
(1970) 08 AHC CK 0021

In the Allahabad High Court

Case No : Sales Tax Reference No. 388 of 1964

Commissioner, Sales Tax

APPELLANT

Vs

Auraiya Chambers of Commerce

RESPONDENT

Date of Decision : 21-08-1970

Acts Referred:

Constitution of India, 1950 — Article 226, 96
Contract Act, 1872 — Section 72

Citation : (1973) 30 STC 41

Hon'ble Judges : Verma, J;R.S. Pathak, J;R.L. Gulati, J

Bench : Full Bench

Judgement

R.S. Pathak, J.—The dealer was assessed to sales tax for the assessment year 1948-49 under the U.P. Sales Tax Act, in respect of forward contract transactions by an assessment order dated 5th April, 1950. Before the assessment order he had already deposited a sum of Rs. 3,535-3-0 towards the tax liability, and after the assessment order he deposited, a further sum of Rs. 1,083-3-0 as tax. Shortly, thereafter, the Supreme Court held in *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, , that the levy of sales tax on forward contracts was ultra vires. On 19th April, 1955, the dealer filed a revision application against the aforesaid assessment order, but the revision application was dismissed on 10th September, 1958, as barred by limitation. On 24th May, 1959, the dealer applied for refund of sales tax paid in respect of forward contract transactions. The refund application was rejected on 19th May, 1960, by the Sales Tax Officer. Thereafter, on 9th July, 1960, he applied to the Commissioner of Sales Tax for refund of the tax, and the application was forwarded by the Commissioner to the Sales Tax Officer who rejected that application also by his order dated 23rd September, 1960. The Sales Tax Officer took the view that the refund application should have been made within three years from the last day of August, 1954, the month in which the Supreme Court judgment in *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, , was published in the Supreme Court Journal. The period of three years was considered as the period of limitation by reference to

Section 96 of the First Schedule to the Indian Limitation Act, 1908. The dealer then filed a revision application before the Judge (Revisions), Sales Tax, challenging the orders dated 19th May, 1960, and 20th September, 1960, rejecting the refund applications. The revision application was allowed by the Additional Judge (Revisions) by his order dated 13th November, 1962. The Additional Judge (Revisions) has held, relying on the decision of the Supreme Court in the Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , and on the decision of this court in Sales Tax Commissioner, U. P. v. Sada Sukh Vyopar Mandal [1959] 10 S.T.C. 57, that the refund of sales tax deposited in respect of forward contracts could be claimed u/s 72 of the Indian Contract" Act as both parties were acting under a mistake of law. The Additional Judge (Revisions) observed that the period of limitation mentioned in Section 29 of the U.P. Sales Tax Act, which provision came into effect from 1st April, 1959, was not attracted, and that there was no period of limitation for applying for refund of tax under the U. P. Sales Tax Act. He also held that Section 96 of the First Schedule to the Indian Limitation Act could not be applied. Accordingly, he allowed the revision application and made an order directing the refund of the tax paid by the dealer. At the instance of the Commissioner of Sales Tax, the Additional Judge (Revisions) has referred the following questions :

(1) Whether the observations (subject, however, to the question of estoppel, waiver, limitation or the like) made by their Lordships of the Honourable Supreme Court in the case of Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , imply that the provisions of the Indian Limitation Act are applicable to cases under the U. P. Sales Tax Act and whether these observations are inconsistent with the view taken by the Honourable High Court in the case of Sales Tax Commissioner, U. P. v. Sada Sukh Vyopar Mandal [1959] 10 S.T.C. 57?

(2) Whether in these cases in which refund was claimed on the principles of Section 72 of the Indian Contract Act, the period of limitation under article 96 of the Limitation Act could be taken into consideration by the sales tax authorities in refusing to allow refund ?

(3) Whether under the circumstances of the case as stated above, the Additional Judge (Revisions), Sales Tax, was legally justified in holding that the sums deposited by the company towards sales tax for the year 1948-49 was refundable to the company ?

(4) Whether the Additional Judge (Revisions), Sales Tax, was legally justified in entertaining the revision application in question of the aforesaid company after the lapse of several years from the date of the assessment order particularly when the appeal and the revision application of the company in respect of that assessment order were dismissed ?

2. It will be seen at once that the first question has been framed in the abstract without relevance to the facts of the present case, and, therefore, need not be answered.

3. The second question raises the point whether article 96 of the First Schedule to the Indian Limitation Act can be resorted to for ascertaining the period of limitation for the refund applications on the principle embodied in Section 72 of the Indian Contract Act. Now, the U. P. Sales Tax Act contains a number of provisions contemplating the refund of tax to the dealer. There is Section 9(5) of the Act providing that if the appellate authority reduces the amount of tax by an appellate order it shall direct the excess amount of tax to be refunded. Section 10(5) of the Act provides that if the amount of tax is reduced by the revising authority by an order disposing of the revision application, it shall direct the excess amount of tax to be refunded. Then, Section 11(8) provides that if the amount of tax is reduced as a result of reference decided by the High Court, the excess amount of tax paid shall be refunded with interest. Finally, Section 29 requires an assessing authority to refund to a dealer applying in this behalf the amount of tax, fees or other dues paid in excess of the amount due from the dealer under the Act except to the extent that he is liable to deposit it under Sub-section (4), or Sub-section (5), as the case may be, of Section 8A. The proviso to Section 29 prescribes the limitation within which the claim to refund must be made. All these provisions of the Act proceed on the principle that an amount paid by a dealer as tax in excess of the amount truly due must be repaid or returned to him. Section 72 of the Indian Contract Act declares :

A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it.

4. It seems to me that the principle codified in Section 72 of the Contract Act is embodied in the aforesaid provisions of the U. P. Sales Tax Act.

5. But the question which has been raised before us is whether in a case, such as the, present, where the assessment order determining the tax liability remains effective and undisturbed, can the sales tax authorities grant refund of the tax assessed thereby ? In my opinion, if the assessment can be said to have been made under the Act, no such power can be exercised by the sales tax authorities. In such a case, the observations of the Supreme Court in *State of Madhya Pradesh (Now Maharashtra) Vs. Haji Hasan Dada*, would fully apply. That was a case where the assessment in question was made by the Assistant Commissioner of Sales Tax and the assessee applied for a refund in the belief that in the turnover of his business were included dyeing charges which were not taxable under the Act. Apparently, it was a case of an application of the law which was merely erroneous, because I find the following observation in the judgment of the Supreme Court :

There is abundant authority for the view that until it is set aside by appropriate proceedings under the Act which authorised the levy of tax, full effect must be given to an order of assessment, even if it be later found that the order was erroneous in law.

and reference was made by the Supreme Court to Commissioner of Income Tax,

West Punjab v. Tribune Trust, Lahore [1948] 16 ITR 214 (P.C.). In that case, the Privy Council was concerned with an assessment of income which was claimed by the assessee to be exempt from tax, and the Board held in those circumstances, that the assessment could not be described as a nullity. On this opinion of the Board, the Supreme Court observed in State of Madhya Pradesh (Now Maharashtra) Vs. Haji Hasan Dada, :

The Judicial Committee reversed the order of the High Court and held that the assessments which were duly made by the Income Tax Officer in the proper exercise of his duty were validly made and were effective until they were set aside.

6. The position of law" laid down by the Supreme Court is, I think, fully applicable where the assessment order is made under the Act.

7. But in the case before us, the assessment proceeded on the basis of a provision which was ultra vires the powers of the State Legislature. The definition of "sale" contained in Section 2(h) of the U.P. Sales Tax Act means any transfer of property in goods for cash or deferred payment or other valuable consideration and includes forward contracts. In The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash, , the Supreme Court held that to the extent the State Legislature had enlarged the definition of "sale" so as to include forward contracts, it was ultra vires. For the same reason, the Supreme Court held explanation III to Section 2(h), which provided that forward contracts "shall be deemed to have been completed on the date originally agreed upon for delivery", and Section 38, which enacted "notwithstanding anything contained in Section 3, the turnover of any dealer in respect of transactions of forward contracts, in which goods are not actually delivered, shall be taxed at a rate not exceeding rupees two per unit as may be prescribed" to be ultra vires.

8. The Sales Tax Officer exercising the power of assessment under the U. P. Sales Tax Act can do so on the basis of provisions which form part of the Act. To the extent that he takes into account provisions which are ultra vires and, therefore, not a part of the Act, the Sales Tax Officer acts without jurisdiction and an assessment order made by him must be treated as a nullity. In the present case, inasmuch as a fundamental provision of the Act was struck down as ultra vires, no other conclusion appears possible.

9. In Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , an attempt was made on behalf of the Sales Tax Officer to urge that the procedure laid down in the U.P. Sales Tax Act by way of appeal and revision against the assessment orders in question ought to have been followed by the dealer, and that not having been done the dealer was debarred from proceeding in the civil courts for obtaining a refund of the moneys paid by it. The Supreme Court ruled that the contention was not available to the Sales Tax Officer by reason of the categorical statement made by the Advocate-General before the High Court that he did not contend that the assessee ought to have proceeded

for the recovery of the amount claimed otherwise than by a petition under Article 226 of the Constitution. Since then, the Supreme Court has clearly laid down that where an amount has been recovered as tax by an authority in excess of the constitutionally permissible amount, a suit for recovery of such excess will lie notwithstanding a provision in the statute barring a suit questioning an order made under it. That decision was rendered in *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, . "The Supreme Court did not accept *Raleigh Investment Co. Ltd. v. Governor-General in Council* [1947] 15 ITR 332 (P.C.) as laying down the correct law, and declined to apply the principles propounded there to the position obtaining under the Constitution of India. One of the considerations which prevailed with the Supreme Court was the inherent inability of the authorities constituted by the statute to sit in judgment on the vires of a provision of that statute. Since then, that principle has been elaborated by the Supreme Court in *K.S. Venkataraman and Co. Vs. State of Madras*, . That is a case which bears a close parallel to the one before us. For the assessment years 1948-49 to 1952-53 the dealer was assessed to sales tax under the Madras General Sales Tax Act, 1939, on the basis that certain contracts executed by it were works contracts. On the basis of the decision of the Madras High Court in *Gannon Dunkerley v. State of Madras* [1954] 5 S.T.C. 216, that the relevant provisions of the Act empowering the State of Madras to assess indivisible building contracts to sales tax were ultra vires, the dealer filed a suit in the City Civil Court for recovery of the amount of tax illegally levied and collected from it. The suit was founded on the ground that the provisions of the Act empowering the sales tax authorities to impose sales tax on indivisible building contracts were unconstitutional and void, that the sales tax authorities had no jurisdiction to assess the tax in respect of those transactions, and that the dealer having paid the amounts under mistake of law was entitled to a refund of the same. The suit was dismissed by the City Civil Court, which followed the decision of the Privy Council in *Raleigh Investment Co. Ltd.* [1947] 15 ITR 332 (P.C.), and the Madras High Court upheld that decision. On appeal, the Supreme Court referred to its decision in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, , confirming the view that the provisions of the Act enabling the imposition of tax on the turnover of indivisible building contracts were ultra vires and, therefore, void and observed that the question as to the vires of a provision of a statute could not be questioned by an authority created by that statute. The legal position was summarised as follows :

If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, by necessary implication, bar the maintainability of a civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdictional fact thereby precluding by necessary implication the jurisdiction of a civil court in that regard. But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not

outside it. If it acts on the basis of a provision of the statute, which is ultra vires, to that extent it would be acting outside the Act. In that event, a suit to question the validity of such an order made outside the Act would certainly lie in a civil court.

10. Upon this, it is sufficient for me to say that the assessment order made against the dealer, in the case before me, cannot operate so as to disentitle him to a refund.

11. The Supreme Court clearly laid down in *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, that the provisions of the U.P. Sales Tax Act enabling the levy of sales tax on forward contracts were ultra vires. The law so laid down is binding upon all courts and tribunals of the land and the sales tax authorities were bound to give effect to that law. Upon that declaration of the law by the Supreme Court, the sales tax authorities were bound to proceed on the basis that those provisions did not exist in the Act.

12. Reverting to the question whether the period of limitation prescribed by article 96 of the First Schedule to the Indian Limitation Act could be taken into consideration by the sales tax authorities in refusing to allow the refund, it is pertinent to note that article 96 prescribes the period of limitation for filing a suit. The provision applies to suits only. It does not apply to proceedings taken under the U.P. Sales Tax Act. My answer to the second question is in the negative.

13. The third question is whether the Additional Judge (Revisions) was justified in holding that the sums deposited by the dealers were refundable. If the matter be viewed from the legal justification of the claim to refund on its merits, there is no doubt that the amount having been paid in respect of forward contract transactions concerning which no sales tax was constitutionally permissible, the claim of the dealer to refund was well-founded. But regard must be had to the controversy which arose before the Additional Judge (Revisions), and that controversy was whether the refund applications were barred by limitation. The Additional Judge (Revisions) held that article 96 of the First Schedule to the Indian Limitation Act did not apply, and, as I have already said, I am also of that opinion. The Additional Judge (Revisions) then considered whether Section 29 of the U.P. Sales Tax Act applied and he held that it was not attracted. He proceeded on the view that as Section 29 came into force only from 1st April, 1959, it could not operate at all in respect of a refund, the right to which had accrued much earlier. The application of Section 29 was considered because the proviso thereto prescribed a period of limitation, the period being two years from the date on which the assessment order was passed. I am also of the view, though for different reasons, that Section 29 does not apply on the facts of the present case. Section 29 contemplates cases where the payment is made pursuant to a provision of the Act or in compliance with an order made under the Act. It is concerned with refund of payments made under the Act, though in excess of the amount due under the Act. That is also clear from the proviso to Section 29, which speaks of the refund of a tax or other amount paid under the

Act. The moneys, of which refund is claimed here, do not represent payments made under the Act. That is so because the payments were made pursuant to a liability not within the contemplation of the constitutionally valid provisions of the Act. The liability sought to be met, arose out of provisions which were constitutionally invalid. An application for refund of such sums does not lie u/s 29 of the Act. That result also follows when I consider that the Legislature intended a period of limitation for all claims to refund made u/s 29, and the period of limitation takes its starting point with reference to orders contemplated under the Act. Now, if an application for refund of such sums was contemplated under the Act, a period of limitation would have been prescribed by the Act. It is difficult to contemplate that while there is a period of limitation for filing a suit for such refund, the law should have contemplated no period of limitation for a refund application under the Act.

14. The Additional Judge (Revisions) could, u/s 10, revise only an order made under the Act. If the order of the Sales Tax Officer refusing refund cannot be ascribed to any jurisdiction vested in him under the Act, the revising authority had no jurisdiction to revise that order. While it may be an order capable of challenge by way of suit, it was not an order open to revision u/s 10. In my opinion, the Additional _ Judge (Revisions) was wrong in directing a refund. Accordingly, I answer the third question in the negative.

15. The fourth question raises the point whether the Additional Judge (Revisions) was justified in entertaining the revision application after the lapse of several years from the date of the assessment order. In view of my answer to the third question, it is not necessary, I think, to express any opinion on this point.

16. I accordingly answer the questions referred as follows:

Question No. (1) : Need not be answered.

Question No. (2) : In the negative.

Question No. (3) : In the negative.

Question No. (4) : Need not be answered.

17. There is no order as to costs. Counsel's fee is assessed at Rs. 100.

R.L. Gulati, J.

18. I regret very much that I cannot subscribe to the view taken by my learned brother Pathak, J., on question No. (3).

19. By an assessment order dated 5th April, 1950, the assessee was assessed to sales tax in respect of its turnover of forward transactions for the assessment year 1948-49. In the The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash, , the Supreme Court declared that the provision in the U.P. Sales Tax Act authorising levy of sales tax on forward transactions was ultra vires. The assessee filed a revision application against the assessment order on 19th April,

1955, but the same was dismissed on 10th September, 1958, as barred by limitation. On 24th May, 1959, the assessee applied for the refund of the tax paid by it on the turnover of forward transactions. This application was rejected by the Sales Tax Officer on 19th May, 1960. On 9th July, 1960, the assessee applied to the Commissioner for the refund. That application was forwarded by the Commissioner to the Sales Tax Officer who rejected the same on 23rd September, 1963, on the ground that it was barred by time. The Sales Tax Officer took the view that the claim for refund should have been made within three years as prescribed under article 96 of the Indian Limitation Act and the limitation started from the last day of August, 1954, the month in which the Supreme Court judgment in the case of N. Satyanathan Vs. K. Subramanyan and Others, was published in the Supreme Court Journal. The assessee challenged the two orders of the Sales Tax Officer rejecting its applications for refund before the Judge (Revisions) u/s 10 of the Act. The Judge (Revisions) allowed the revision application holding that article 96 of the Indian Limitation Act did not apply, nor did the period of limitation provided in Section 29 of the Act apply as that provision had come into force, with effect from 1st April, 1959, while the right to claim refund had accrued to the assessee earlier. The Commissioner of Sales Tax applied for reference u/s 11(1) of the U. P. Sales Tax Act and suggested the following four questions :

(1) Whether in view of the facts stated in paragraphs 1 and 2 of his aforesaid judgment dated 30th November, 1962, the learned Additional Judge (Revisions) was legally justified in holding that the sum deposited by the company towards sales tax for 1948-49 was refundable to the company ?

(2) Whether in view of the facts stated in paragraphs 1 and 2 of his aforesaid judgment, the learned Additional Judge (Revisions), Sales Tax, was legally justified in holding that the provisions of the Indian Limitation Act would not apply to claim of refund under the U. P. Sales Tax Act in spite of the observations of the Honourable Supreme Court of India in 1958 Sales Tax Cases page 759, Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, ?

(3) Whether the learned Additional Judge (Revisions), Sales Tax, was legally justified in entertaining the revision application in question of the aforesaid company after the lapse of several years from the date of the assessment order particular!}? when the appeal and the revision application of the company were dismissed ?

(4) Whether the learned Additional judge (Revisions), Sales Tax, was legally justified in ignoring the view of the Honourable Supreme Court expressed in 1958 Sales Tax Cases page 759, Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , and in holding that, irrespective of the pointed observations of the Honourable Supreme Court, the sales tax deposited by the company for 1948-49 should be refunded to the company ?

20. The revising authority has allowed this application but has retrained the

questions and has submitted the following questions, as refrained by it, for the opinion of this court :

(1) Whether the observations (subject, however, to the questions of estoppel, waiver, limitation or the like) made by their Lordships of the Honourable Supreme Court in the case of Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , imply that the provisions of the Indian Limitation Act are applicable to cases under the U. P. Sales Tax Act and whether these observations are inconsistent with the view taken by the Honourable High Court in the case of Sales Tax Commissioner, U. P. v. Sada Sukh Vyopar Mandal [1959] 10 S.T.C. 57 ?

(2) Whether in these cases in which refund was claimed on the principles of Section 72 of the Indian Contract Act, the period of limitation under article 96 of the Limitation Act could be taken into consideration by the sales tax authorities in refusing to allow refund ?

(3) Whether under the circumstances of the case as stated above, the Additional Judge (Revisions), Sales Tax, was legally justified in holding that the sums deposited by the company towards sales tax for the year 1948-49 was refundable to the company ?

(4) Whether the Additional Judge (Revisions), Sales Tax, was legally justified in entertaining the revision application in question of the aforesaid company after the lapse of several years from the date of the assessment order particularly when the appeal and the revision application of the company in respect of that assessment order were dismissed?

21. I shall first deal with question No. (3) because, on the decision of that question would depend as to whether or not the remaining questions should be answered.

22. On the authority of the decision of the Supreme Court in the case of The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash, , there can be no manner of doubt that the assessee was entitled to the refund of the tax because the same had been paid under a mistake of law within the meaning of Section 72 of the Indian Contract Act. This position appears to be admitted between the parties and indeed admits of no doubt after the decision of the Supreme Court in Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, . The only dispute which arose between the parties was as to whether the assessee's claim for refund was barred by time. The Judge (Revisions) purported to follow the decision of this court in Sales Tax Commissioner, U. P. v. Sada Sukh Vyopar Mandal [1959] 10 S.T.C. 57, where it was observed at page 65 that there was no period of limitation for claiming a refund under the Sales Tax Act. The department on the other hand relied upon the following observations of the Supreme Court at page 759 in the case of Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, :

If mistake either of law or of fact is established, he is entitled to recover the

moneys and the party receiving the same is bound to repay or return them irrespective of any consideration whether the moneys had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like.

23. The department's contention was that the underlined portion (sic) of the above-quoted observation clearly suggested that in respect of a claim for a refund of tax based upon Section 72 of the Indian Contract Act, there would be a period of limitation and that period of limitation was to be found in article 96 of the Limitation Act.

24. While dealing with question No. (3), brother Pathak, J., has taken the view that the revising authority was not competent, to entertain the revision petition on the view that "the Additional Judge (Revisions) could, u/s 10, revise only an order made under the Act. If the order of the Sales Tax Officer refusing refund cannot be ascribed to any jurisdiction vested in him under the Act, the revising authority had no jurisdiction to revise that order." It is plain that such a question does not arise out of the revisional order because such a question was neither raised nor decided by the Judge (Revisions) nor indeed did the Commissioner ask for a reference on such a question in his application u/s 11(1) of the Act.

25. It is well-settled that the High Court in the exercise of its advisory jurisdiction u/s 11 of the Act cannot answer a question which does not arise out of the order of the revising authority passed u/s 10, nor can it answer a question which the party at whose instance the reference is made did not call upon the revising authority to refer the same (see Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , T.D. Kumar and Brothers (P.) Ltd. Vs. Commissioner of Income Tax, Calcutta, and Commissioner of Income Tax, West Bengal, Calcutta Vs. Smt. Anusuya Devi,). Moreover, if the view that the Sales Tax Officer was not competent to entertain the assessee's application for refund and likewise the Judge (Revisions) was not competent to entertain the revision against the order passed by the Sales Tax Officer on such an application is correct, the present reference itself would be incompetent. Section 11 of the Act contemplates a reference to this court only against an order of the Judge (Revisions) which he had the jurisdiction to pass (see Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar,). I, however, am of the opinion that neither the order passed by the Sales Tax Officer nor by the Judge (Revisions) can be said to be without jurisdiction in the circumstances of this particular case.

26. It is true that the authorities under the Act are not competent to adjudicate upon the vires of a statutory provision of the Act. Therefore, if the assessee in the instant case had applied to the Sales Tax Officer for refund on the ground that the provision authorising the imposition of tax on forward transactions was ultra vires, the Sales Tax Officer would not have been competent to entertain such an application because he had no authority to adjudicate upon such a question as has been held by the Supreme Court in K.S. Venkataraman and Co. Vs. State of Madras, , and any decision given by the Sales Tax Officer about the

vires of the provisions would have been beyond his jurisdiction and all further proceedings by way of revision or a reference would be barred. But, such is not the case here. The Supreme Court had already declared the levy of tax on forward transactions to be ultra vires. The law declared by the Supreme Court is binding upon all courts and tribunals which are bound to give effect to such a declaration of the law. In such a situation, the Sales Tax Officer was bound to entertain the application for refund and to pass an appropriate order thereon. Such an order cannot be said to be beyond the jurisdiction of the Sales Tax Officer. A revision application would accordingly lie to the revising authority and the order passed by the revising authority cannot be said to be without jurisdiction. As is evident from the observation of the Supreme Court in the case of Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , quoted above, the party paying the money under a mistake of law is entitled to the refund of the money and the party receiving the same is bound to repay or return it. It is the Sales Tax Officer who received the tax and it is the Sales Tax Officer who was bound to refund it.

27. It is true that in a case like the present one, an assessee can file a civil suit without having recourse to the remedies provided in the Act. But it does not mean that before filing a suit, he cannot make a demand from the Sales Tax Officer for the refund and that the Sales Tax Officer is not competent to deal with such an application. To accept the view that an application for the refund of tax realised by the Sales Tax Officer under a mistake of law is not entertainable by the Sales Tax Officer, would lead to the anomalous result that even though he is bound to return the tax so realised and is willing to return the same, yet he cannot do so and the assessee must be forced to file a civil suit. It is also true that an assessment order based upon an ultra vires provision of the Act can be ignored and a claim can straightaway be lodged for the refund of the tax realised under such an assessment order. But it does not follow that such an assessment order cannot be challenged by way of an appeal or a revision and the appellate or the revising authority cannot set aside such an assessment order and direct the refund of the tax. So long as the authorities are not called upon to declare a provision to be ultra vires, I see no reason why they cannot be called upon to give effect to the law declared by the Supreme Court.

28. In the instant case, the assessee's claim for refund was based upon the law declared by the Supreme Court and if the authorities proceeded to entertain such a claim, they cannot be said to have acted beyond their jurisdiction.

29. In the circumstances, I do not find it possible to hold that the Judge (Revisions) was not legally justified in holding that the assessee was entitled to the refund of the tax. Whether his decision is right or wrong is a different matter depending on as to whether or not there was a period of limitation for making such a claim and whether the assessee's claim was within time.

30. In view of the answer proposed by me to question No. (3), the other questions relating to limitation would directly arise. But I do not propose to

answer those questions because if the view taken by brother Pathak, J., on question No. (3) is correct, then no other question would arise. It is, therefore, necessary that the controversy over question No. (3) should be resolved first.

31. We have differed in the answer to question No. (3). That question is :

Whether under the circumstances of the case as stated above, the Additional Judge (Revisions), Sales Tax, was legally justified in holding that the sums deposited by the company towards sales tax for the year 1948-49 was refundable to the company ?

32. In the circumstances, we refer this question to a third Honourable Judge for his opinion.

33. The papers of this case shall be laid before the Honourable Chief Justice for appropriate orders.

34. In pursuance of the above said order, the case came on for hearing before VERMA, J., on 14th July, 1970.

Verma, J.

35. This sales tax reference has been listed before me because of a difference of opinion between R. S. Pathak, J., and R. L. Gulati, J., with regard to the answer to the following question :

Whether under the circumstances of the case as stated above, the Additional Judge (Revisions), Sales Tax, was legally justified in holding that the sums deposited by the company towards sales tax for the year 1948-49 was refundable to the company ?

36. R. S. Pathak, J., has answered the question in the negative, whereas R. L. Gulati, J., has answered it in the affirmative.

37. The Sales Tax Officer, Etawah, passed an assessment order against the dealer for the year 1948-49 in respect of certain forward transactions. The order required the dealer to pay Rs. 4,623-6-0 as sales tax. Part of the amount had been deposited before the assessment order and the balance was deposited after it had been passed. An appeal filed by the dealer was dismissed on 17th May, 1951. On 3rd May, 1954, the Supreme Court held in *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, that the levy of sales tax on forward transactions was ultra vires. On 19th April, 1955, the dealer filed a revision against the assessment order dated 5th April, 1950. On 10th September, 1958, the revision was dismissed as barred by limitation. On 24th May, 1959, the dealer filed an application before the Sales Tax Officer for the refund of the amount deposited. His case was that this deposit had been made by a mistake of law. This application was rejected on 19th May, 1960. On 9th July, 1960, an application was filed directly before the Commissioner of Sales Tax for the refund of the amount. The Commissioner sent it down to the Sales Tax Officer for appropriate action. On 23rd September, 1960, the Sales Tax Officer rejected that application

on the ground that, the application was barred under article 96 of the First Schedule of the Indian Limitation Act, 1908, as it had not been filed within 3 years of the decision of the Supreme Court. A revision was filed against this order and on 13th November, 1962, this revision was allowed by the Additional Judge (Revisions), Sales Tax, Agra. The learned Judge held that neither article 96 of the First Schedule of the Indian Limitation Act nor Section 29 of the U. P. Sales Tax Act was applicable. A direction for the refund of the amount was issued. Thereafter, the Commissioner of Sales Tax applied for a reference to this court and the learned Additional Judge (Revisions), Sales Tax, referred four questions for decision to this court. I am only concerned with the third question which I have already quoted above.

38. R. S. Pathak, J., has taken the view that, as the amount deposited by the dealer was not legally realisable under the Sales Tax Act, the order of the Sales Tax Officer was not under the Act and that, therefore, the order passed by the Additional Judge (Revisions), Sales Tax, too was without jurisdiction. I shall quote his own words :

The Additional Judge (Revisions) could, u/s 10, revise only an order made under the Act. If the order of the Sales Tax Officer refusing refund cannot be ascribed to any jurisdiction vested in him under the Act, the revising authority had no jurisdiction to revise that order.

39. I find it very difficult to agree with this view. In the Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, , their Lordships have clearly laid down that if money has been paid to the sales tax department either by mistake of fact or of law, the dealer is entitled to a refund and the authorities who have realised it are bound to repay it. Their Lordships observed as follows :

The state of mind of the respondent would be the only thing relevant to consider in this context and once the respondent establishes that the payments were made by it under a mistake of law, (and it may be noted here that the whole matter proceeded before the High Court on the basis that the respondent had committed a mistake of law in making the said payments), it was entitled to recover back the said amounts and the State of U. P. was bound to repay or return the same to the respondent irrespective of any other consideration.

40. In my opinion, the dealer could justifiably go to the Sales Tax Officer and show that the money had been paid by mistake and that he should refund it. If he refunds it, it cannot be said that he has acted without jurisdiction. If he refuses to refund it, I fail to see why the revising authority cannot direct refund of the money which has, admittedly, been wrongly realised. It may be that the dealer could have also filed a suit for the refund of the money, but I fail to see why he should be forced to do so. I, therefore, agree with R. L. Gulati, J., and answer the third question referred to this court in the affirmative.

41. Let the papers of this case be returned to the Bench concerned.

42. The order of the Bench dated 21st August, 1970, is as follows:-

R.S. Pathak, J.

43. Upon the answer given by the third Judge to the question on which we differed, it appears necessary now to decide also the fourth question referred in this case. The question is whether the Additional Judge (Revisions), Sales Tax, was justified in entertaining the revision application after the lapse of several years from the date of the assessment order. It seems to me that the date of the assessment order is of no relevance whatsoever for determination of the question whether the revision application was within time. The revision application was directed against the order dated 19th May, 1960, passed by the Sales Tax Officer, Etawah, rejecting the refund application. The period of limitation prescribed by Section 10(3-B) of the U. P. Sales Tax Act for filing a revision application is one year from the date of the service of the order complained of. Admittedly, the revision application was filed within this period, taking into regard that the order complained of was the order rejecting the refund application. There can be no dispute, I think, that the revision application made by the assessee was filed within time. The Additional Judge (Revisions) was justified in entertaining the revision application.

44. The fourth question is answered accordingly.

R.L. Gulati, J.

45. Originally I had answered question No. (3) only leaving other questions unanswered because there was a difference of opinion between us on question No. (3). Question No. (3) has now been answered in favour of the assessee in accordance with the opinion of the learned third Judge.

46. After going through the judgment of my brother Pathak, J., I have no hesitation in agreeing with the answers proposed by him to the other questions.

47. In view of the opinion expressed by us in our respective judgments and the opinion returned by the third Judge, the four questions referred in this case are answered as follows :

Question No. (1) : Need not be answered.

Question No. (2) : In the negative.

Question No. (3): In the affirmative.

Question No. (4): In the affirmative.

48. The assessee is entitled to its costs which we assess at Rs. 100. Counsel's fee is assessed at the same figure.