

(2004) 12 GAU CK 0005

In the Gauhati High Court

Case No : Writ Petitions (C) No's. 5342, 5343 and 5344 of 2004

Eastern Enterprises and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 02-12-2004

Acts Referred:

Assam General Sales Tax Act, 1993 — Section 17(4), 18, 2(1), 2(34), 3
Assam General Sales Tax Rules, 1993 — Rule 7

Citation : (2005) 2 GLT 35 : (2006) 143 STC 518

Hon'ble Judges : D. Biswas, Acting C.J.

Bench : Single Bench

Advocate : A.K. Saraf, D. Baruah, N. Hawelia and M.L. Gope, for the Appellant;
K.N. Choudhury I. Choudhury and J. Pathak, for the Respondent

Final Decision : Dismissed

Judgement

D. Biswas, Ag. C.J.

1. The Writ Petitions (C) Nos. 5342, 5343 and 5344 of 2004 are taken up together for disposal.

2. The petitioner No. 1 in all the three writ petitions is a partnership firm having its office at Panbazar, Guwahati, and the petitioner No. 2 is one of the partners of the firm. The notice dated June 22, 2004 issued by the Joint Commissioner of Taxes, Assam, in purported exercise of powers u/s 36(1) of the Assam General Sales Tax Act, 1993 is in challenge in these three petitions. The notice reads as follows :

To M/s. Eastern Enterprises, M.L. Nehru Road, Panbazar, Guwahati-1. Sub : Show cause notice contemplating revision under Section 36(1) of the Assam General Sales Tax Act, 1993 of the revised assessment order for assessment years 1993-94, 1994-95 and assessment order for assessment year 1996-97. While examining the refund petitions submitted by you for assessment years 1993-94, 1994-95 and 1996-97 and keeping in view the direction of the

honourable Court, it is found that the refund as claimed by you is not admissible as the assessment orders passed in this regard is found to be erroneous and prejudicial in the interest of Government revenue.

And whereas it is found on scrutiny that the assessment orders for the assessment years 1993-94, 1994-95 and 1996-97 of the Superintendent of Taxes, Guwahati--"A" prima facie appeared to be erroneous and prejudicial in the interest of Government revenue inasmuch as the payable excise duty in respect of the goods ought to have been included in the assessable turnover of the concerned dealer irrespective of the fact whether such excise duty had been paid by the dealer himself or his assignee vendors. This position has been most unequivocally brought out in the judgment and order of the honourable Supreme Court in the case of Mcdowell & Co. Limited v. Commercial Tax Officer [1985] 59 STC 277 overruling the earlier judgment in the like cases which seems to have been completely disregarded by the decision taken by the Deputy Commissioner of Taxes (Appeal) while deciding the issue at his end on which the assessment orders are based on and thereby resulting a huge under-assessment of taxes.

You are, therefore, asked to appear before the undersigned on July 6, 2004 at 11 P.M. in the Office of the Commissioner of Taxes, Assam, "Kar Bhawan", Guwahati-6 and file your submission, which you would like to make either orally or in writing along with the necessary evidences.

It may be noted that in case you fail to make "adequate response to the terms of this notice the matter will be disposed without any further reference to you.

Sd/- (M.H.A. Choudhury) Joint Commissioner of Taxes, Assam, Guwahati-6.

3. I have heard Dr. AK. Saraf, learned Senior Counsel for the petitioners assisted by Mr. D. Baruah, Ms. N. Hawelia and Ms. ML. Grope, learned Counsel and Mr. KN. Choudhury, learned Senior Counsel for the respondents assisted by Mr. I. Choudhury, learned Counsel.

4. At this stage, the facts in brief may be referred to for better appreciation of the core issue of this case. The Superintendent of Taxes, Guwahati, by the order dated April 29, 1996 completed the assessment for the years 1993-94 and 1994-95 u/s 17(4) of the Assam General Sales Tax Act, 1993, hereinafter referred to as "the Act". Being aggrieved, the petitioner-firm preferred appeals before the Deputy Commissioner of Taxes (Appeals) on July 10, 1996. The assessment order was challenged on the ground that the assessing officer erred in computing the annual turnover in so far it relates to outright freight, excise duty element, etc. The Deputy Commissioner of Taxes (Appeals) by the order dated 11th April, 2000 partly allowed the appeal in respect of the assessment year 1995-96 and set aside the assessment order in so far it relates to charging of interest with direction for recalculation. The other appeals preferred challenging the assessment orders passed for the assessment years 1993-94 and 1994-95 were also allowed by the order dated August 11, 1997. The assessing officer was directed to make fresh assessment in the light of the observation

made by the Deputy Commissioner of Taxes (Appeals). The observation/direction of the appellate authority are quoted hereinbelow :

(a) That the learned Superintendent of Taxes neither discussed in the assessment orders nor allowed the total freight outward amount which is actually borne by the appellant for Rs. 3,10,000 and Rs. 4,75,000 during the years 1993-94 and 1994-95. The said amount is allowable deduction from the total sale price as per provision 2(34)(d)(i) of the Act. No certain conditions and restrictions prescribed in the Act in this regard.

(b) The learned Superintendent of Taxes neither discussed in the assessment orders nor allowed the discount/trade discount amounting to Rs. 3,20,000 and Rs. 3,75,000 during the year 1993-94. The said amount is already allowed by the appellant in the sale price and is allowable deduction as per provision of Section 2(34)(d)(ii) of the Act.

(c) That the learned Superintendent of Taxes charged/levied interest without any speaking order in the assessment orders during the years 1993-94 and 1994-95. Moreover, the interest was also charged up to the date of chalan, whereas the appellant deposited the advance/due taxes by cheque much ahead of the chalan date. The date of cheque handed over to the department is to be treated as the date of payment of taxes if such cheques are not dishonoured.

(d) That the learned Superintendent of Taxes included the excise duty paid directly by the appellant to the Excise Authority of the State during the years 1993-94 and 1994-95. In this regard the learned authorised representative, referred to the judgment and order passed by the honourable Supreme Court of India in the case of "McDowell & Company Ltd v. Commercial Tax Officer, VII Circle, Hyderabad [1977] 39 STC 151" "Held : We have, therefore, no hesitation in holding that the excise duty and countervailing duty paid directly by the buyers of Indian liquors as stated above did not constitute a part of turnover of the appellant.

As because the judgment and orders of the apex Court are identical/similar in nature, hence the appellant deserves the same treatment in these appeal cases also.

(e) That in accordance with the judgment and order passed by the honourable Supreme Court in the case of :

Indian Aluminium Cables v. Excise and Taxation Officer [1977] 39 STC 19" "Held : The tax, interest or any other sum remains stayed by the order of any court shall be excluded.

5. Accordingly, in compliance with the aforesaid direction the assessing officer completed the assessment for 1993-94 and 1994-95. The assessment for the year 1996-97 was also finalised by the assessing officer in compliance with the aforesaid directions of the appellate authority. Needless to say that the assessing officer while computing the annual turnover for the aforesaid three assessment

years excluded the component of excise duty, freight and discount from the turnover of the petitioner No. 1.

6. After finalisation of the assessment, the petitioner lodged claim for refund of the excess amount paid for the three assessment years.

7. The Joint Commissioner of Taxes (respondent No. 3) during the course of examination of the claim for refund noticed that the claim of the petitioner-firm is not maintainable inasmuch as the assessment orders passed were erroneous and prejudicial to the interest of the Revenue and, thereafter, issued the impugned show cause notice in exercise of powers conferred u/s 36(1) of the Act.

8. It is an admitted fact that the assessing officer completed the assessment in terms of the order passed by the Deputy Commissioner of Taxes (Appeals). The appellate authority disposed of the appeals relying upon the decision of the apex Court in McDowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad, which was overruled by the Constitution Bench of the honourable Supreme Court in McDowell & Company Limited v. Commercial Tax Officer reported in [1985] 59 STC 277 : (1985) 3 SCC 230. It is for this reason the Joint Commissioner of Taxes considered it appropriate to issue the impugned notice expressing his intention to exercise powers u/s 36(1) of the Act to revise the assessment orders for the aforesaid three years.

9. Dr. A.K. Saraf, learned Senior Counsel for the petitioners, argued that the assessment orders passed by the assessing officer in compliance with the direction of the appellate authority cannot be condemned as erroneous and, as such, the Commissioner of Taxes cannot be permitted to exercise the powers of revision u/s 36(1) of the Act to revise the assessment orders inasmuch as the powers of revision u/s 36(1) is not available for review of the orders of the appellate authority. On maintainability of the writ petitions, Dr. Saraf argued that the show cause notice dated June 22, 2004 is patently without jurisdiction and, therefore, the writ is maintainable.

10. Let us at the beginning look at the two judgments of the honourable Supreme Court delivered in 1977 and 1985. In 1977 judgment, the honourable Supreme Court held that "The excise duty or the countervailing duty, as the case might be, paid directly to the excise authorities of the State or deposited directly in the State exchequer in respect of Indian liquor by the buyers thereof before removing it from distillery or the bonded warehouse and not included in the sale bills issued either by the manufacturer or the owner of the bonded warehouse could not form part of their turnover and were not liable to sales tax under the Andhra Pradesh General Sales Tax Act, 1957. The duty in such a case had not been charged or received by the dealer. It had also not gone into the common tills of the dealer and had not become a part of his circulating capital". This judgment was overruled by the Constitution Bench of the honourable Supreme Court in McDowell & Company Limited v. Commercial Tax Officer reported in [1985] 59 STC 277 : (1985) 3 SCC 230.

The observation of the honourable Supreme Court relevant for the case at hand is available in paras 33 and 35 of the said judgment (pages 290 and 292 of STC). The decision of the honourable Supreme Court is quoted below :

33. The definition clearly indicates that the total amount charged as the consideration for the sale is to be taken into account for determining the turnover. Where a bill of sale is issued (and obviously the bill has to state the total amount charged as consideration), the total amount set out therein is to be taken into account. In every transaction of sale, there is bound to be a seller at one end and a buyer at the other and transfer of title in the goods takes place for a consideration.

....

35.

Admittedly, the bills issued by the appellant did not include the excise duty. As already found, payment of excise duty is a legal liability of the manufacturer ; its payment is a condition precedent to the removal of the liquor from the distillery and payment by the purchaser is on account of the manufacturer. According to normal commercial practice, excise duty should have been reflected in the bill either as merged in price or being shown separately. As a fact, in the hands of the buyer the cost of liquor is what is charged by the appellant under its bill together with excise duty which the buyer has directly paid on seller's account. The consideration for the sale is thus the total amount and not what is reflected in the bill. We are, therefore, clearly of the opinion that excise duty though paid by the purchaser to meet the liability of the appellant, is a part of the consideration for the sale and is includible in the turnover of the appellant. The purchaser has paid the tax because the law asks him to pay it on behalf of the manufacturer."

11. It is, therefore, settled that the sale price includes the excise duty and is a component of the sale price and is, therefore, to be included in the annual turnover of the assessee. The judgment by the Deputy Commissioner of Taxes (Appeals) in the instant case was delivered long after 1985. The appellate authority apparently relied upon the judgment of 1977 which was not the law at the time of disposal of the appeals. The judgment of the appellate authority is contrary to law as interpreted by the honourable Supreme Court and is erroneous. But the Revenue did not prefer any appeal against the aforesaid judgment though provision for appeal against the judgment of the Deputy Commissioner was available. The judgment of the Deputy Commissioner (Appeals) became final and it was binding upon the assessing officer. The assessing officer had no option but to finalise the assessment in compliance with the order passed by the appellate authority which had already attained finality.

12. The Joint Commissioner issued the impugned notice for the purpose of revision of the assessment orders in exercise of his power conferred u/s 36(1) of the Act only after the assessee filed application claiming refund. Exercise of this

power of revision in the given context would mean reviewing the order passed by the appellate authority in exercise of quasi-judicial power. Whether it is permissible or not is a matter to be decided on the scheme of the Act and the provisions contained therein.

13. Dr. A.K. Saraf, learned Senior Counsel, argued that the order passed by the assessing officer on April 28, 1998 to give effect to the appellate order cannot be disturbed at this stage in exercise of the jurisdiction u/s 36(1) of the Assam General Sales Tax Act. According to Dr. Saraf, the powers of suo motu revision of the Commissioner under Sub-section (1) of Section 36 is in the nature of supervisory jurisdiction and can be exercised only when the two circumstances specified therein exist, i.e., the order sought to be revised is erroneous and the Revenue has been prejudiced on that count.

14. The Assam General Sales Tax Act, 1993 was enacted to amalgamate, consolidate and amend the laws relating to levy of taxes on the sale and purchase of goods in the State of Assam. It is divided into twelve chapters. Chapter 2 deals with the tax authorities and the Appellate Tribunal. Chapter 5 deals with the return, assessment and reassessment. Chapter 8 provides for appeal, revision, determination and rectification. Sub-section (1) of Section 3 provides for appointment of Commissioner of Taxes and other persons to assist him. Sub-section (5) of Section 3 empowers the State Government to authorise an officer not below the rank of a Deputy Commissioner of Taxes to exercise the powers and perform the functions of the appellate authority u/s 34. These two sub-sections read as follows :

3. Tax authority.--(1) For carrying out the purpose of this Act, the State Government may by notification appoint a person to be the Commissioner of Taxes, together with such other persons to assist him as it thinks fit and may specify the area or areas over which they shall exercise jurisdiction.

(5) The State Government may authorise an officer, not below the rank of a Deputy Commissioner of Taxes appointed under Sub-section (1) to exercise the power and perform the functions of the appellate authority u/s 34.

15. The Joint Commissioner appointed to assist the Commissioner sought to invoke the revisional powers under Sub-section (1) of Section 36 to revise the assessment orders passed by the assessing officer in pursuance of the orders passed by the appellate authority. It is, therefore, considered expedient to quote hereinbelow the provisions contained in Section 36 for better appreciation of the situation at hand :

36. Revision of order by the Commissioner.--(1) The Commissioner may call for and examine the records of any proceeding under this Act and if he considers that any order passed therein by any person appointed under Sub-section (1) of Section 3 to assist him is erroneous insofar as it is prejudicial to the interests of the Revenue, he may, after giving the dealer or the person to whom the order relates an opportunity of being heard and after making or causing to be made

such enquiry as he deems necessary, pass such order, as the circumstances of the case justify including an order enhancing or modifying the assessment of tax or penalty or cancelling such order and directing that a fresh order should be made :

Provided that no order under this sub-section shall be made after the expiry of eight years from the end of the financial year in which the order sought to be revised was made.

Explanation : The provisions of this sub-section shall apply, notwithstanding that the order sought to be revised has been made the subject of any proceeding by way of appeal, in respect of matters not actually considered and decided in such proceedings.

(2) In the case of any order passed by a person appointed to assist the Commissioner under Sub-section (1) of Section 3, not being an order to which Sub-section (1) applies, and not being an order against which an appeal u/s 33 has been filed or an order in respect of which the time allowed for appeal u/s 33 has not expired, the Commissioner may, either of his own motion or on an application made in the prescribed manner by the dealer or person affected by such order, call for the record of any proceeding under this Act in which any such order has been passed and may make such enquiry or cause such enquiry to be made and subject to the provisions of this Act, pass such orders thereon, not being an order prejudicial to the dealer or person to whom the order relates as he thinks fit :

Provided that the Commissioner shall not revise ny order under this sub-section after the expiry of ninety days from the end of the financial year in which such order was made :

Provided further that where an application for revision has been made before the expiry of ninety days as aforesaid the order in revision may be made at any time.

(3)(a) When an assessing officer is aggrieved by any order passed by the appellate authority, he may file a revision petition within ninety days from the date of receipt of such order.

(b) When a revision petition is filed by an assessing officer, the Commissioner may, after examination of the order of the appellate authority and the records of any proceedings under this Act to which the order of the appellate authority relates and after making an enquiry or causing an enquiry to be made, as he may deem necessary, pass any order reversing, modifying or upholding the order of the appellate authority :

Provided that Commissioner shall not pass any order prejudicial to the dealer or the person to whom the order relates without giving him a reasonable opportunity of being heard.

(4) Notwithstanding anything contained in Sub-section (4) of Section 3, the

Commissioner shall not delegate any of the powers or functions under this section to any officer appointed to assist him under Sub-section (1) of that section, who is below the rank of a Deputy Commissioner.

16. It would appear from the provisions in Section 36 that the Commissioner is authorised to exercise the powers of revision suo motu and interfere with the orders passed by any officer other than himself if he is of the opinion that any such order is erroneous in so far it is prejudicial to the interest of the Revenue. Sub-section (1) makes it clear that the power of suo motu revision can be exercised by the Commissioner only when any order passed thereunder by any officer appointed to assist him is erroneous in so far it is prejudicial to the interest of the Revenue. The powers under Sub-section (1) can be exercised only on fulfilment of two conditions, i.e., (i) the order is erroneous, and (ii) it is prejudicial to the interest of the Revenue. The Commissioner, obviously, cannot invoke the powers under Sub-section (1) with a view to start roving enquiries in matters or orders which have attained finality. It is a supervisory jurisdiction of the Commissioner and can be exercised only when the aforesaid two circumstances exist. The order of revision under Sub-section (1) can be made within a period of eight years from the end of the financial year in which the order sought to be revised was made. This power of the Commissioner has been delegated to the Joint Commissioner also. Therefore, the move initiated by the Joint Commissioner is not without jurisdiction and this could be permissible only when the aforesaid two conditions exist. The powers available under Sub-section (2) apply to orders other than the orders to which the provisions of Sub-section (1) apply. This power can also be exercised suo motu, and on application by the assessee.

17. Let us examine whether the aforesaid two conditions mandatory for the exercise of the powers under Sub-section (1) of Section 36 exist in the case at hand. The judgment of the honourable Supreme Court in *Mcdowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad*, was overruled by the honourable Supreme Court in *Mcdowell* case reported in [1985] 59 STC 277 : (1985) 3 SCC 230. The Deputy Commissioner of Taxes (Appeals) while disposing of the appeals preferred by the assessee directed the assessing officer for reassessment of the annual turnover excluding the excise duty or countervailing duty from the annual turnover. The orders in appeals were passed in 1997. Obviously the ratio available in this judgment was not the law at that point of time as the aforesaid judgment stood overruled in 1985. In 1985, the honourable Supreme Court in paragraphs 33 and 35 (at pages 290 and 292 of 59 STC) held that the consideration for the sale is the total amount inclusive of the excise duty paid by the purchaser to meet the liability of the seller and, therefore, the excise duty has to be treated as a component of the sale price and is, thus, includible in the annual turnover of the seller. The order passed by the Deputy Commissioner of Taxes (Appeals) relying upon the judgment of 1977 was, therefore, erroneous being contrary to the law in force. Therefore, the appellate authority committed gross error in interpreting the law. The assessing officer passed the final

assessment orders relying upon the aforesaid erroneous decision of the Deputy Commissioner of Taxes (Appeals). Thus, the assessments made contrary to the provisions of law were also bad in law. This is so far the first requirement is concerned.

18. Mr. K.N. Choudhury, learned Senior Counsel for the Revenue, argued that non-inclusion of the excise duty in the sale price resulted in huge loss of revenue to the State. Mr. Choudhury with reference to the materials on record submitted that the loss of revenue was in terms of crores and this has been occasioned because the assessing officer fell in error in applying the correct law. According to Shri Choudhury, though the Revenue did not challenge the orders of the Deputy Commissioner of Taxes (Appeals) before higher forum, yet the powers of revision under Sub-section (1) of Section 36 should be available for revision of the final assessment orders passed by the assessing officer erroneously in prejudice to the interest of the Revenue. It, therefore, follows that the action of the assessing officer in excluding the excise duty from the annual turnover of the assessee resulted in loss of revenue to the State. In my considered opinion, the two requisites essential for exercise of the revisional powers do exist in the instant case. The Joint Commissioner having been delegated with the powers of the Commissioner was, therefore, within its jurisdiction in his move to invoke the powers under Sub-section (1) of Section 36.

19. Now the question that arises for consideration is whether the powers under Sub-section (1) of Section 36 can be invoked to revise an assessment order which would otherwise result in reversal of the order passed by the Deputy Commissioner of Taxes (Appeal).

20. Though the Deputy Commissioner of Taxes (Appeals) discharge the functions of appellate authority and is a quasi-judicial authority, it is neither a Tribunal as provided in Sub-section (1) of Section 5 of the Act, nor a court. Therefore, orders passed by the Deputy Commissioner of Taxes (Appeals) cannot be treated as final and conclusive for the purpose of carrying out the provisions of the Act. Section 2(1) defines the appellate authority which means the authority authorised by the State Government under Sub-section (5) of Section 3 to hear and decide appeals u/s 34. Officers not below the rank of Deputy Commissioner of Taxes can be appointed under Sub-section (1) to exercise the powers and perform the functions of the appellate authority u/s 34. The Deputy Commissioner of Taxes is appointed to assist the Commissioner of Taxes under Sub-section (1) of Section 3. It would appear from Sub-section (3) of Section 36 that the Commissioner is authorised to exercise the powers of revision to examine the orders of appellate authority and the records of any proceedings under the Act to which the order of appellate authority relates and after making an enquiry or causing an enquiry, may pass any order reversing, modifying or upholding the order of the appellate authority in a revision petition filed by the assessing officer. This power of the Commissioner extends in reversing, modifying or upholding the order of the appellate authority as well.

21. The language employed in Sub-section (1) of Section 36 empowers the Commissioner to enhance or modify the assessment of tax or penalty, etc., in any proceeding under this Act in which order has been passed by a person appointed to assist the Commissioner. The words "in any proceeding under this Act" without any exception indicated therein suggest that an assessment order passed by the taxing authority relying upon a decision of the appellate authority is also subject to revisional powers of the Commissioner. The Legislature do not appear to have had the intention to place the orders passed by the Deputy Commissioner of Taxes (Appeals) at a higher pedestal. The orders passed by the Deputy Commissioner of Taxes (Appeals) cannot be equated with an order passed by the Tribunal or the High Court.

22. Explanation to Sub-section (1) of Section 36 provides that the provisions of Sub-section (1) shall also apply, notwithstanding that the order sought to be revised has been made the subject of any proceeding by way of appeal, in respect of matters not actually considered and decided in such proceedings. It is thus clear that an order of assessment made by an assessing officer relying on an order passed by the appellate authority other than the Tribunal or the High Court can be revised. Explanation is not to be considered as an exception to the substantive provision. It has to be read in tune with the substantive provisions embodied in the section. In case of any confusion arising out of any Explanation, such confusion has to be dispelled by interpretation in tune with the substantive provisions of the Act. The powers of suo motu revision of the Commissioner of any order passed in any proceeding under the Act cannot be circumscribed by assigning a meaning contrary to the substantive provision which provides for revision of any order passed in any proceedings under the Act. The court will not narrow the provisions of any taxing statute designed to curb evasion of tax or take care of escaped assessment. The confusion in this regard, if any, stands cleared by the provisions of Clause (iii-a) to Rule 7 of the Assam General Sales Tax Rules, 1993 wherein the Deputy Commissioner of Taxes (Appeals) has also been enlisted as an authority appointed to assist the Commissioner. Though the insertion was brought into force with effect from September 22, 1998, it being a procedural law and in tune with the provisions of Sections 3 and 5 would have retrospective effect in deciding matters within the purview of Sub-section (1) of Section 36. The provisions of Section 2(1), Section 3 and Section 5 and Section 36(1) and 36(3) and Clause (iii-a) of Rule 7 together make the position abundantly clear. The Explanation to Sub-section (1) has to be interpreted consistent with the provisions of this Scheme. The powers of suo motu revision will, however, not be available against an order passed by the Tribunal constituted u/s 5 of the Act or against any order passed by the High Court in revision as provided in Sub-section (1) of Section 35. The decisions of the honourable Supreme Court in *Income Tax Officer, Alleppey Vs. M.C. Ponnose and Others*, , *Eicher Motors Limited and Another Vs. Union of India and Others* Etc., and in *Samtel India Ltd. Vs. Commissioner of Central Excise, Jaipur*, with regard to retrospectivity do not appear to have any bearing in the case at hand.

The Supreme Court in *Rai Bahadur Seth Shreeram Durgaprasad Vs. Director of Enforcement*, discussed the principles relating to procedural law and was of the opinion that no person has a vested right in any course of procedure. In *Parashuram Pottery Works Co. Ltd. Vs. Income Tax Officer, Circle I, Ward A, Rajkot*, the Supreme Court held as follows :

It has been said that the taxes are the price that we pay for civilisation. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity.

23. The decision in this judgment clearly indicates that there must be a point of finality in all legal proceedings and stale issues cannot be reactivated beyond a particular stage. In the instant case though the assessment was made final, but the effort made by the Joint Commissioner is within the period of limitation prescribed in the Act. In a case where the circumstances required for suo motu revision are present and powers of suo motu revision are sought to be invoked to protect the interest of the Revenue, it would be impermissible to stall that process merely because the remedies available under Sections 18 and 37 were not availed. The decision of the apex Court in *State of Andhra Pradesh v. T.G. Lakshmaiah Setty & Sons* reported in [1994] 94 STC 190 dealt with the parameters of suo motu revision of the Commissioner and other authorities. The honourable Supreme Court held that the suo motu power was conferred on higher authorities to correct errors of law or to correct improper or irregular procedure or illegality in the procedure to safeguard the interest of the Revenue. This power of suo motu revision is undoubtedly distinct from the powers given under Sections 18 and 37 of the Act which are primarily meant for taking care of escaped assessment and for rectification of arithmetical mistake or other mistake of factual nature apparent from the records of the case. The case at hand is definitely not for rectification of any arithmetical error or mistake of factual nature. The move is for correction of an error which has occasioned loss of revenue. For this reason, the decisions in *State of Kerala v. K.M. Cheria Abdulla and Company* reported in [1965] 16 STC 875 and in *Shree Automobiles Private Limited v. Commissioner of Taxes* reported in [2003] 132 STC 125 appear to be of no significance so far this case is concerned. Omission to avail the corrective powers under Sections 18 and 37 cannot stand on the way of exercise of powers u/s 36.

24. Dr. Saraf relying upon the judgment of this Court in *Santalal Mehendi Ratta (HUF) v. Commissioner of Taxes* reported in* (2002) 2 GLT 262 argued that the

powers of suo motu revision u/s 36 have to be confined to jurisdictional errors only. According to Dr. Saraf, in the case at hand, the powers of rectification u/s 37 of the Act could be invoked within a period of three years. After expiry of the period of three years, the authority cannot be allowed to invoke the provisions of suo motu revision under Sub-section (1) of Section 36 to correct the error, if any, crept-in in the assessment order. The contention of Dr. Saraf does not appear to be relevant to the scheme of the Act. The powers in Sections 18, 36 and 37 are distinct and different from one another. The provisions of Section 18 can be invoked by the assessing officer for the purpose of levying tax on the escaped assessment and the provisions of Section 37 for the purpose of rectification of arithmetical mistake and factual error. The case at hand is obviously not for correction of arithmetical mistake or factual error. The powers u/s 37 for rectification of assessment orders were also not invoked by the assessing officer. It is in this context, the Joint Commissioner issued the notice under Sub-section (1) of Section 36 after having found that the assessing officer acted erroneously relying upon an erroneous order of the Deputy Commissioner of Taxes (Appeals) which has resulted into loss of revenue. The diligence and promptitude expected from the assessing officer is obviously lacking in the instant case. Therefore, the action of the Joint Commissioner cannot be said to be without jurisdiction. The decision in Santalal Mehendi Ratta (HUF) (2002) 2 GLT 262 cannot salvage the situation for the assessee-firm.

25. In the above background, the decision of the Allahabad High Court in K.N. Agrawal v. Commissioner of Income Tax reported in [1991] 189 ITR 769 relied upon by Dr. Saraf may be looked into. The Allahabad High Court held that the order of the assessing officer could not be said to be erroneous if they merely follow the decision of the higher authority or the court on the same point. The orders of Tribunal and the High Court have been made binding upon the assessing officer as they act in a quasi-judicial capacity. But in the instant case, the assessing officer was not acting upon any order of the Tribunal or the High Court. This observation was rendered in the context of appellate orders of the Tribunal or the High Court and not of any other appellate forum constituted to assist the Commissioner.

26. The above discussion may be summarised as follows :

- (a) The orders of assessment passed in the proceedings under the Act is erroneous insofar as they are prejudicial to the interest of the Revenue.
- (b) The Deputy Commissioner of Taxes (Appeals) is an authority appointed to assist the Commissioner for carrying out the purposes of the Act and, therefore, is not an authority higher than the Commissioner.
- (c) The Deputy Commissioner of Taxes (Appeals) is neither a Tribunal nor a court.
- (d) The provisions of Clause (iii-a) of Rule 7 of the Rules of 1993 is procedural and will have retrospective operation.

(e) Powers under Sections 18, 36 and 37 are independent. Failure to invoke the powers u/s 18 or 37 does not preclude the Commissioner or the officer delegated with the powers of Commissioner to invoke the powers of suo motu revision u/s 36.

(f) The Explanation to Sub-section (1) of Section 36 has to be interpreted consistent with the provisions of this Scheme.

27. Keeping in mind the features summarised above, we may refer to the decision of the honourable Supreme Court in Commissioner of Sales Tax, Orissa and Another Vs. Halari Store, With reference to the provisions of Section 23(4) (a) of the Orissa Sales Tax Act and Rule 80 of the Orissa Sales Tax Rules, the Supreme Court held that the powers of suo motu revision is also exercisable even in respect of an appellate order. The question before the honourable Supreme Court was whether an appellate order passed under Sub-section (2) of Section 23 comes within the ambit of the expression "any order made under this Act" occurring in Section 23(4)(a) of the Act. According to the honourable Supreme Court, the language used in Section 23(4)(a) is plain and simple and there is no ambiguity in it. The honourable Supreme Court held that the expression--"any order made under this Act" is of wide connotation and it includes an assessment order as well as an appellate order passed under the Act. In the instant case, Sub-section (1) of Section 36 empowers the Commissioner to call for and examine the records of any proceedings under the Act and to revise any order passed therein if such order is erroneous in so far as it is prejudicial to the interest of the Revenue. Sub-section (3) authorises the Commissioner even to revise, modify or uphold the order of the appellate authority. The language employed in Section 23(4)(a) of the Orissa Act and Sub-section (1) of Section 36 of the Act of 1993 are identical and, as such, capable of same interpretation. Explanation to Sub-section (1) of Section 36 has to be interpreted in tune with the meaning of the substantive provisions of the Act. Therefore, it would be just and proper to hold that the suo motu powers of Commissioner under Sub-section (1) of Section 36 will also cover an appellate order other than the orders passed by the Tribunal or the High Court. Therefore, there cannot be any bar in exercise of this power to revise an order of assessment passed by an assessing officer relying upon the orders of the Deputy Commissioner of Taxes (Appeals). The impugned notice is, therefore, not without jurisdiction.

28. In the result the writ petitions are dismissed.

No costs.