
(2001) 02 RAJ CK 0106

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3224 of 1999

Black Stone Rubber Industries Pvt. Ltd.

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 19-02-2001

Acts Referred:

Central Sales Tax Act, 1956 — Section 3, 4, 5
Constitution of India, 1950 — Article 286
Income Tax Act, 1922 — Section 34
Rajasthan Sales Tax (Amendment) Act, 1994 — Section 2(38), 65
Rajasthan Sales Tax Act, 1954 — Section 12, 12(2), 12(8), 147, 148

Citation : (2001) 2 RLW 1311

Hon'ble Judges : Sunil Kumar Garg, J; Rajesh Balia, J

Bench : Division Bench

Advocate : Sanjeev Johari, for the Respondent

Final Decision : Partly Allowed

Judgement

Balia, J.

(1). Through This writ petition, the assessee challenges the notices dated 7.12.94 under Sec. 12 of the Rajasthan Sales Tax Act, 1954 for re-assessment of the assessee under the Rajasthan Sales Tax Act, 1954 for the assessment years 88-89, 89-90, 90-91 and 91-92 which are Annx. 10 to 13. It appears that subsequently the file of the assessment was transferred to CTO, Anti Evasion, Jodhpur and fresh notices were issued under Sec. 12 for the same period on 21st August, 1995 (Annx. 16 to 19) on the very same grounds by the successor Assessing Authority. It is represented by both the learned counsel that if proceedings under Annexure 10 to 13 were validly initiated, then the notices on transfer of case to another CTO issued by him will only be in continuation of existing proceedings will not be affected. So also if the notices Annexure 10 to 13 are held to be invalid, the subsequent notices merely repetition of earlier one will have no better consequence. Hence validity of notices Annexure 10 to 13 only need be examined on merit and Annexure 16 to 19 need not be examined

independently.

(2). These notices were initially challenged by way of writ petition before this Court as D.B. Civil Writ Petition No. 136/95 on 11th Jan., 1995 which on constitution of the Rajasthan Taxation Tribunal under a special enactment stood transferred to that Tribunal where certain amendments were made in the petition. However, on abolition of the Tribunal, the petition again stood transferred to this Court and this is how the matter is before this Court.

(3). The notices have been challenged primarily on three grounds, (i) Firstly that the notices have been issued merely on the change of opinion as entire material relevant for the assessment has been disclosed by the assessee during the original assessment and it is after considering all the aspects of the matter the value of goods involved in execution of works contract by the assessee in its business of retreading tyres have been subjected to assessment by excluding the purchases made by him which were tax-paid and now notices to subject the turnover of the assessee at a higher value of intermediary product during the completion of same job work amounts to mere change of opinion which cannot be a reason for re-opening of the concluded assessment. GO Secondly, notices have been issued to include the profit of estimated profit assumed to accrue on the transfer of inter-mediatory product of "tread rubber" in the process of rereading of tyres has been sought to be included by the impugned notice which is contrary to settled propositions of law laid down by the Supreme Court, (iii) Thirdly, that the notice is to include entire value of the "tread rubber" in the taxable turnover of the assessee solely on the basis of its being used within the State of Rajasthan without application of the principles governing the question whether the transaction of sale or purchase or transfer of property in the goods involved in execution of works contract is sale in the course of inter-state trade and commerce inasmuch as from the assessments earlier made and from the material disclosed it was already on record that major part of the assessee's business involved movement of goods from within State to outside State of Rajasthan because the major job work the petitioner takes from outside State of Rajasthan in pursuance of which the old tyres travel from outside State of Rajasthan within Rajasthan at the factory of the petitioner and on completion of job work in execution of which only the goods in question were involved, the retreaded tyres move out of State of Rajasthan. Also the purchases of goods used in the execution of works contract too have been made from outside State of Rajasthan in the course of interstate trade and commerce, (iv) Lastly, it has been contended that the issuance of notice for levying penalty in the facts and circumstances of the case disclose pre-determined mind of the assessing officer inasmuch as unless the assessment is primarily determined and the issues involved in the case are decided by the assessing officer, no question would arise for levy of penalty on any part of the turnover as having escaped due to non-disclosure of material facts and details, of such sales, which have already been subject matter of thorough scrutiny at the earlier occasion on the existing material inviting attention to the provisions for levy of penalty for non-disclosure

of material facts under Sec, 16(1)(i) of the Rajasthan Sales Tax Act 1954 corresponding to Sec. 65 of the Rajasthan Sales tax Act 1994.

(4). In addition to aforesaid grounds common to all notices relating to four assessment periods, it has been urged by the learned counsel for the petitioner that at any rate the notice under Sec. 12 for the assessment period 88-89 is barred by time under the provisions of Sec. 12 itself as it stood at the relevant time issuing notices and therefore notices Annx. 10 issued by respondent No.3 as well as Annex. 16 issued by respondent No. 5 suffers from inherent lack of jurisdiction on the face of it.

(5). Taking up last additional contention in the first instance, it may be noticed that w.e.f. 1.4.91 sub-sec. (2) of Sec. 12 of the Act of 1954 which was amended w.e.f. 1.4.91 reducing the period within which the assessing officer could exercise his authority for re-opening the completed assessment from 8 years to 5 years. Sub-sec. (2) of Sec. 12 of the Act of 1954, when power to initiate proceedings thereunder was exercised, reads as under:-

"12 (2) No notice under sub-section (1) shall be issued in respect of any business, registration fee or exemption fee for any year after the expiry of five years from the end of the relevant assessment year:

Provided that nothing contained in this sub-section shall apply to "any assessment or reassessment made in consequence of, or to give effect to, any finding or direction contained in an order u/s 13, 14 or 15 or in an order of any competent court. Explanation.- Where the assessment proceedings relating to any dealer remain stayed under the orders of any competent court, the period during which the proceedings remain so stayed shall be excluded in computing the period of limitation for assessment or reassessment provided under this sub-section."

(6). It has been the contention of Revenue at one stage that for the assessment period which ended prior to 1.4.91 the unamended provision as it was existing before 1.4.91 would apply and amendment would apply only for the assessment years falling after 1.4.91. In other words the amendment would affect only future assessment periods. That question has been directly subject matter of contention in S.B. Sales Tax Rev. No.574/94 ACTO vs. Srinath Emporium, which has been decided on 27th Jan., 2000 by this Court. This Court, in the aforesaid case has held as under: -

"Prescribing of period under the taxing statute are usually not considered as law of repose. That is to say that for the times, in such cases law authority re-opening of closed assessment is to be looked as on the date power thereunder is to be exercised. It is not a case for enforcement of right but it is a case of exercise of power by the authority designated under the relevant statute. When the officer takes recourse to the proceedings and exercises his power, it has to accord with provision at the time the authority under the statute seeks to exercise power conferred by statute, it has to be in accordance of conditions

under which such power can be exercised. There is no vested right in any authority to exercise power in future."

and has held that in the absence of any saving clause for making any special provision for saving any action which may become barred by time due to prescribing shorter period within which power to initiate action could be exercised, no benefit can be drawn from provisions of General Clauses Act to result in any fruitful proceedings, on expiry of such period.

(7). We are in agreement with the aforesaid view. There cannot be any doubt about the fact that if sub-Sec. (2) of Sec. 12 applies to all the actions initiated after 1.4.91, the notice issued in respect of assessment year 1988-89 is clearly barred by time inasmuch as proceedings in respect of assessment year 1988-89 could have been initiated latest by 31st March 1994 and not thereafter. Therefore, the notices issued on 31st Aug. 1995 must be held to be without jurisdiction which the concerned Commercial Taxes Officer after 31.3.94 had no jurisdiction to issue for reassessments of turnover of financial year 88-89 under the amended provision. For this reason, Annx. 10 and 16 which relate to Asst. Year 1988-89 must be held to be invalid and deserves to be quashed.

Whether mere change of opinion can be ground of re-opening?

(8). The contention that there can be no recourse to power under Sec. 12 for re-opening the concluded assessments on mere change of opinion on principle appears to be justified.

(9). It has been contended by learned counsel for the Revenue in that regard that the expression used in Sec. 12 is not "for reason to believe" akin to what has been used in the provisions vesting powers for reassessments under the Income Tax Act, 1961 but is of much wider amplitude, Sales Tax Act 1954 empowers an assessing authority to have recourse to reassessment "for any reason." The expression "for any reason" cannot be circumscribed by inherent limitation, which are appended to expression "reason to believe". He submits that expression "for any reason" within its compass, will take even change of opinion on the same facts whether or not it has received the attention of the assessing authority on the earlier occasion. He relies on, in this connection, a decision of the Supreme Court in Kameshwar Singh vs. State of Bihar

(1) and two decisions of this Court in Rajasthan Felts Mfg. Co. vs. State of Rajasthan

(2) and Century Ecka vs. State of Rajasthan (3).

(10). The expression "for any reason" in the context of matters which are required to be determined under taxing statutes have received attention of judicial interpretation time and again. Before examining those decisions, we may at the outset notice the basic premise that function of an assessing authority under the taxing statute is not administrative in nature but is of quasi judicial nature which has all the precincts of deciding issues raised between the parties

particularly between the taxpayer and the revenue and they are determined after due enquiry and application of mind to the rival contentions by the authority under the respective enactments invested with duty to determine the assessment of tax and other incidental matters. He is to decide thereon judiciously and judicially in the light of the provisions governing levy and collection of taxes under the concerned statute. The another premise which has to be kept in mind is that the power of review one's own decision where an authority is required to function quasi judicially is not inherent but is governed by the provisions of the statute and not by the provisions of the General Clauses Act, where authority empowered to make an order is presumed to have a right to rescind, modify or amend his earlier action. It is in the light of the nature of functions, and balancing between the interest of revenue to bring home the levy intended under the statute according to the provisions of the Act, time and again the Courts while holding that the limitation provided under the provisions requiring re-assessment of the earlier assessment is not of a law of repose but such limitations are intended to give a quietus to the concluded proceedings and protection against harassment that may be caused to the taxpayer by subjecting him to proceedings in the same matter, again and again.

(11). However wider or narrower view of the expression used in such provisions are taken, in our opinion, there is no warrant for contention that mere change of opinion on the same facts, without anything more vests the assessing authority with power to reopen a closed assessment as and when he changes his mind. When we say mere change of opinion, we say on the premise that the matter has been directly received the attention of the assessing officer on earlier occasion and after due application of mind to that issue he has reached his conclusion on earlier occasion than if on the very officer or his successor in office, by simply taking different view of the very same material wants to redecide the very same issue, that case is really a case of change of opinion and that case is not envisaged to be governed by the provisions of Sec. 12 even under the expression "for any reason". In that sense, the Courts have held that reason cannot exist in vacuum and reason must have relation to some existing material, which can have objective rational link with the question of escapement of assessment or earlier assessment being subjected to too lower a rate.

(12). In *ST. Officer vs. Uttareswari Rice Mills* (4), Supreme Court was concerned with the provisions under the Orissa Sales Tax Act. Sub-sec. (8) of Sec. 12 of that Act reads that

"If for any reason the turnover of a dealer for any period to which this Act applies has escaped assessment or has been under-assessed or where the tax has been compounded when composition is not permissible under this Act and the rules made thereunder the Commissioner may at any time within thirty six months from the expiry of the year to which that period relates call for a return."

(13). It is apparent that the expressions used for giving jurisdiction to the Commissioner for calling upon the assessee to file return of the earlier year on

the ground of escapement was couched in the very same expression as the Rajasthan Act viz. "for any reason". The very contention as has been raised before us that the expression "for any reason" cannot be controlled with the expressions like where the authority has reason to believe. In other words, the contention was that while the term "reason to believe" lend colour to the objectiveness in having recourse to proceedings under the Sales Tax Act, the expression "for any reason" is wide enough to cover all possible grounds that can be envisaged. The Court said:-

"Although the opening words used in S. 12(8) are "if for any reason: and not "if the sales tax authority has reason to believe, the different in phraseology, in our opinion, should not make much material difference, A reason cannot exist in vacuum. Somebody must form the belief that reason exists and looking to the context in which the words are used, we are of the view that it should be the sales tax authority issuing the notice who should have reason to believe that the turnover of a dealer has escaped assessment or has been under assessed. The approach in this matter has to be practical and not pedantic. Any view which would make the opening words of Sec. 12(8) unworkable has to be avoided."

(14). In *Dy. Commissioner vs. Dhanlakshmi Vilas Cashew Co.* (5), in the context of the provisions of re-assessment, the Court pointed out that "the reason which gives jurisdiction to the assessing authority to have recourse to the provisions for reassessment must exist on material de hors the records of the proceedings and not from the records of the assessment proceedings." Meaning thereby that mere change of opinion cannot be held to be a reason having nexus with the escapement of the assessment which has earlier taken place after due application of mind to the question which is again sought to be re-decided without anything more. It was a case in which the Commissioner had resorted to his power for revising the order passed by an assessing officer, which he thought was erroneous from the perusal of the record. The assessee challenged the authority of the revising authority to have recourse to the provisions of revision and contended that where assessment is sought to be modified or altered on the ground of any mistake committed in computing the assessable turnover the proper course would be to have recourse to the power under Rule 33 of the Kerala General Sales Tax Rules for initiating the re-assessment proceedings by the assessing officer and where the matter squarely fell within the jurisdiction to have recourse to re-assessment proceedings, the Commissioner could not have invoked power to revise the order under Sec. 15. The Tribunal in the first stance said:

"The turnover was before the officer. There was no inadvertence on the part of the officer in not taxing turnover. But he did not tax the turnover stating that "the stock of pepper and ginger available is not liable to tax because they have been sold subsequently. This only shows that the assessment was illegal and improper as exemption ought not to have been given as stock was not sold in the year of assessment but subsequently. We therefore find that the turnover had

not escaped assessment but that the assessment was made illegally and improperly."

(15). Thus clearly the Tribunal has found that the finding a mistake in the assessment order which on the facts and reasons before the assessing officers appears to be a wrong view of the matter is not a case of escaped turnover but assessment of a turnover made illegally and improperly. The escapement of an assessment in the sense that it has escaped the notice or being subjected to the charge by the assessing officer either for want of necessary material or for want of any application of mind is distinct from after application of mind reaching to a conclusion erroneously or rightly. The view of the Tribunal has been upset by the High Court on appeal. Against the order of High Court the Supreme Court allowed the appeal and restored the order of the Tribunal noticed above. The Apex Court said:-

"Now section 15 of the Act empowers the Deputy Commissioner to call for and examine the record of any case suo moto or on application for the purpose of satisfying himself as to the legality or propriety of an order made by the subordinate authority or as to the regularity of the proceedings. He is further empowered to pass any order with respect thereto as he thinks fit. This jurisdiction is quite distinct and separate from the one created by rule 33 which obviously has been framed under clause (f) of section 24(2). That rule enables the assessing authority within the prescribed period to determine to the best of its judgment the turnover of a "dealer" which has escaped assessment Section 15(1) is meant for interference when there is some illegality or impropriety or irregularity in the order of the assessing authority which has to be set right. It can hardly be said to cover those cases in which the turnover has escaped assessment. As has been observed in the State of Kerala vs. M. Appukutty in which similar provisions relating to the Madras General Sales Tax Act came up for consideration, the Deputy Commissioner while exercising revisional jurisdiction would be restricted to the examination of the record for determining whether the order of assessment was according to law. The rule which confers power to assess escaped turnover is normally to be exercised "on matters de hors the record of assessment proceedings" before the assessing authority."

(16). It may be noticed that like the provision with which we are concerned, Rule 33(1) of the Kerala General Sales Tax Rules, 1950 also provided that "if for any reason the whole or any part of the turnover of business of a dealer or licensee has escaped assessment to the tax in any year or if the licence fee has escaped levy in any year, the assessing authority or licensing authority as the case may be, subject to the provisions of sub- rule (2) may at any time within three years next succeeding that to which the tax or licence fee relates, determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable or levy the licence fee on such turnover after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary." The Court not only did not countenance recourse to the contention that assessment

proceedings for taking merely a different view on the same material could be reopened but left it to be decided by the revising authority, who alone can properly consider legality and correctness of the assessment on the existing material, but further made it clear that in order to bring the case within the scope of escaped turnover, which provides foundation for initiating reassessment proceedings, it must depend on the material de hors the record.

(17). In *Maharaj Kumar vs. I.T, Commr. (6)*, while considering the provisions of Sec. 34 of the Indian Income Tax Act, 1922 as then existing, the question arose whether without any fresh information from external source or whether the successor of the Income Tax Act under Sec. 34 on the ground that the order of assessment passed by his predecessor was erroneous and divergent views have been expressed on this point, it would be open to the Income Tax Officer to act under the Act. However, the Court left this question open without deciding the same. We may recall that in the case of *Dy. Commissioner vs. Dhanlakshmi* (supra) the Supreme Court answered this question by holding that while the same officer or the successor officer is not entitled to take recourse to reassess the assessee by reopening the assessment merely on the basis of change of opinion because he holds a different view.

(18). In *Kameshwar Singh vs. State of Bihar* (supra), on which considerable reliance has been placed by the learned counsel for the Revenue, arose under the Bihar Agricultural Income Tax Act which has used the words "any reason" instead of "reason to believe". The Court expressed its opinion that the use of words "any reason" which are of wide import dispenses with those conditions by which Sec. 34 of the Indian Income Tax Act is circumscribed and held that for the Income Tax Officer is competent under Sec. 26 of the Bihar Agricultural Income-tax Act to assess an item of income which he had omitted to tax earlier even though in the return that income was included and the Income Tax Officer then thought that it was exempt. However, we do not find any such observation that mere change of opinion was held by the Court to be a ground falling within the term "for any reason."

(19). In This connection reference may be made to a later decision of the Supreme Court in *Commr. of Agricultural IT., Trivandrum vs. Smt. Lucy Kochuvareed* (7), wherein the Court referred to both the judgments of *Kameshwar Singh* referred to above reported in AIR 1959 SC and distinguished the case of *Kameshwar Singh vs. State* (supra), as having been decided on its own facts which was a case of pure and simple omission on the part of the assessee and did not apply to the facts where the case has been deliberately considered and decided by the Assessing Authority on earlier occasion in *Lucy Kochuvareed's* case after referring to the decision in *Dhanlakshmi Vilas's* case. The Court said "Every case of underassessment is not a case of escaped assessment" and the case where the order passed by the assessing officer is erroneous and illegal must be distinguished from the cases of escaped assessment. Relying on the decision in *Dhanlakshmi Vilas's* case (supra) with

reference to Kameshwar Singh's case (supra), the Court said by distinguishing the same and said that it was not a case where the agricultural Income-tax Officer omitted to assess any item of income disclosed in the assessee's return.

(20). Considering the very same provision of Sec. 12 of the Rajasthan Sales Tax Act, a Division Bench of this Court in *M/s. National Clinic vs. Assistant Commercial Tax Officer* (8), held that notices are to be based on the reason and not merely on here say or change of opinion where notice on the face of it does not show such reason, it is liable to be quashed.

(21). In *Rajasthan Felts Mfg. Co. vs. State of Rajasthan* (supra), a Bench decision relied on by the learned counsel for the Revenue, discloses that it too does not lay down any principle contrary to what has been stated in *National Clinic's* case. It was a case where the assessee firm was engaged in the business of manufacturing woolen felts. For the assessment year 68-69, the assessee firm claimed exemption from the sale of woolen felts as fabric and the assessing authority agreed with the said claim. Subsequently, this Court in its decision dt. 22.4.76 in *S. Zoraster & Company vs. Union of India* (9), which arose Under Central Excise and Salt Act, held that term woolen fabrics does not include "Woolen Felts" manufactured for industrial purpose. IE is relying on that decision, notices for reopening the original assessment on account of alleged escapement of assessment of the sale of woolen felt were issued. On challenge, after noticing the rival contention as has been raised before us also, the Court said that even if we apply the principles laid down in *National Clinic vs. Assistant Commercial Taxes Officer, Sri Ganaganagar*, then also, on the facts of this case, it cannot be said that it is a case of mere change of opinion. What is reasonable and what is not reasonable would depend on the circumstances of each case. IE will not be always possible to put all the circumstances in a straight jacket. The Court also relied on a decision in *Maharaj Kumar Kamal Singh vs. Commissioner of Income Tax, Bihar and Orissa* (supra), that the term "information" will also comprehend knowledge about a state of law or a decision on a point of law. In view of the aforesaid conclusion, the Court did not exercise its jurisdiction to interfere in the notices on merit inasmuch as in its opinion it was not a case of mere change of opinion. Thus, the case turned on the facts of its own and does not lay down as a proposition of law that in all cases where the assessment proceedings have been reopened merely for change of opinion, and no more, would give jurisdiction to the assessing officer to have resort to the proceedings under Sec. 12.

(22). The another decision on which the learned counselor the Revenue relies on is *Century Ecka vs. State of Rajasthan* (supra). Another Bench of this Court, while holding that the scope of expression "for any reason" is wider than the expression "reason to believe" used in the Income Tax Act excluded categorically the cases of change of opinion simplicitor from the purview of Sec. 12. The Court said while considering the merit of the notice under challenge:

"The reason for reassessment ex-facie cannot be said to be without any reason

or simply based on whims or caprice or merely on a change of opinion."

(23) We may notice that in Rajasthan Felt Manufacturing Co.'s case, the Court has not taken note of the later Supreme Court decision in S.T. Officer vs. Uttarewari Rice Mills (supra), holding that contours of expression "for any reason" cannot be different from the expression "where the Sales-tax Officer has reason to believe" because reasons cannot be said to exist in vacuum.

(24) It may also be noticed that reliance was placed for raising contention that as per observations made in Woolen Felt Manufacturing's case that the National Clinic's case has been impliedly overruled in M/s. Akbarali Amanatali vs. Assistant Commercial Taxes Officer (10), apparently appears to be mere obiter inasmuch in Woolen Felt Manufacturing Co. the Court found that it was not a case of mere change of opinion and the judgment did not rest on that observation. Such observation itself cannot be taken to be a ratio of the said decision to have a binding effect. This brings into focus the decision of this Court in M/s. Akabarali Amanalali.

(25). Akbarali Amanatali's case was a case where the jurisdiction of the Sales-tax Officer in re-opening assessment had not been challenged until before the proceedings were completed by the framing of the re-assessment proceedings. The writ was filed to set aside the order of Assessing Officer inter-alia on the ground that the Assessing Officer had no jurisdiction to re-open the assessment. The Court in that context said:-

"After the Assistant Commercial Taxes Officer had passed the orders of re-assessment and imposed the tax, there remained no question of prohibiting him in exercising his jurisdiction. No writ of prohibition, therefore, lies. A writ of certiorari is a discretionary writ and the High Court is not bound to interfere when there is adequate alternative provided under the Act."

(26). In Akbarali Amanalali's case, to which the reference has been made in Rajasthan Felt Manufacturing Co.'s case as having been overruled by that decision, in our opinion appears to be obiter dicta and also per incuriam. Firstly, in the Akbarali Amanalali's case no conclusion has been reached as to the jurisdiction of the Sales-tax Officer to initiate proceedings merely on the basis of change of opinion, secondly no reference has been made to the earlier Bench decision of this Court in National Clinic's case referred to by us above but two decisions of the Supreme Court for the purposes of distinguishing those cases whether the Rajasthan Act provides for a complete machinery in itself or not, and thirdly the challenge was against the final assessment order after the stage for issuance of a writ of prohibition has ceased to exist for challenging the authority of the notice at that stage and this is apparent from the fact that after referring to host of decisions, the Court said:

"None of the decisions relied upon support the contention that merely because a notice is invalid the order of re- assessment can be quashed by a writ of certiorari. They were all cases where the assessee came to the court after service

of a notice of re-assessment."

(27). It is on this count the assessee was non suited on a prayer for quashing the re-assessment order following the notice to re- open assessment as lacking in jurisdiction because of the invalidity of notice. A bench of co-ordinate jurisdiction cannot be said to have overruled a judgment of another co-ordinate Bench of same strength even impliedly. In fact only an observation was made that in view of decision of Supreme Court in M.D. Kameshwar Singh's case (supra) it cannot be said to be laying down good law. However in making this observation the Court has not noticed the later decisions of Supreme Court in Dhantakshmi Vilas's case (supra) and Commissioner of Agri. I.T. vs. Smt. Lucy Kachuvareed (supra), in which the Supreme Court explained and distinguished its earlier decision in M.D. Kameshwar Singh's case (supra) and followed decision in Dhanlakshmi (supra).

(28). Therefore, passing observation made on the basis of decision in Akbarali Amanatali's case that the aforesaid judgment stands overruled in Akbarali Amanatali's case while in Rajasthan Fell's case on facts the case has been decided and can only be treated as obitor dicta particularly keeping in mind that both the decisions does not notice later decision of Supreme Court in case of Agricultural Income Tax vs. Smt. Luck Cochuvareed (supra), the apex Court had explained and distinguished its earlier decision in Maharajdhirraj Kameshwar Singh's case (supra), and followed the principle laid in Dhanlakshmi Vilas's case (supra). As has been seen, no such order has been made so much so that no issues has been joined on the ground.

(29). So far as the authorities under the Income Tax are concerned whether prior to insertion of Section 147 in its present form or after the insertion of new Sec. 147 for re- assessment, the judicial pronouncement is against inferring any power for having recourse to the reopening of assessment on mere change of opinion on the same set of the fact on the same issue without anything more. The decision of the Gujarat High Court in VXL India Ltd. vs. Asst. CIT (11), may be noticed. After considering the provisions of Sec. 147 of the Income-tax Act as they now exist which has done away with the requirement of receipt of an information as it existed before and after taking into consideration the provisions of Explanation 2 giving much wider scope for bringing certain earlier decisions of the assessing authority within the scope of reassessment proceedings, the-Court held:

"We are also of the opinion that, howsoever wide the scope of taking action u/s 148 of the Act, it does not confer jurisdiction on change of opinion on the interpretation of a particular provision earlier adopted by the assessing authority. For coming to the conclusion whether there has been excessive loss or depreciation allowance or there has been under assessment or assessment at a lower rate or for applying other provisions of Explanation 2, it must be material and it should have nexus for holding such opinion contrary to what has been expressed earlier. The scope of Section 147 of the Act is not for reviewing its

earlier order suo moto irrespective of there being any material to come to a different conclusion apart from just having second thoughts about the inferences drawn earlier."

(30). The principle was followed in *Birla VXL Ltd. vs. Asst. CIT* (12), and *Garden Silk Mills Pvt. Ltd. vs. Dy. Commissioner of Income Tax* (13).

(31). In view of the aforesaid, we are of the opinion that howsoever wide the expression "for any reason" may be construed, it cannot go in the realm of the assuming the expression for any reason to bring in mere change of opinion" to have a just second look on the very issue and material for drawing different conclusion either because the same officer having a second thought or a successor officer holding a different view, within its compass. No power of review of its own order to which mind has been applied earlier too has been conferred on the assessing authority else it would become a tool of harassment and the power will be fraught with vice of being uncontrolled and uncannelised.

(32). Thus, coming to the conclusion, the question that arise is whether the present is the case in which the recourse to Sec. 12 has been taken on mere change of opinion or the assessing officer has acted de hors the record, to wit the expression used in *Dhanlakshmi Vilas*'s case necessary to warrant recourse to this jurisdiction.

(33). The facts of the case are that the petitioner is engaged in the business of rereading of lyres and is doing business as a corporate sole being registered under the Companies Act, 1956. The petitioner factory is divided in two sections, viz; Rubber Section, and Rereading Section. The commercial production In the petitioner factory commenced in 1985. It is engaged in doing tyre vulcanizing and rereading job work. For the purpose of ret reading tyres, the petitioner brings into the factory old tyres belonging to third parties and performs job work of ret reading tyres. The petitioner mostly purchases lax paid materials viz. natural rubber, carbon black and other chemicals and process them in its rubber section and by proper blending homogeneous compound is prepared which is also known as tread rubber in the market. The little of the property in the goods viz. tyres or re treaded tyres vest with the original owner and not with the petitioner. All that the petitioner does is to retread tyres by using natural rubber, carbon black and other chemicals and receives rereading charges from the owner of the tyres and re-export the retreaded tyres outside the State of Rajasthan in case the job work is done for the persons situated outside the State of Rajasthan. These transactions which involve the customers from outside the State of Rajasthan, movement of goods from outside Rajasthan and from within the State of Rajasthan fall properly within the scope of inter-state trade. According to the petitioner, the volume of such job work consists about 60 to 75% of the total business. Likewise for doing vulcanizing job work the petitioner receives either from within Rajasthan or from outside by way of inter-state transaction first skived at a place where foreign particle has penetrated inside the tyre carcass, then it is filled with cushion gurn and cured by putting in

vulcanizing machine, after that chemical patch is applied to the repaired spot. The material and patches solution used in doing vulcanizing job work are either purchased as Sales-Tax paid or Sales-tax is paid when such materials are purchased on "C" forms. About 25% of the job works relates to vulcanizing and 75% pertains to ret reading. It is further the case of the assessee about which there is no dispute that during the first accounting period relating to the assessment year 1985-86 the petitioner had shown sale of "tread rubber" from its rubber section to ret reading section and charged sales tax on such sale at the prescribed rate and Excise Duty was paid on removal of the tread rubber from one factory to its another unit where the work of ret reading is going on. In respect of that assessment period, the assessing authority observed that the procedure adopted by the assessee was faulty inasmuch as there could not be any sale from one unit to another. One person cannot be seller and buyer of the same goods at the same time,

(34). Thus while the transfer of tread rubber from one factory to another factory was not subjected to tax as the tread rubber was not sold in the market but was utilised in doing the job work, penalty under Sec. 5-C(2) was levied for assessment year 1985-86 and 1986-87 for breach of condition of Sec. 5-C{2) inasmuch as the assessee did not sell the goods manufactured by it out of the material purchased on the concessional rates and the sales-tax charged by the assessee was adjusted against revised assessment order.

(35). In consonance with the aforesaid departmental stand about the faulty system adopted by the assessee for accounting transfer of his goods from one factory to another by treating them to be sale inter-se between the two factories owned by him, the assessee after incorporation of the provisions relating to tax on transfer of goods involved in execution of works contract, changed the system by purchasing natural rubber, carbon black and other chemicals on payment of full tax under the State Act from the dealers in doing job work for rereading of tyres. The stand taken at the time of original assessment was that the goods were purchased by the petitioner on payment of full tax under the State Act did not involve transfer of property in any goods which were not tax paid, secondly no lax liability arose under the said job work Where the petitioner was using such material/goods purchase on "C" forms in the course of Inter-state trade or on "D" forms the lax was paid in the State of Rajasthan. Thus they also became fully tax paid. Hence on that basis earlier assessments were completed. This plea of the assessee was accepted to some extent. The raw-material purchased by the assessee was found to be fully lax paid and involved in the execution of the works contract. The transfer of property in such goods did not Involve transfer on Which tax was not paid and no tax was levied. However, on remainder, if any, the tax was levied on purchase of the raw-material without taking into consideration the value, of the goods at the time of its involvement in the execution of the works contract but at stage of the purchase.

(36) The assessments of 1987-88, 1988-89 and 1989-90 were completed by

assessments orders dated 7.6.90, 13.5.92 and 30.6.92 respectively. The assessment order goes to show that the Assessing Officer after taking note of the job receipts had found that total purchases made by assessee of raw-materials which came in the form of tread rubber before the same was appropriated in ret reading amounting to Rs. 13,88,481 and then dealt with the cost of the five items purchased by the assessee for the purpose of levy of tax. Out of aforesaid purchase, he gave deduction of first point purchases made within the State of Rajasthan from registered dealer of making full payment of tax. However, on the remaining amount, the assessing officer held that there is liability to pay tax. On this amount 10% profit was added and was subjected to tax after imposing the tax at the prescribed rate and rebate was given at the concessional rate and the tax was computed and the same process was followed for assessment in the subsequent years with which we are concerned. It is further case of the assessee that those matters are subject matter of second appeal pending before the Rajasthan Tax Board after he was not successful before the Dy. Commissioner (Appeals).

(37). It is in the aforesaid circumstances, the present notice has been served on the assessee date 7th Dec., 1994. The assessing officer has referred to the decision of the Supreme Court in 1993 (1) SCC 354 expressing his opinion that the assessment of the value of the property which has been transferred in question and which is involved in execution of works contract whether as such goods or in other form is not in accordance with law inasmuch as neither the computation has been done in that respect nor the tread rubber sheet" which is a taxable item has at all been included in the goods which has passed in the execution of works contract.

(38) Without going into the merits of the case, we are of the opinion that prima facie the Assessing Officer has not acted improperly. It cannot be said to be a mere change of opinion on the issues which has been heard and decided by the assessee on the same material. Firstly the Assessing Officer has connected his reason with the ratio laid down by the Supreme Court in Cannon Dunkerley's case (15) which has been decided only in 1993. He has also referred to the omissions to bring to tax the "tread rubber" which is stated to be the stage at which the goods are used in execution of the works contract. The question whether the value of the goods involved in execution of works contract is to be taken at the purchase price of the assessee or the value of the goods at the time when the goods are used or involved in actual user is to be taken into consideration, was not at all in the minds of the assessee or the assessing officer at the time of assessment. It is a question independent of the issues which were before the Assessing Officer. May be in respect of the same material, but as a question of law whether the value of the property in goods which has been transferred on their being involved in the execution of works contract is to be determined on what principle viz. at the purchase price of the basic raw material by the assessee or at the value of the goods as intermediary stage at which they have reached at the time of actual appropriation in execution of works contract

by the assessee.

(39). We would refrain from expressing any opinion on merit of this issue at this stage as it would not only require collection of necessary material as an assessing officer but also to go into different aspects of the terms of contract and the process used in execution of works contract, when it can be said that the goods are Involved in the execution of works. This enquiry cannot be equated with the case "on mere change of opinion" so as to deprive the assessing officer from going into such questions by having recourse to Sec. 12 of the Act, if in the original assessment proceedings there has been omission to address to such question as was the case in Kameshwar Singh's case (supra). It clearly falls within the distinction pointed out by the Supreme Court in a later decision in Lucy Kochuvareed's case (supra) that a case of omission must be treated distinctly from a case where application of mind has been made to particular issue and the decision has been reached thereon rightly or wrongly. We are, therefore, of the opinion that the impugned notices cannot be invalidated on the ground of being "based on mere change of opinion."

(40). The last of contentions, namely about notice to include entire purchases made by the assessee and the value of the tread rubber involved in execution of works contract as taxable turnover and the notice to levy penalty etc. under Sec. 16(1)(i) need further consideration.

(41). It is well settled that the competence of the State Legislation to levy Sales-tax is under Entry 54 of List 11 (State List) of the 7th Schedule of the Constitution and the authority to levy tax on "sale or purchase of the goods made in the course of inter-state trade or commerce" has been excluded from Entry 54 of the State List and the subject is kept exclusively for the parliament to enact. So also under Article 286(1) is envisaged that no law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase has taken place outside the State or in the exercise of the import of the goods into or export of the goods out of the territory of India. It also envisages that Parliament may formulate by law principles of determining when a sale or purchase of goods takes place in any of the ways stated above. The parliament in exercise of its power under Entry 92-A of the List I (Union List) of the 7th Schedule and Article 286 of the Constitution has enacted Central Sales Tax Act, 1954 laying down the principles on which the determination of the question when a sale or purchase can be said to have been made (i) in the course of inter-state trade or commerce or (ii) on sale or purchase of goods outside a State or (iii) sale or purchase of goods in the course of export outside or import into territory of India. These" principles have been enacted in provisions of Sec. 3, 4 & 5 of the Central Sales Tax Act.

(42). No authority has been conferred on the State Legislation to make laws to impinge upon those principles and to define sale for its own purpose and to levy tax solely on the basis of sit us of sale by creating a legal fiction to that effect as a non-obstinate provision by deeming any sale to be deemed to have taken

within the State of Rajasthan on the basis of the place of appropriation without excluding from within its preview the transaction which properly can be considered as sale or purchases within the course of interstate trade and commerce, or in the course of export outside or import in India, or sale outside State as per the provisions of CST Act, 1954.

(43). Sub-sec. (3) of Sec. 5 of the State Act as it existed originally was declared to be invalid and void and ultra vires the provisions of Constitution on the ground of making no provision for excluding such sale and purchases and making the entire category of purchases and sales as taxable. Sec. 5(3) of the Rajasthan Act was held to be ultra vires by the Supreme Court in *Cannon Dunkerely & Co. vs. State of Rajasthan* (supra). On such declaration, the definition of sale was amended with retrospective effect w.e.f. 1.4.87. The definition of sale under Sec. 2(o) of the Act of 1954 reads as under:-

"Sale", with all its grammatical variations and cognate expressions, means every transfer of property in goods (other than by way of mortgage, hypothecation, charge or pledge) by one person to another for cash, or deferred payment or other valuable consideration and includes-

- (i) a transfer, otherwise than in pursuance of a contract, of property in goods for cash, deferred payment or other valuable consideration;
- (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- (iii) a delivery of goods on hire-purchase or other system of payment by installments;
- (iv) a transfer of the right to use goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
- (vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply is for cash, and such transfer, delivery or supply shall be deemed to be a sale and the word "purchase" or "buy" shall be construed accordingly.

Explanation I. -The transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract shall be deemed to take place within the State of Rajasthan if the goods are within the State at the time of their appropriation or application or use for the execution of the works contract irrespective of the place where the agreement for such works is made or from where the goods are transferred or delivered for, use in the works contract.

Explanation II.- Where the work under a work contract is spread over many States including the State of Rajasthan, the proportionate work done within the

State of Rajasthan shall be deemed to be the sale under this clause irrespective of the place of agreement for works or the point of movement of goods involved in the execution of that works contract."

(44). Explanation I, brings within the definition of sale the transfer of property in goods whether as goods or any other form involved in execution of works contract and deems such sale or purchase to take place within the State of Rajasthan if at the time of its application or use in the execution of works contract such goods are in Rajasthan irrespective of the place where the agreement for such works has been made or from where the goods are transferred or delivered for use in the works contract.

(45). Explanation II, in the like manner, envisaged a legal fiction that sale shall be deemed to take place within the State of Rajasthan only if goods involved in execution of works contract at the point of their appropriation were in Rajasthan irrespective of place of agreement for the execution of works contract, and irrespective of the fact that in pursuance of such contract the goods moved from one State to another.

(46). Apparently such legal fiction is directly repugnant to the provisions made under Central Sales Tax Act laying down the principle when any sale shall be considered to take place outside the State or in the course of interstate trade or commerce or in the course of export outside or import into territory of India. Even if the sale is to be considered outside State of Rajasthan as per provisions of Central Sales Tax Act, laying down the principle as envisaged under Article 286, yet it makes possible to treat such sale within the State of Rajasthan and subject it to tax. So also a sale which is to be considered a sale or purchase in the course of interstate trade or commerce, or in the course of export outside or import outside territory of India, and not amenable to State Legislation, is brought within exorbitance of tax under RST Act by enlarging the field of sale within the State of Rajasthan by enacting legal fiction,

(47). Like provisions were made in Section 2(38) of the Rajasthan Sales Tax Act 1994 by enacting Explanation II and IV to that provision defining sale thereunder. 1954 Act was repealed and replaced by the new Act. However, the levy of Sales-tax prior to 1954 continued to be governed by the Act of 1954.

(48). Suffice it to state that clause (b) of Explanation II of Sec. 38 has been held to be beyond the legislative competence by the Supreme Court in 20th Century Finance Corpn. Ltd. vs. State of Maharashtra (16).

(49) Following the aforesaid two decisions, this Court in Triveni Engineering & Industries Ltd. vs. State of Rajasthan & Ors. (17), has held Clause (a) of Explanation II to Sec. 2(38) of the Act of 1994 to be ultra vires the Constitution as beyond the legislative competence of the State legislature. Following said decision in petitioner's own case D.B. Civil Writ Petition No. 2468/99 decided on 19.2.2001 same view has been reiterated and Explanation IV to Sec. 2(38) of the Act of 1994 has also been held to be ultra vires.

(50). In this view of the matter, it must be held that by dint of the aforesaid artificial definitions the transaction which fall within the purview of inter-state trade and commerce in accordance with the Central Sales Tax Act or sale outside State a sale in the course of export or import cannot be brought within the operative field of the Rajasthan Sales-tax Act by widening definition of sale by enacting deeming provision in Sec. 2(o) of the Act, 1954 in form of Explanation I & II thereto referred to above. To that extent the Assessing Officer cannot be permitted to include such sales or purchases which has taken place in the course of inter-state trade or commerce, or outside State or in the course of export outside or import inside India within the meaning of Central Sales-tax Act, 1954 as a taxable transaction within the Rajasthan Sales Tax Act solely on the basis of sit us related to appropriation of goods in execution of works contract within the State.

(51). So far as levy of penalty is concerned, we find from the language of Section 12 itself that there is no warrant for issuing notice under that provision for levy of penalty at the outset when assessments are re-opened for assumed non-disclosure of facts. Whether the assessee has disclosed fully and truly all material facts for assessment or not, particularly, in the present facts and circumstances of the case cannot be assumed at the outset of the proceedings to threaten the assessee with the penalty proceedings for non-disclosure or concealing particulars at this stage. It can only arise during the course of assessment wherein the assessee has failed to give truly and fully details which are necessary for the assessment of the case. The mere satisfaction about escapement of the assessment, which apparently has not been attributed to any failure on the part of assessee in the present case, calling upon the petitioner to show cause against proposed penalty u/s 16(1)(i), in our opinion was wholly unwarranted to put a tax payer under an undue pressure. We are not expressing any opinion whether the assessee is ultimately found to be held as a dealer who is guilty of not disclosing material fact relevant for the purpose of Section 16(1)(i) under the Act of 1954, but certainly we are of the opinion that there was no justification to issue notice for the assessing officer at this juncture to show cause against proposed penalty at this stage inasmuch as nothing has been pointed out at this point as to which of the material has not been disclosed by the assessee to invite action for levy of penalty u/s 16(1)(i).

(52). As a result, this petition is partly allowed. The notices for assessment period 88-89 Annx. 10 & 16 are quashed as barred by time. The action of issuance of notices for reassessment for subsequent assessment years is upheld and the proceedings for re- assessment may continue in furtherance thereof subject to observations made above as to the exigibility to the tax, the transactions which are properly to be construed as sales or purchases in the course of inter-state trade and commerce under the provisions of CST Act without consideration of the provisions of RST Act more particularly the impugned Explanation 1 & II u/Sec. 2(o) of that Act, which are beyond legislative competent of the State and also without dwelling on the question of penalty to

start with. However, it will be open to the Assessing Officer, in the course of assessment if any material comes to light that there has been non-disclosure of material facts or details on the part of the assessee, to initiate proceedings for penalty also.

(53). No orders as to costs.