
(1970) 10 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petn No's. 4063 of 1969 and 1086, 1087, 1117 and 1118 of 1970

Indian Ceramic House, Agra

APPELLANT

Vs

Sales Tax Officer, II Sector, Agra

RESPONDENT

Date of Decision : 20-10-1970

Acts Referred:

Uttar Pradesh Sales Tax Rules, 1948 — Rule 41(3), 48

Citation : AIR 1971 All 251 : (1971) 28 STC 231

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

Bench : Full Bench

Advocate : Gopal Behari Shrish Prasad, for the Appellant; Standing Counsel, for the Respondent

Judgement

Mathur, J.—In these Writ Petitions the following question has been referred to us for decision in view of the conflict in two decisions of this Court, namely, Adarsh Bhandar Vs. Sales Tax Officer, and Steel Enterprises (Pvt.) Ltd. v. State of Uttar Pradesh 1969 All LJ 399.

"Whether in view of the various sub-rules of Rule 41, U. P. Sales Tax Rules, a dealer is entitled to deposit the tax admitted by him to be due and whether the assessing authority is entitled to make an enquiry whether the position assumed by the dealer as to his liability was justified in law, while making the provisional assessment?"

Adarsh Bhandar Vs. Sales Tax Officer, is a Full Bench decision, wherein Mootham. C. J. observed as below:--

"Under Sub-rule (3) of Rule 41 the Sales Tax Officer is empowered to make an assessment to the best of his judgment when no return is submitted or when a return is submitted but is not accompanied by a treasury chalan in proof of the deposit in the treasury of the amount of tax calculated by the dealer on the turnover shown in such return or by a cheque for that amount-The dealer is

required to calculate the tax payable in accordance with the prescribed rate. Neither Sub-rule (2) nor Sub-rule (3) provides that a treasury chalan or cheque need accompany the return only when the dealer admits liability for the tax.

These sub-rules require the payment of tax for its deposit in the treasury) on the turnover shown by the dealer in his return, and they do not authorise the dealer to withhold payment of tax on the ground that he is not liable therefore. In the present case the return submitted by the petitioner was not accompanied by a treasury chalan or cheque. I am therefore of opinion that the Sales Tax Officer was--assuming Rule 41 to be valid--free to determine the turnover of the petitioner to the best of his judgment, and provisionally to assess the tax payable by the petitioner for the quarter ending the 30th June, 1956."

Raghubar Dayal and Srivastava, JJ. agreed with this conclusion arrived at by the Hon"ble the Chief Justice and the observations made by him in respect thereof. The point on which they expressed a dissent was entirely different. The above can thus be taken as the view of all the three Judges constituting the Full Bench.

2. 1969 All LJ 399 (supra) is a decision by a Division Bench of this Court in which it was observed :--

"It is plain from the scheme set out in Rule 41 that what is intended is the advance deposit of the tax admitted by the dealer to be due on the basis of the return. The statute is a fiscal enactment and the intention appears to have been to ensure an expeditious payment of the tax admitted by the dealer to be due without waiting for the regular assessment at the end of the year.....It is plain from the language of Sub-rules (1), (2) and (3) of Rule 41 that the dealer was required merely to deposit the tax admitted by him to be due and when filing the return for each quarter to adduce proof of such payment. If the return was filed and the proof adduced there was no jurisdiction in the Sales Tax Officer to make any assessment of the turnover at that stage. It is only if no return was submitted by the dealer or the return was submitted without payment of the tax that Rule 41 (3) empowered the Sales Tax Officer to determine the turnover to the best of his judgment and provisionally assess the tax payable for the quarter and require of the dealer to pay the tax so assessed."

The Full Bench decision had not been brought to the notice of the Division Bench and for this reason, the question was not then referred to a larger Bench.

3. As the question has been referred to us, constituting a Bench of three Judges, the question naturally arises whether we can depart from the expression of opinion in the earlier Full Bench case. As observed in *Atma Ram Vs. The State of Punjab and Others*, a better course would be to constitute a larger Bench where a Full Bench of three Judges is inclined to take a view contrary to that of another Full Bench of equal strength. This rule is invariably applied to cases where matters in issue requiring decision of the Court have been decided by one Full Bench and another Full Bench is inclined to take a contrary view. In such cases the matter must be referred to a larger Bench for reconsideration, but this rule

cannot be applied to such expression of opinion which fall in the category of obiter dictum, not binding even on a single Judge of the Court With regard to obiter dictum it has often been observed that it is not binding even on the subordinate Courts, though the expression of opinion must be given due respect depending upon the Court which made the observations and also depending upon whether the opinion was expressed casually or on consideration of all the aspects arising in the case.

4. The above question, in one way determines the jurisdiction of this Full Bench, and it shall but be proper that we should clearly express our opinion why we regard the observations made in the above Full Bench case as obiter dicta which cannot be used as a precedent on the Interpretation of rule 41 of the U. P. Sales Tax Rules (to be referred hereinafter as the Rule). In section 29 of Salmond on Jurisprudence. Twelfth Edition, rules determining ratio decidendi have been indicated. It can, broadly speaking, be said that what is not a ratio decidendi is an obiter dictum. It is the ratio which Is binding on the Courts. The material observations on this question contained in the above section are as below:--

"First, however, we must distinguish what a case decides generally and as against all the world from what it decides between the parties themselves. What it decides generally is the ratio decidendi or rule of law for which it is authority:....."

"As against persons not parties to the suit, the only part of a case which is conclusive (with the exception of cases relating to status) is the general rule of law for which it is authority. This rule or proposition, the ratio decidendi may be described roughly as the rule of law applied by and acted on by the Court, or the rule which the court regarded as governing the case....."

Or again, having decided the case on one point, the judge may feel it unnecessary to pronounce on the other points raised by the parties, but he may nevertheless want to indicate how he would have decided these points if necessary. Here again we are not given the judge's final decision on a live issue, so that once more it would be unwise to endow it with as much authority as the actual decision. These observations by the way obiter dicta, are without binding authority, but are nonetheless important; not only do they help to rationalise the law but they serve to suggest solutions to problems not yet decided by the courts. Indeed dicta of the House of Lords or of judges who were masters of their fields, like Lord Blackburn, may often in practice enjoy greater prestige than the ratios of lesser judges.

The ratio decidendi as opposed to obiter dicta is the rule acted on by the court in the case,.....

"Various methods of determining the ratio have been advanced. The "reversal" test of Professor Wambaugh suggested that we should take the proposition of law put forward by the judge, reverse or negate it, and then see if its reversal would have altered the actual decision. If so, then the proposition is the ratio or

part of it; if the reversal would have made no difference, it is not. In other words the ratio is a general rule without which the case would have been decidendi otherwise. This test, however, will not help us in cases.....

Nor is it very helpful where a court gives several reasons for its decision. In such cases we could reverse each reason separately and the decision would remain unaltered, since it could still rest on the other grounds..... Quite often, in fact, where a case is argued on several grounds the judge will decide it on one of these and merely indicate his views on the remaining points, so that here his first proposition of law alone will constitute the ratio. Sometimes, however he will declare that he is deciding the case on more than one ground, and here each proposition on which he bases the decision will qualify as a ratio."

5. Consequently, where the case is decidendi in favour of the petitioner on grounds more than one, but on certain points a finding is recorded against him, on the application of the reversal test, the decision on the main question, if apparent from the judgment, would be ratio decidendi. otherwise all the grounds in support of the decision would be ratio decidendi but the point on which a finding is given against the petitioner would not be a ratio decidendi and shall be mere obiter dictum considering that the reversal of the finding on this point would not alter the decision of the case.

6. In Chapter X of Keeton's Elementary Principles of Jurisprudence Second Edition, "obiter dicta" is described as "statements of law made by a judge in the course of a decision, arising out of the circumstances of the case, but not necessary for the decision". It was further laid down "that the value of such dicta as sources of law naturally varies with the reputation of the judge, and with the closeness of their relation to the matter in issue in the case in which the dicta are delivered."

7. The opinions of other authorities and also the English decisions are reproduced in the three cases of Bombay, Madras and Nagpur High Courts to which we shall make a reference shortly. The purpose shall be served by our giving certain quotations from these cases. In Mohandas Issardas and Others Vs. A.N. Sattanathan and Others, , the point under consideration was whether an obiter dictum of the Supreme Court was as much binding upon the High Courts, as an express decision given by the Supreme Court. However, the allied question what is an obiter dictum which has a binding effect upon a Court was also commented upon. Obiter dictum was regarded as an expression of opinion on a point which was not necessary to the decision of the case. The material observations on this point are as below:--

"Now, an "obiter dictum" is an expression of opinion on a point which is not necessary for the decision of a case. This very definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of the case. But in both cases points must arise for the determination of the tribunal. Two questions may arise before

a Court for its determination. The Court may determine both although only one of them may be necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be the "ratio decidendi" the opinion of the tribunal on the question which was not necessary to decide the case would be only an "obiter dictum".

Reference was then made to the definition of "obiter dictum" to be found in Stroud's Judicial Dictionary, which is based upon the case--"Flower v. Ebbw Vale Steel Iron and Coal Co". 19342 KB 132 and the following passage at page 154 in the judgment of Mr. Justice Talbot in Dew v. United British Steamship Co. Ltd. 1928 139 LT 628:

".....It is of course perfectly familiar doctrine that obiter dicta though they may have great weight as such are not conclusive authority. Obiter dicta in this context means what the words literally signify namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case and the reasons for the decision."

Thereafter the statement of the law in Halsbury, Volume XIX, at page 251 was quoted and it is as below:--

"It may be laid down as general rule that that part alone of a decision of a Court of law is binding upon courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the "ratio decidendi". Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose in hand (usually termed dicta) have no binding authority on another Court, though they may have some merely persuasive efficacy."

8. In M. Shaikh Dawood Vs. Collector of Central Excise, Madras, , reference was made not -only to the passage in the judgment of Mr. Justice Talbot, already quoted above, but also to certain passages from Salmond on Jurisprudence, 11th Edition, the material part of which is as below:--

"A precedent, therefore, is a judicial decision which contains in itself, a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.----- "The only thing" says the same distinguished judge in another case, "in a Judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decidedi"..... The only judicial principles which are authoritative are those which are thus relevant in their subject-matter and limited in their scope. All others, at the best, are of merely persuasive efficacy. They are not true ratios decidendi and are distinguished from them under the name of dicta or obiter

dicta, things said by the way."

"The weight to be given to obiter dicta depends upon the circumstances. Sir Carleton Allen's conclusion is that "if the eminence of the tribunal, the consensus of judicial opinion, and the degree of deliberation all combine to lend a special weight and solemnity to dicta, then their authority is for all practical purposes indistinguishable from that of ratios decidendi."

9. In AIR 1955 49 (Nagpur) , reference was made to rule for determining the ratio decidendi of a case as stated by Professor John Chipman Gray at page 2G1 in the Nature and Sources of the Law (Edition 1921) and also to Allen in his Law in the Making and to the following observations of Lord Sterndale M. B. in "Slack v. Leeds Industrial Cooperative Society Ltd." (1923) 1 Ch 431.

"Dicta are of different kinds and of varying degrees of weight: Sometimes they may be called almost casual expressions of opinion upon a point which has not been raised in the case and is not really present to the Judge's mind. Such dicta, though entitled to the respect due to the speaker, may fairly be disregarded by judges before whom the point has been raised and argued in a way to bring it under much fuller consideration. Some dicta, however, are of a different kind; they are, although not necessary for the decision of the case deliberate expressions of opinion given after consideration upon a point clearly brought and argued before the Court. It is open, no doubt, to other judges to give decisions contrary to such dicta, but much greater weight attaches to them than to the former class."

10. The well-recognised principle of interpretation accepted by the Courts in England, therefore, is:--

"Any judgment of any Court is authoritative only as to that part of it, called the ratio decidendi, which is considered to have" been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called upon to consider the precedent, to determine what the true "ratio decidendi" was..... Judicial opinions upon such matters, whether they be merely casual, or wholly gratuitous or (as is far more usual) of what may be called collateral relevance, are known as "obiter dicta" or simply "dicta", and it is extremely difficult to establish any standard of their relative weight." (Allen in his Law in the Making).

A Judgment is authoritative only as to that part of it which is considered to have been necessary to the decision of the case, and not that part which was not necessary to its decision. The first is called "ratio decidendi" which is binding as a precedent. The other called "obiter dicta" cannot be treated as a binding precedent though the opinion so expressed is entitled to respect. This rule has been followed by the three High Courts mentioned above and we find no reason to depart from this well-recognized principle.

11. The learned Standing Counsel invited our attention to two English decisions

Jacobs v. London County Council 1950 1 All ER 737 and Behrens v. Betram Mills Circus Ltd. 1957 2 QB 1 but they apply to only those cases where more than one reason has been given for the decision, and not where it was not necessary to record a finding on a particular point for the proper decision of the case. Where more than one reason has been given for the view expressed in the case, that is, in support of the decision, both shall be ratio decidendi as no one can say with certainty except for the judge himself who decided the case, which point was uppermost in his mind; but where many questions arise in the case some are decided in favour of the petitioner and others against him, and, in the end, decision is given in favour of the petitioner, they shall be the points decided in his favour which have a binding precedent, and not the one which was decided against him, for the simple reason, that for the decision of the case it was not necessary to record a finding on the latter category of points. Only those points were material for the decision of the case which entitled him to a favourable judgment and the others which could not entitle him to a favourable judgment need not have been decided.

12. There can never exist any controversy as to the absence of binding effect of observations of a casual nature, or where the remarks have been made in passing on certain questions of law involved in the case. They shall all be casual observations which cannot take the place of a final expression of opinion on those questions. Such observations cannot amount to a precedent, that is, ratio decidendi they would be obiter dicta which can be disregarded by another judge, though the observations made by higher Court or even by a Bench of a larger number of Judges must be given due respect and departure therefrom made on good grounds after detailed consideration of the provisions of the law and the rules. Difficulty arises only when observations have been made after detailed consideration on points which were not necessary to the decision of the case. Where there has been no detailed comments on the provisions of the enactment and the rules, formal expression of opinion on points not necessary to the decision of the case, can be placed in the same category as casual observations and they shall be obiter dicta not binding on other Courts, all the more, a Court constituted with the same number of Judges. Even when the points not necessary to the decision of the case are decided after detailed consideration of the provisions of the law, they can be regarded as the, considered expression of opinion by the Judges but in other respects would fall in the same category as casual observations not necessary to the decision of the case. We find no reason to depart from the well-recognised principles already commented upon above.

13. In Adarsh Bhandar Vs. Sales Tax Officer, , the petitioner furnished a return of his turnover for the quarter ending 30th June, 1956, but denied that any sales tax could legally be recovered from him on the turnover on the ground that the turnover on the goods in which he dealt was not liable to tax. The Sales Tax Officer, however, provisionally assessed the petitioner to a tax of Rs. 75,000/- on an estimated turnover of Rs. 12 lacs at the rate of one anna per rupee. The Full Bench allowed the Writ Petition on a few grounds though they also recorded the

finding that the Sales Tax Officer had the jurisdiction to provisionally assess the petitioner when proper sales tax had not been deposited before submitting the return or a cheque for the proper amount was not enclosed with the return. This finding would have justified the dismissal of the Writ Petition in case the other points were not favourable to the petitioner. In other words, for the favourable decision of the Writ Petition, it was not necessary to record a finding on the jurisdiction of the Sales Tax Officer to make provisional assessment where proper tax, though the liability was disputed was not deposited or remitted by cheque with the return. Even if a finding was not recorded on this point, the decision of the case would have been the same.

14. The observations of Mootham C. J. on this question are contained in para 38 of the Report. It shall be found that no detailed comments have been made, all the more, with reference to the provisions" of Section 7 of the U. P. Sales Tax Act (to be referred hereinafter as the Act). In the earlier part Mootham, C. J. himself mentioned that he was referring briefly to the three submissions made on behalf of the petitioner with regard to the invalidity of the assessment proceedings. This by itself makes it clear that there was no proper and detailed consideration of these points and Mootham, C. J. made certain observations simply because these points had also been argued before the Bench. When the other points raised by the petitioner had appealed to the Bench, the petitioner himself may not have made detailed submissions on the three points on which the validity of the assessment proceedings was being challenged. We are thus of opinion that the finding on the above question contained in para 38 of the Report of the Full Bench case of Adarsh Bhandar Vs. Sales Tax Officer, cannot be placed in the category of a precedent binding on other Benches, all the more, on a Full Bench with a similar strength. It is not a ratio decidendi. but is mere obiter dictum which cannot be used as a precedent in other cases. When this finding cannot be deemed to be a judicial pronouncement having the force of a binding precedent, the matter can be reconsidered by this Full Bench without recourse to a reference to a still larger Bench. This view is in consonance with the observations in Atma Ram Vs. The State of Punjab and Others, . Their Lordships of the Supreme Court had advised reference to a larger Bench where a Full Bench of three Judges was inclined to take a view contrary to that of another Full Bench of equal strength so that the subordinate Courts may not be placed under the embarrassment of preferring one view to another, both equally binding upon them. When the expression of opinion by the earlier Full Bench does not have the force of a binding precedent, there shall be only one decision of the Full Bench binding on the subordinate courts and no occasion for embarrassment shall arise. We are thus of the opinion that we are competent to hear and decide the question referred to us even though the earlier Full Bench had made observations contrary to the law as is being enunciated by us.

15. The question referred to us pertains to the jurisdiction of the Sales Tax Officer to make a provisional assessment under Rule 41 (3) of the Rules. For proper appreciation of this sub-rule it shall be necessary to read Section 7 of the

Act and Rule 41 of the Rules together. The material parts of Section 7 and Rule 41 are therefore, being reproduced hereinbelow side by side so that it may be easy to understand the difference in phraseology and the scope thereof.

Section 7 of the Act

Rule 41 of the Rules

(1)

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

(1)

Every dealer who is liable to pay tax under Act shall, before the last day of July, October, January and April, submit to the Sales Tax Officer a return of his gross turnover for the Quarters ending June 30, September 30, December 31 and March 31. respectively in Form IV:

(1-A)

Before submitting the return under sub-section (1) or along with such return the dealer shall deposit in such manner as may be prescribed the amount of tax due on the turnover shown in such return.

(2)

Before submitting the return under sub-rule (1), the dealer shall deposit in the treasury the amount of tax calculated by him on the turnover shown in such return and shall submit the treasury challan with the return or submit with the return a cheque for the amount so calculated:

(2)

If the assessing authority after, such inquiry, as he considers necessary, is satisfied that any returns submitted under sub-section (1) are correct and complete he shall assess the tax on the basis thereof.

(3)

If no return is submitted in respect of any quarter or month, as the case may be, within the period or if the return is submitted without payment of tax in the manner prescribed in Rule 48, the Sales Tax Officer shall, after making such enquiries as he considers necessary, determine the turnover to the best of his judgment, provisionally assess the tax payable for the quarter or the month, as the case may be, and serve upon the dealer a notice in Form XI and the dealer shall pay the sum demanded within the time and in the manner specified In the

notice.

(3)

If no return is submitted by the dealer under sub-section(1), within the period prescribed in that behalf or, if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such inquiry as he considers necessary, determine the turnover of the dealer to the best of his judgment and assess the tax on the basis thereof.

(5)

Upon the expiry of the assessment year the Sales Tax Officer, shall, after such enquiry as he may deem necessary determine the turnover of the assessment year and shall assess the tax thereon.

(6)

If the tax assessed differs from the total amount deposited or paid by cheque, the difference shall be realized or refunded by the Sales Tax Officer, as the case may be.

16. Before making comments on the questions of law involved it shall be proper to briefly indicate the facts of the five Writ Petitions. In Writ Petition No. 4063 of 1969 the petitioner, Indian Ceramic House, Langra-ki-Chowki, Agra was carrying on the business of manufacture and sale of Liquid gold scientifically known as "Colloidal gold, and there existed an old dispute between the petitioner and the Sales Tax Department as to the rate of sales tax chargeable on the liquid gold. The Sales Tax Department treated the liquid gold as a chemical on which sales tax at the rate of 7 per cent was leviable. The petitioner, on the other hand, claimed that it was a specie of gold bullion which was taxable at the rate of half per cent on sales and in the alternative, it was an unspecified article taxable at the rate of 2 per cent. on the turnover. While submitting the return of turnover for the quarter ending 30-6-1969, the petitioner filed a return of turnover amounting to Rs. 4,85,607/10 and enclosed therewith a cheque for Rs. 9,712/14 representing the Sales Tax at the rate of 2 per cent. It was thereafter that under Rule 41 (3) the Sales Tax Officer made an ex parte provisional assessment and assessed sales tax at 7 per cent treating the turnover as shown in the return to be correct.

17. The petitioners of other Writ Petitions Nos. 1087, 1117 and 1118 of 1970 are excise licencees whose claim is that they are not liable to pay sales tax on the sale of country liquor. They filed the quarterly return or returns, as the case may be, without depositing the sales tax, nor did they enclose any cheque on the ground that they were not liable to pay any sales tax. In their cases also the Sales Tax Officer made a provisional assessment. In all the cases recovery certificates for the realisation of sales tax so assessed were issued and it was at this stage that the petitioners moved this Court for quashing the provisional assessment and also the subsequent proceedings. It shall thus be found that in

one case the petitioner deposited sales tax at a lower rate, rate at which according to it, sales tax was leviable; and in the others, there was no deposit of sales tax for the reason that the petitioners claimed that they were not liable to pay any sales tax.

18. Section 7 of the Act nowhere speaks of provisional assessment. Sub-section (1) provides for submission of return or returns of turnover at such intervals, within such period, and in such form as may be prescribed. Sub-section (1-A) makes it necessary to deposit the amount of tax due on the turnover shown in the return either before submitting the return or along with the return. If the assessing authority is satisfied as to the correctness of the return, he can under Sub-section (2) assess the tax on its basis; otherwise under Sub-section (3), if no return is submitted or if the return submitted appears to be incorrect or incomplete, the assessing authority can, after such enquiry as may be considered necessary, determine the turnover of the dealer to the best of his judgment and can assess the tax on the basis of such turnover. The assessing authority acts under Sub-section (3) when no return is submitted or if the return appears to be incorrect or incomplete, and this has no reference to the deposit of the tax prescribed under Sub-section (1-A). Whatever action is taken, is for regular assessment, and not for provisional assessment.

19. It is Rule 41 which makes a provision for a provisional assessment. Sub-section (1) of Section 7 corresponds to Sub-rule (1) of Rule 41. In fact, this sub-rule prescribes the intervals, the form and also the period within which the returns are to be submitted. Sub-rule (2) of Rule 41, one can say, corresponds to Sub-section (1-A) of Section 7. This sub-rule clarifies Sub-section (1-A) by clearly providing that the amount to be deposited in the treasury or paid by cheque along with the return is the amount of tax, calculated by the dealer himself on the turnover shown in the return. In the absence of the sub-rule it could be said, though it may be noted that this view shall not be in consonance with the observations of the Supreme Court in the *Rajasthan* case to be referred hereinafter, that tax must be deposited at a proper and legal rate, and not the rate at which, in the opinion of the dealer, the tax is due if at all. But in Sub-rule (2) the words used are "the amount of tax calculated by him on the turnover." Two important ingredients of the calculation are the "turnover" and the "rate", and when it is for the dealer to himself calculate the tax due, he can rightly say that the tax is due under another head on a lower rate, or that no sales tax is payable by him, that is, he is not liable to pay such tax.

20. Under Sub-sections (2) and (3) of Section 7 the assessing authority can make an enquiry and if the returns submitted are correct and complete, tax can be assessed on their basis, otherwise the assessing authority is competent to determine the turnover of the dealer to the best of his judgment and to assess the tax on such turnover. Under Sub-rule (3) of Rule 41, which applies to a provisional assessment the jurisdiction of the assessing authority is narrower, and he can determine the turnover to the best of his judgment for purposes of

the provisional assessment only if no return is submitted in respect of any quarter or month within the period allowed, or if the return is submitted without payment of tax in the manner prescribed in Rule 48, The tax payable which has to be deposited before the submission of the return or paid by cheque along with the return is the amount calculated by the dealer himself. Consequently, when he is of opinion that tax is payable at a lower rate and the tax is deposited at such rate, or that there is no liability to pay tax on the turnover, and therefore no deposit was necessary, nor had been made, therefore would be compliance of Sub-rule (2) and the assessing authority shall not have the jurisdiction to determine the turnover to the best of his judgment.

21. Sub-rules (5) and (6) of Rule 41 govern the annual assessment. Sub-rule (5) shall correspond to Sub-sections (2) and (3) of Section 7, and consequently if the returns submitted are correct and complete., the assessing authority shall assess the tax on such turnover and on rates which he considers to be applicable, but if the returns are incorrect and incomplete, he can determine the turnover to the best of his judgment and assess the tax on such turnover on such rates as he considers applicable. It is under Sub-rule (6) that adjustment of the tax shall be made by realising the amount not already deposited or paid by cheque or by refunding the amount deposited or paid in excess. The amount already deposited or paid, contemplated by Sub-rule (6), shall be the amount calculated by the dealer himself and deposited or paid under Sub-rule (2).

22. Had Rule 41 not been incorporated, all the assessments, whether made at the end of the year, or in respect of any quarter or month, would have been final assessments subject to adjustment, if necessary, at the time of the annual assessment, but Rule 41 makes a distinct provision for provisional assessment. The Rule also, briefly, provides for the annual assessment.

23. Both Sub-sections (1) and (1-A) of Section 7 clearly lay down that the return shall be submitted and tax deposited in such manner as may be prescribed. The term "prescribed" is defined in Section 2 (f) of the Act to mean "prescribed by rules made under this Act." The rules so prescribed are contained in Rule 41 and they shall have to be given effect to. To put it differently in so far as the provisional assessment is concerned, the assessing authority (Sales Tax Officer) has a limited jurisdiction. He can determine the turnover to the best of his judgment only if no return is submitted in respect of any quarter or month within the time prescribed, or if the return is submitted without payment of amount of tax calculated by the dealer on the turnover shown in such return. The calculation shall be based on the turnover shown in the return and when the tax has to be calculated by the dealer, it must be on the rate which, in his opinion, is applicable to the case. Where the liability to pay sales tax is denied on the ground that no tax is due, there shall be substantial compliance of Sub-rule (2) if the return is submitted without making any deposit.

24. We shall not be justified to depart from the ordinary meaning of Sub-rules (2) and (3) of Rule 41 on the ground that a dealer may dishonestly, not in good

faith, deny his liability to the payment of tax or assert that tax was due at a lower rate. In our opinion, even if a dealer mala fide or without sufficient cause files a wrong return and asserts that he is not liable to pay tax at all or is liable to pay tax at a lower rate, that would not enable the assessing authority to make a provisional assessment under Sub-rule (3) of Rule 41.

25. In *State of Rajasthan and Others Vs. Ghasilal*, their Lordships of the Supreme Court had the occasion to consider the meaning of the expression "tax due" in connection with the validity of the penalty imposed for not submitting the returns and for not depositing the tax due within the period prescribed. This case arose out of the Rajasthan Sales Tax Act. Section 3 thereof places the liability to pay tax on the dealers. Its provision is similar to Section 3 of the Act. The words used in Section 3 of the Rajasthan Sales Tax Act are "shall be liable to pay tax under this Act." In Section 3 of the Act the words used are "shall pay a tax at the rate of", but these words are suffixed by another expression "which shall be determined in such manner as may be prescribed." A tax cannot be said to be due unless the amount of tax has been determined. The tax is determined by the assessing authority as a result of the assessment at the end of the year, or it may be determined by the assessee himself u/s 7 (1-A) of the Act or under Rule 41 of the Rules as the case may be. In other words, Section 3 of the Act, like Section 3 of the Rajasthan Sales Tax Act, merely places a liability to pay tax, while the tax actually payable is determined later either by the assessing authority or by the dealer himself. In connection with Section 7 (2) of the Rajasthan Sales Tax Act, which is similar to Section 7 (1-A) of the Act and Rule 41 (2) of the Rules, their Lordships observed as below :--

"Section 3, the charging section, read with Section 5 makes tax payable i.e., creates a liability to pay the tax. That is the normal function of a charging Section in a taxing statute. But till the tax payable is ascertained by the assessing authority u/s 10, or by the assessee u/s 7 (2), no tax can be said to be due within Section 16 (1) (b) of the Act, for till then there is only a liability to be assessed to tax."

Tax due is thus determined by the dealer himself while making the deposit or by the assessing authority at the time of assessment of the tax; and when the dealer has to deposit before the submission of the return or by cheque along with the return "the amount of tax", the amount to be deposited shall be the amount as ascertained by the dealer himself which is the same thing as the amount calculated by him. Where the liability to pay tax is denied, there shall, in the opinion of the dealer, be no tax due and the return can be submitted without depositing any amount towards the tax. Similarly, where it is claimed that the tax is payable at a lower rate, the amount of tax due shall be calculated at this rate, and there shall be a deposit of the tax due as contemplated by Section 7 (1-A) and Rule 41 (2),

26. The learned Standing Counsel invited our attention to a recent Supreme Court decision in the *State of Punjab Vs. Sant Singh Kanwarjit Singh*, , but it

relates to final assessment, and not to an assessment which is provisional. Section 4 of the East Punjab General Sales Tax Act, 1948, places a liability to pay tax on the dealers. Section 11 makes a provision for assessment of tax, while Section 10 governs the payment of tax and returns. Returns are furnished under Sub-section (3) of Section 10, and as laid down in Sub-section (4), the amount of tax due is to be deposited before furnishing the return. It is under Sub-section (6) that a penalty can be imposed on a dealer failing to comply with the provisions of Sub-sections (3) and (4) without sufficient cause. The penalty can extend to one-and-a-half times of the amount of tax which may be assessed on him u/s 11 in addition to the amount of tax assessed, and where no tax is payable, a sum not exceeding one hundred rupees. A similar penalty can be imposed under Sub-section (7) if the dealer maintained false and incorrect accounts or submitted returns which were false or incorrect. The assessments contemplated by Sub-sections (6) and (7) are the assessment of tax u/s 11, and the assessment could be none other than a regular assessment, and not a provisional assessment.

27. The distinction between a provisional assessment and a regular assessment was emphasized in *Jaipur Udyog Ltd. and Another Vs. Commissioner of Income Tax, Delhi, Rajasthan and Another*, and *ROSHAN LAL KUTHIALA Vs. Income Tax OFFICER, SPECIAL INVESTIGATION CIRCLE, AMBALA.*, and it was held in the former case:

"The section does not permit an enquiry to be made whether the total income returned by the assessee exceeds the amount admitted by him, nor whether the allowances or deductions claimed are admissible. If there be a discrepancy between the return made and the accounts and documents accompanying the return, the Income Tax Officer may ask the assessee to explain the discrepancy, but he must make a provisional assessment on the basis of the return initially made or clarified and the accounts and documents filed. He cannot make a provisional assessment by holding that certain claims made by the assessee are in law unjustified. If it transpires that the assessee has without reasonable cause concealed particulars of his income or has furnished inaccurate particulars of his, it may be open to the Income Tax Officer to impose penalty upon him after the regular assessment is completed. But it is not open to him to determine whether there has been any concealment of particulars of income or to decide whether claims which have been made are unwarranted."

28. The jurisdiction of the authority while making a provisional assessment is a limited one, and it cannot extend to such powers as he could exercise while making the regular assessment. The jurisdiction of the authority shall be determined by the provisions for provisional assessment, and he cannot go beyond these provisions and to make an assessment in the same manner as he could at the time of the regular assessment.

29. Under Sub-rule (3) of Rule 41 of the Rules the assessing authority can determine the turnover to the best of his judgment and provisionally assess the

tax in only two circumstances: firstly, if no return is submitted within the period prescribed: and secondly, if the return is submitted without payment of tax in the manner prescribed in Rule 48. Rule 48 merely prescribes the manner of payment of tax which can be paid or deposited in the treasury or by cheque or Bank Draft, and in the case of Government Departments by Book Transfer. Rule 48 cannot govern the amount of tax due. Even though the word "tax" has been used in Sub-rule (3), it must be read along with Sub-rule (2) and it shall mean the amount of tax calculated by the dealer. Where, according to his calculations, no amount of tax is due, no deposit shall be "necessary, and the assessing authority can-not act under Sub-rule (3) simply because no tax was paid or deposited while submitting the return during the prescribed period. Similarly, where according to the dealer, tax is payable on lower scale, the tax due shall be the amount calculated at this rate and once this amount has been deposited or paid by cheque, there shall be compliance of Sub-rule (2) and the assessing authority shall not have the power to act under Sub-rule (3).

30. Our reply to the question, referred to this Bench is as below:--

"In view of the various sub-rules of Rule 41 of the U. P. Sales Tax Rules, dealer is entitled to deposit the tax admitted by him to be due and the assessing authority does not have the power to make an enquiry, while making the provisional assessment, whether the position assumed by the dealer as to his liability was justified in law."