.P. Sales Tax Act, 1948 (in short the 'Act') (also described as U.P. Trade Tax Act, 1948) was within the period of limitation and therefore the order passed by the Trade Tax Tribunal, Kanpur Bench-1 (in short the 'Tribunal') passed in four connected Second Appeal Nos.1 to 4 of 2007 for the assessment years 1997-98 and 1998-99 in both the State Act and the Central Sales Tax Act, 1956 (in short the 'Central Act') was contrary to law.

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4. The controversy lies within a very narrow compass relating to scope and ambit of Section 10-B of the Act in the background of Section 21 of the Act.

5. A brief reference to the factual aspects would suffice.

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Orders of assessment were passed for the two assessment years 1997-98 and 1998-99 on 27.2.1999 and 17.6.2000 respectively. On 21.8.2001 notice for re-assessment in terms of Section 21 of the Act with authorization of the Additional Commissioner, Kanpur under Section 21(2) was issued. It is to be noted that for the period during which such notice can be is-

sued is normally two years, but with the approval of the Commissioner it can be extended to 4 years from the end of the concerned assessment year. The order was passed on 29.5.2003 holding that the notice issued under Section 21 was cancelled. In other words, holding that there was no need for any variation in the assessment orders. On 31.1.2006 and 8.2.2006 notices under Section 10-B of the Act for revision of the order dated 29.5.2003 in respect of two assessment years were issued. Preliminary objections raised by the appellant relating to limitation were rejected by order dated 23.12.2006. Appeal was preferred before the Tribunal which by order dated 13.3.2007 reversed the Joint Commissioner's order and held that the notice under Section 10 was issued beyond the period of limitation. Department filed Tax Revision cases before the High Court. As noted above, the High Court has set aside the orders of the Tribunal.

Learned counsel for the appellant submitted that the crucial expression in Section 10-B (3)(c) is "the order in question". In the instant case the initiation of proceedings for revision in terms of Section 10-B related to the order dated 29.5.2003. While purporting to revise that order, in reality orders of assessment have been passed which in substance substitutes the earlier orders of assessment. The notices dated 31.1.2006 and 8.2.2006 cannot be related to the orders of assessment dated 27.2.1999 and 17.6.2000. It is submitted that even if under Section 10-B (1) an order is sought to be revised, the same should be relatable to the order which is sought to be revised and cannot be extended to an order which has become final and in respect of which no proceeding under Section 10B(1) has been initiated.

With reference to the conclusions of the Joint Commissioner it is submitted that by merely stating that the order dated 29.5.2003 was revised, the exemption granted previously has been withdrawn and it has been held that the tax is recoverable.

A It is pointed out that the effect of an order dropping the
proceedings initiated for re-assessment was considered by this
Court in *M/s Kundan Lal Srikishan, Mathura (U.P.) v. Com-*
missioner of Sales Tax, U.P. and Anr. (1987 (1) SCC 684).
B With the object of getting over the view expressed, an amend-
ment was made by U.P. Sales Tax (Amendment and Valid-
ation) Act, 1991 (in short the 'Validation Act') by adding Explana-
tion III to Section 21(1) w.e.f. 1.3.1973. It is pointed out that in
Kundan Lal's case (supra) this Court with reference to the de-
cision in *The Deputy Commissioner of Commercial Taxes v.*
C *M/s H.R. Sri Ramulu* (1977 (1) SCC 703) held that once a
notice is issued for the purpose of making re-assessment, the
assessment proceedings become re-opened and the initial
order of assessment ceases to be operative.

D 6. In response, learned counsel for the respondent sub-
mitted that the High Court has correctly held that in a case where
there was large scale of manipulation of accounts, a purposive
construction has to be made and the revisional order does not
suffer from any infirmity. Levy of tax has been made after hold-
ing that the order dropping the proceedings was bad and, there-
E fore, consequentially the assessment of the escaped turnover
has been directed to be done.

7. A few provisions which have relevance need to be noted.
They are Sections 7, 10-B, 21 and 22 which read as follows:

F **Section 7. Determination of turnover and assessment
of tax.**

(1) Every dealer who is liable to pay tax under this Act
shall submit such return or returns of his turnover at
such intervals within such period, in such form and
G verified in such manner, as may be prescribed; but
assessing authority may in its discretion, for reasons
to be recorded, extend the date for the submission
of the return by any person or class of persons.

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- (2) If the assessing authority, after such enquiry as he considers necessary is satisfied that any returns submitted under sub section (1) are correct, complete, he shall assess the tax on the basis thereof. A
- (3) If no return is submitted by the dealer under sub section (1), within the periods prescribed in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such enquiry as he considers necessary, determine the turnover of the dealer to the best of his judgment and assess the tax on the basis thereof: B C

Provided that before taking action under this Section the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him. D

Explanation — In this section and in sections 7-A, 7-B, 7-C, 7-D, 7-E, 8-A, 14, 15-A, 18, 21 and 24-D the expression, 'turnover' means the turnover of sales or of purchases or both, as the case may be. E

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Section 10-B: Revision by Commissioner

- (1) The Commissioner or such other officer not below the rank of Deputy Commissioner as may be authorized in this behalf by the State Government by notification may call for and examine the record relating to any order (other than an order mentioned in section 10 -A) passed by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order with respect thereof as he thinks fit. F G
- (2) No order under sub-section (1) affecting the interest of a party adversely shall be passed unless he has H

A been given a reasonable opportunity of being heard.

(3) No order under sub-section (1) shall be passed-

B (a) to revise an order, which is or has been the
subject matter of an appeal under Section 9, or
an order passed by the Appellate Authority
under that section:

C Explanation - Where the appeal against any
order is withdrawn or is dismissed for non-
payment of fee payable under Section 32 or for
non-compliance of sub section (1) of Section
9, the order shall not be deemed to have been
the subject-matter of an appeal under section
9;

D (b) before the expiration of sixty days from the date
of the order in question;

E (c) after the expiration of four years from the date
of the order in question or after the expiration of
two years from the date of commencement of
section 19 of the U.P. Sales Tax (Amendment
& Validation) Act, 1978, whichever is latter.

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**Section 21. Assessment of tax on the turnover not
assessed during the year:**

F (1) If the assessing authority has reason to believe that
the whole or any part of the turnover of the dealer, for
any assessment year or part thereof, has escaped
assessment to tax or has been under assessed or
has been assessed to tax at a rate lower than that at
G which it is assessable under this Act, or any
deductions or exemptions have been wrongly allowed
in respect thereof, the assessing authority may, after
issuing notice to the dealer and making such inquiry
H as it may consider necessary, assess or reassess

the dealer or tax according to law:

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Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not except assessment, or full assessment as the case may be:

Explanation I:

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Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment to the best of its judgment.

Explanation II:

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For the purposes of this Section and section 22, "assessing authority" means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

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Explanation III:

Notwithstanding the issuance of notice under this sub-section, where an order of assessment or re-assessment is in existence before the issuance of such notice, it shall continue to be effective as such, until varied by an order of assessment or reassessment made under this section in pursuance of such notice.

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- (2) Except as otherwise provided in this section, no order of assessment or reassessment under any provision of this Act for any assessment year shall be made after the expiration of two years from the end of such year or March 31, 194, whichever is later:

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Provided that if the Commissioner on his own or on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do authorizes the assessing authority in that behalf,

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A such assessment or reassessment may be made
after the expiration of the period aforesaid but not
after the expiration of four years, from the end of
such year notwithstanding that such assessment or
reassessment may involve a change of opinion:

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Section 22: Rectification of mistakes.

(1) Any officer or authority, or the Tribunal or the High
C Court may, on its own motion or on the application of
dealer or any other interested person rectify any
mistake in any order passed by him or it under this
Act, apparent on the record within three years from
the date of the order sought to be rectified:

D Provided that where an application under this sub-
section has been made within such period of three
years, it may be disposed of even beyond such
period:

E Provided further that no such rectification as has the
effect of enhancing the assessment, penalty, fees or
other dues shall be made unless reasonable
opportunity of being heard has been given to the
dealer or other person likely to be affected by such
enhancement.

F (2) Where such rectification has the effect of enhancing
the assessment, the assessing authority concerned
shall serve on the dealer a revised notice of demand
in the prescribed form and therefrom all the
provisions of the Act, and the rules framed thereunder
G shall apply as if such notice had been served in the
first instance.

8. It is to be noted that in *Kundan Lal's* case (supra) it was
observed that on initiation of the re-assessment proceedings
the original order of assessment becomes inoperative. But

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Explanation III to sub-Section (1) of Section 21 makes the position clear that where an order of assessment or re-assessment is in existence before the issuance of the notice under sub-section (1) it continues to be effective as such until varied by an order of assessment or re-assessment made under Section 21 in pursuance of that notice. In other words, an order of assessment or re-assessment which was in existence at the point of time the notice was issued, continues to be effective unless it is varied. If it is not varied it goes without saying that it continues to be operative and effective. The period for making assessment or re-assessment is provided in sub-section (2) of Section 21. The period fixed for making assessment or re-assessment under any provision of the Act for any assessment year is two years from the end of the concerned assessment year. However, this period can be extended in terms of the proviso to sub-section (2) if the Commissioner on his own or on the basis of reasons recorded by the assessing officer is satisfied that it is just and expedient to do so to make the assessment or the re-assessment after the expiration of the period provided in sub-section (2) but in any event not after the expiration of 4 years from the end of such year notwithstanding that such assessment or re-assessment may involve a change of opinion. In other words, the maximum period available for making assessment or re-assessment is 4 years from the end of the assessment year in question. That is no exception to this position because sub-section (2) of section 21 itself provides that such assessment or re-assessment may be made under any provision of the Act which includes Section 10-B. The power of revision by the Commissioner or such officer not below the rank of Deputy Commissioner as may be authorized in this behalf by the State Government by the notification, can be exercised by calling for and examining the records relating to any order other than an order mentioned in Section 10A passed by any officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of such order. The Commissioner or the authorized officer is empowered to pass such order with respect thereof as he thinks fit. The crucial expressions

A in Section 10B(1) are “for the purpose of satisfying himself as to the legality or propriety of such order” and “with respect thereof”. In the present case what the revisional authority was empowered to test was the legality or propriety of the order cancelling the notices issued under Section 21(1) by order dated
B 29.5.2003. Such an exercise cannot encompass an order of assessment. It is of significance to note that the original orders have not been varied and could not have been varied after the period of limitation. What could not have been directly achieved has been attempted to be done in an indirect manner. If the
C revisional authority was of the view that the order dated 29.5.2003 was not legal, then that order would have been varied if it was found that order lacked legality or propriety. The expression “with respect thereof” makes the position clear that for testing the legality or propriety of the order (in the instant
D case the order dated 29.5.2003) if any order was to be passed that had to be passed with respect thereof. Such an order does not empower the revisional authority to make an order of assessment. As noted above, what the revisional authority has done is to substitute the original orders of assessment in the garb of testing the legality and/or propriety of the order cancelling the notices. Such a course is not countenanced and has no
E legal basis. Therefore, the High Court was not justified in interfering with the order of the Tribunal. The impugned orders of the High Court are set aside and the appeals are allowed but without any order as to costs.

F N.J.

Appeals allowed.