

(1982) 01 AHC CK 0051
In the Allahabad High Court
Case No : Sales Tax Revision No. 337 of 1981

Indo International Industries	Vs	APPELLANT
Commissioner, Sales Tax		RESPONDENT

Date of Decision : 29-01-1982

Acts Referred:

Constitution of India, 1950 — Article 136
Limitation Act, 1963 — Section 5

Citation : (1982) 50 STC 249

Hon'ble Judges : V.K. Mehrotra, J

Bench : Single Bench

Advocate : R.C. Sharma, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

V.K. Mehrotra, J.—This revision is by the dealer who carries on business of manufacture and sale of glass syringes. For the year 1969-70, the taxable turnover disclosed by the dealer was accepted and as claimed by the dealer, was taxed as unclassified goods under the U. P. Sales Tax Act. This was upheld by the Additional Judge (Revisions), Sales Tax, by order dated 7th December, 1978. The Commissioner, Sales Tax, assailed the order u/s 11(1) of the Act before this Court and urged that glass syringes were taxable as glassware at the rate of 7 per cent.

2. A Division Bench of this Court had held in Sales Tax Reference No. 101 of 1972 (Commissioner of Sales Tax v. S. S. R. Syringes and Thermometers reported in 1973 LD 178), that glass syringes were liable to be taxed as glassware at the rate of 7 per cent. Following that judgment, this Court held, in the revision filed by the Commissioner in the dealer's case, that syringes were liable to be taxed as glasswares. The Additional Judge (Revisions) then passed an order dated 12th June, 1980, in conformity with the judgment of the High Court subjecting the turnover of the applicant to tax at the rate of 7 per cent.

3. The Supreme Court reversed the view of this Court in the case of Commissioner of Sales Tax v. S. S. R. Syringes and Thermometers 1973 LD 178 on 25th March, 1981, in Civil Appeal No. 151 of 1981 in the dealer's own case relating to the assessment year 1973-74 [reported as Indo International Industries v. Commissioner of Sales Tax 1981 UPTC 481 (SC) and held that glass syringes were taxable up to 30th November, 1973, at the rate of 4 per cent as "hospital equipment" under entry 44 of the First Schedule to the Act. The dealer then moved an application u/s 22 of the Act for rectification of the order dated 12th June, 1980, before the Sales Tax Tribunal which had, in the meantime, replaced the Additional Judge (Revisions), Sales Tax, seeking reduction of the tax liability by recalculating it at the rate of 4 per cent, instead of 7 per cent, in view of the judgment of the Supreme Court. This application was rejected by the Tribunal. The Tribunal was of the view that the dealer should have approached this Court for the rectification sought because the order of the Additional Judge (Revisions) passed earlier had merged in that passed by this Court and the subsequent order dated 12th June, 1980, of the Additional Judge (Revisions) was merely in implementation of the order passed by this Court in exercise of its revisional jurisdiction u/s 11(1) of the Act. It rejected the application of the dealer as incompetent and not maintainable. The dealer has now approached this Court with the prayer that the Tribunal be directed to consider its application for rectification of the order dated 12th June, 1980, on merits because the view of the Tribunal that the application was incompetent was erroneous in law.

4. The question that arises for determination in the case is whether the order passed by the High Court in the revision of the Commissioner of Sales Tax was one of which a review should have been sought by the dealer before he could claim rectification of the consequential order passed on 12th June, 1980, by the Additional Judge (Revisions) or that the dealer rightly sought rectification of the order of the Additional Judge (Revisions) dated 12th June, 1980, as that was the order which finally disposed of the revision of the Commissioner of Sales Tax against the earlier order of the Additional Judge (Revisions) holding that glass syringes were taxable as unclassified item. The answer to this question would naturally depend upon the true nature of the order passed by this Court disposing of the Commissioner's revision.

5. Prior to its amendment by the Uttar Pradesh Taxation Laws (Amendment and Validation) Act, 1978 (U. P. Act 11 of 1978), the provisions relevant to the present case stood thus :

Section 9. Appeal.-(1) Any dealer objecting to any order made by the assessing authority, other than an order mentioned in Section 10-A, may, within thirty days from the date of service of the copy of the order, appeal to such authority as may be prescribed :

Provided that no appeal against an assessment order under this Act shall be entertained unless the appellant has furnished satisfactory proof of the payment of not less than,-

(a) where all the returns for the assessment year have been filed, the amount of tax or fee due under this Act on the turnover of sales or purchases, as the case may be, admitted by the appellant in the returns filed by him or at any stage in any proceedings under this Act, whichever is greater ; or

(b) where some of the returns for the assessment year have not been filed or no return has been filed for such year, the amount of tax or fee due under this Act on the turnover of sales or purchases, as the case may be, admitted by the appellant in the returns, if any, filed by him or at any stage in any proceedings under this Act, or 20 per cent of the amount of tax or fee assessed, whichever is greater, and

Provided further that the appellate authority may, for special and adequate reasons, to be recorded in writing, waive or relax the requirements of Clause (b) of the preceding proviso.

(2) The appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(3) The appellate authority may, after calling for and examining the relevant records, and after giving the appellant, and the Commissioner of Sales Tax a reasonable opportunity of being heard,-

(a) in the case of an order of assessment or penalty,-

(i) confirm, reduce, enhance or annul the order of assessment or of penalty or both; or

(ii) set aside the order and direct the assessing authority to pass a fresh order after such further inquiry as may be specified ; or

(b) in the case of any other order, confirm, cancel or vary such order.

(3-A) The appellate authority shall not have the power of staying the realisation of any amount of tax, fee or penalty payable by the appellant under an order under appeal.

(4) Every order passed in appeal under this section shall, subject to the powers of revision conferred by Section 10 and of any reference made to High Court u/s 11, be final.

(5) If the amount of tax assessed, fee levied or penalty imposed is reduced by the appellate authority under Sub-section (3) he shall order the excess amount of tax, fee or penalty, if realised, to be refunded.

(6) Section 5 of the Limitation Act, 1963, shall apply to appeals under this Act.

(7) The appellate authority shall be under the superintendence and control of the Commissioner of Sales Tax :

Provided that in the exercise of such superintendence and control, no orders,

instructions or directions shall be given by the Commissioner of Sales Tax so as to interfere with the discretion of the appellate authority in the exercise of its appellate functions.

Section 10. Revision.-(1) The State Government shall appoint a revising authority, and such number of additional revising authorities as it thinks fit, from amongst persons who are qualified to be appointed as Judges of a High Court.

(2) The revising authority or an additional revising authority, on an application of the Commissioner of Sales Tax aggrieved by any order made by an assessing or appellate authority, or of any other person aggrieved by an order made by an appellate authority, not being an order mentioned in Section 10-A, may, in its discretion, for the purpose of satisfying itself as to "the legality or propriety of such order, call for and examine the relevant record and after giving the parties a reasonable opportunity of being heard and after making such further inquiry, if any, as it deems necessary,-

(a) confirm, cancel or vary such order, or

(b) set aside the order and direct the assessing or appellate authority, as the case may be, to pass a fresh order after such further inquiry as may be specified.

(3) An additional revising authority shall have jurisdiction in respect of such areas or such class of cases as may be specified by the State Government:

Provided that the revising authority may transfer any case or class of cases pending before itself to any additional revising authority, and may likewise transfer any case pending before an additional revising authority to another additional revising authority or to itself.

(4) The revising authority or any additional revising authority on an application of the dealer, may, after giving the Commissioner of Sales Tax an opportunity of being heard stay the realisation of any amount of tax, fee or penalty payable by him under an order against which an appeal or revision is pending :

Provided that no such application shall be entertained unless the dealer has furnished satisfactory proof of the payment of not less than one-third of the disputed amount of tax, fee or penalty in addition to the amount of tax or fee required to be deposited by him u/s 9 :

Provided further that the revising authority or the additional revising authority, as the case may be, may, for special and adequate reasons to be recorded in writing, waive or relax the requirements of the preceding proviso in respect of the disputed amount of tax, fee or penalty :

Provided also that no stay order under this Sub-section shall remain in force for more than sixty days after making thereof unless in the meantime the applicant has furnished security to the satisfaction of the assessing authority for payment of the amount the realisation whereof has been stayed.

(4-A) The revising authority or additional revising authority, as the case may be, on an application moved by the Commissioner of Sales Tax during the pendency of any revision or reference, may direct the stay of the refund of any amount in pursuance of any order of any assessing or appellate authority or of itself, until the disposal of such revision or reference.

(5) A copy of the order passed by the revising authority or the additional revising authority, as the case may be, under any provision of this section or u/s 11 shall be served forthwith on both the applicant and the opposite party; and

(6) No application under Sub-section (2) shall lie after the expiry of a period of one year from the date of service of the order complained of :

Provided that an application may be entertained after the said period when the applicant satisfies the revising authority, or the additional revising authority, as the case may be, that he had sufficient cause for not making the application within the said period.

(6-A) No application under Sub-section (4) shall lie after the expiry of a period of ninety days from the date of service of the order against which an appeal or revision is pending.

(7) If the amount of tax assessed, fee levied or penalty imposed is reduced by the revising authority or the additional revising authority under Sub-section (2), it shall order the excess amount of tax, fee or penalty, if already realised, to be refunded.

Section 11. Statement of case to the High Court.-(1) Within, one hundred and twenty days from the date of service of the order u/s 10, the person aggrieved may by application in writing, accompanied by a fee of one hundred rupees, require the revising authority or the additional revising authority, as the case may be, to refer to the High Court any question of law arising out of such order, and the revising authority or the additional revising authority, as the case may be, unless he refused the application shall, within one hundred and twenty days of the receipt of such application, draw up a statement of case and refer it to the High Court.

(2) Where the revising authority or the additional revising authority, as the case may be, refused to refer a case under Sub-section (1) he shall by order in writing inform the applicant accordingly, and the applicant may then within thirty days from the date on which he receives copy of the order refusing to state the case, withdraw his application. If he does so, the fee paid shall be refunded.

(3) The provisions of Sub-section (1) shall also be applicable to the Commissioner of Sales Tax with the modification that it shall not be necessary for him to deposit any fee.

(4) If on any application being made under Sub-section (1) or (3), the revising authority or the additional revising authority, as the case may be, refuses to

state the case on the ground that no question of law arises, the person aggrieved, or the Commissioner of Sales Tax, as the case may be, may, within ninety days from the date on which he is served with notice of refusal, apply to the High court and the High Court, if it is not satisfied with the correctness of the decision of the revising authority or the additional revising authority, as the case may be, may, require the revising authority or the additional revising authority, as the case may be, to state the case and refer it and on receipt of any such requisition, the revising authority or the additional revising authority, as the case may be, shall state the case and refer it accordingly.

(4-A) Where the revising authority or the additional revising authority, as the case may be, draws up a statement of case under Sub-section (1), Sub-section (3) or Sub-section (4) and refers it to the High Court, such authority shall direct the parties concerned to appear before the High Court within a period of three months from the date of service of the copy of the order referring the case to the High Court and shall also intimate the High Court of the respective dates of service on the parties.

(4-B) In default of appearance being entered by any party before the High Court within the period specified in Sub-section (4-A), the reference may be heard and determined by the High Court in the absence of such party.

(5) If the High Court is not satisfied that the statement of the case referred under this section is sufficient to enable it to determine the question raised thereby, it may refer the case back to the revising authority to make such additions to and alterations in the statement as the court may direct.

(6) The High Court, upon the hearing of any such case, shall decide the question of law raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded and shall send a copy of such judgment under the seal of the Court and the signature of the Registrar to the revising authority or the additional revising authority, as the case may be, and the Commissioner of Sales Tax, and the revising authority or the additional revising authority, as the case may be, shall thereupon pass such orders as are necessary to dispose of the case in conformity with such judgment.

(7) Where a reference is made to the High Court under this section, the costs including the disposal of fee referred to in Sub-section (1), shall be at the discretion of the court.

(8) The payment of the amount, if any, of taxes due in accordance with the order of the revising authority or the additional revising authority, as the case may be, in respect of which reference has been made under Sub-section (1) or (3) shall not be stayed pending the disposal of the reference, but if such amount is reduced as a result of such reference, the excess tax paid shall be refunded in accordance with the provisions of this Act.

(9) Section 5 of the Limitation Act, 1963, shall apply to applications under Sub-

sections (1), (3) and (4).

Section 11-A. Manner in which references u/s 11 are to be heard.- When any case has been referred to the High Court u/s 11 it shall be heard by a Bench of not less than two Judges of the High Court and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges :

Provided that where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall then be heard upon that point only by one or more of other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

Section 22. Rectification of mistakes.-(1) The assessing, appellate, revising or additional revising authority may, at any time within three years from the date of any order passed by it, rectify any mistake apparent on the record :

Provided that no such rectification, which has the effect of enhancing the assessment shall be made unless the authority concerned has given notice to the dealer of his intention to do so and has allowed him a reasonable opportunity of being heard.

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

6. In *State of Uttar Pradesh v. Modi Industries Ltd.* 1977 UPTC 158 (SC) occasion arose for the Supreme Court to consider the question whether the matter comes to be finally decided by an order made by the High Court u/s 11(6) or it is so decided by the revising authority when it comes back to it after the decision of the High Court. The Supreme Court expressed itself thus :

6. The question is whether the judgment of the High Court dated 24th July, 1961, answering question No. (1) of the aforesaid reference by stating that the sales tax had to be charged from the dealer for the assessment year 1948-49 at the rate applicable to the various commodities on 1st April, 1948, and for the assessment year 1949-50 at the rate applicable on 1st April, 1949, was binding on the Additional Judge (Revisions) in spite of the amendment made by the amending Act by insertion of Section 31 in the Act? The High Court has taken the view in its impugned judgment dated 11th February, 1970 (*Modi Industries Ltd. v. State of U. P.* 1970 UPTC 763 that the revising authority was not free to take a different view from the one expressed by it (High Court) on any ground whatsoever" including the ground of any subsequent amendment in the law, and that it was bound to decide the case in conformity with the judgment of the High Court. The High Court has expressed its view as follows :

The judgment of the High Court may be said to have become erroneous as a result of the amendment, but so long as the judgment stands, it is binding upon

the parties and the revising authority has no option except to give effect to it in its order passed u/s 11(6).

The High Court further made the following observation :

We, however, express no opinion as to the course which the department should adopt in a situation like this, but we have no doubt in our mind that the amendment brought about by Section 31 of the Act does not make the judgment of the High Court a nullity and the Judge (Revisions) was not free to ignore it for any reason whatsoever.

The question is whether this view of the High Court is correct ? The answer to the question depends on the answer to the further question whether the proceedings for the assessment of the sales tax had become final after the High Court's judgment dated 24th July, 1961, or whether, after that judgment, something remained to be done by the Additional Judge (Revisions) ?

7. Sub-section (6) of Section 11 of the Act provides that the High Court, upon hearing the reference, shall decide the questions of law and shall deliver its judgment thereon and shall send its copy to the- revising authority and the Commissioner of Sales Tax, "and the revising authority shall thereupon pass such orders as are necessary to dispose of the case in conformity with such judgment". So, while the Additional Judge (Revisions) was in seisin of the case for the limited purpose for passing such orders as were necessary to dispose it of in conformity with the judgment of the High Court, it cannot be gainsaid that he was in such seisin and was required, in the facts and circumstances of this case, to make an order which would make the assessment order final and binding in all respects. It was at that stage that Section 31, which was inserted by Section 7 of the amending Act, was sought to be applied to the controversy. According to Sub-section (2) of that section, the assessments made at the enhanced rates, in accordance with the notification dated 9th April, 1948, were to be deemed to be good and valid as if they had been duly made, and as if the amendment made by the insertion of Section 31 had been in force on all material dates. It was expressly provided by the Sub-section that that was to be so notwithstanding any judgment, decree or order of any court. The order of the Additional Judge (Revisions) dated 28th December, 1968, had, therefore, the effect of recognising the restoration of the orders of assessment which were made by the Sales Tax Officer at the enhanced rates, and Sub-section (2) of Section 31 had the effect of making them "good and valid in law". It cannot be said that the Additional Judge (Revisions) erred in taking that view, and in not passing an order for giving effect to the judgment of the High Court dated 24th July, 1961, which had become unenforceable by the aforesaid Section 31. It has to be appreciated that even if the Additional Judge (Revisions) had passed an order under Sub-section (6) of Section 11 of the Act as directed by the High Court, that would have been of no consequence and would have been inoperative because of the specific provisions of Sub-section (2) of Section 31, so that the position would have been the same as if no such order had been passed at all.

8. The High Court has expressed the view that if its judgment (dated 24th July, 1961) was considered by the department to be erroneous, it could have filed an appeal against it to this court under Article 136 of the Constitution to have it set aside or modified. It is not clear to us how that would have been possible when the amending Act had not been passed till then, and was enacted some 11/2 years thereafter. The other suggestion of the High Court that it may have been open to the department to ask for a fresh reference to it against the order of the revising authority u/s 11(6) on the ground that by the amendment a fresh question of law had arisen is also untenable because that order (dated 28th December, 1968) was in favour of the department. In fact, any suggestion or observation of the High Court for seeking any other mode of redress is beside the point for the State felt aggrieved against the impugned judgment of the High Court dated 11th February, 1970, and has come up in appeal against it. And now that this court is in seisin of the case, it would be a work of supererogation to require the parties, or any of them, to go back to the Additional Judge (Revisions) or the High Court for an order.

7. In Commissioner of Sales Tax, U. P. v. Sholamal Zalim Singh [1977] UPTC 376, a Division Bench of this Court observed thus :

...The modification in the assessment was made by the Judge (Revisions) when he passed an order in conformity with the decision of this Court. The standing counsel urged that in substance when the court answered the question, it modified the assessment. We are unable to agree with this contention, for the jurisdiction of this Court on a reference is purely advisory. The fact that after it gives its opinion on the question referred, the revising authority passed an order in conformity with that decision, does not alter the character of the order passed by this Court. The modification in the assessment takes place as a result of the order passed by the revising authority and not directly on account of the order passed on reference.

8. In Commissioner of Sales Tax v. famuna Prasad Gur Prasad (STR No. 400 of 1972 decided on 12th December, 1973) reported in 1974 Law Dairy 12 another Division Bench of this Court said that:

...Section 11(6) of the U. P. Sales Tax Act provides that the revising authority shall thereupon pass such orders as are necessary to dispose of the case in conformity with such judgment. This being the position, if the High Court decides a question, the revising authority will dispose of the revision by passing such orders as are necessary to dispose of in conformity with the High Court's opinion. Thus, the revision is to be disposed of all over again by the revising authority by passing a suitable order in the light of this Court's findings and according to law...

9. By U. P. Act No. 11 of 1978, Sections 11 and 11-A were substituted by a new Section 11 thus:

11. Revision by High Court in special cases.-(1) Any person aggrieved by an

order made under Sub-section (2) of Section 10 may, within ninety days from the date of service of such order, apply to the High Court for revision of such order on the ground that the case involves any question of law :

Provided that, where such order was served on the person concerned at any time before the date of the commencement of this section, as substituted by the Uttar Pradesh Taxation Laws (Amendment and Validation) Act, 1978 (hereinafter in this section referred to as the said date), and the period of one hundred and twenty days for making the application as referred to in this Sub-section, as it existed before the said date, had not expired on the said date the person aggrieved may apply for revision within sixty days from the said date.

(2) Any person aggrieved by an order made by the revising authority or an additional revising authority refusing to state the case under this section, as it stood immediately before the said date, may, where the limitation for making an application to the High Court under Sub-section (4), as it stood immediately before the said date, has not expired, likewise apply for revision to the High Court within a period of ninety days from the said date.

(3) Where an application under Sub-section (1), or Sub-section (3), as they stood immediately before the said date, was rejected by the revising authority or an additional revising authority on the sole ground that the period of one hundred and twenty days for making the reference as specified in the said Sub-section (1) has expired, such applicant may apply for revision of the order made under Sub-section (2) of Section 10, to the High Court within sixty days from the said date on the ground that the case involves any question of law.

(4) No application for revision under Sub-section (1) or Sub-section (2), shall be entertained, unless it is accompanied by a treasury chalan showing a deposit of two hundred and fifty rupees under the head 040-Sales Tax-Receipts under the Central/State Sales Tax Act-(4) other receipts :

Provided that no such deposit shall be necessary in the case of an application for revision by or on behalf of the Commissioner of Sales Tax.

(5) Every application for making a reference to the High Court under Sub-section (1) or Sub-Section (3), as they stood immediately before the said date, pending before the revising authority or an additional revising authority on the said date shall stand transferred to the High Court, and if the High Court is satisfied that a question of law is involved in the case, it may admit the same as a revision under this section and may dispose it of accordingly.

(6) Where the High Court has before the said date, required the revising authority or an additional revising authority to state the case and refer it to the High Court under Sub-Section (4), as it stood immediately before the said date, such authority shall, as soon as may be, comply with such requirement and thereupon such reference shall be deemed to be a revision under this section and shall be disposed of accordingly.

(7) The recovery of any tax, fee or penalty due in accordance with the order of the revising authority or an additional revising authority sought to be revised, under this section shall not be stayed pending disposal of the application for revision but if the amount of such tax, fee or penalty is reduced as a result of the final order passed in such revision, the excess amount shall be refunded.

(8) The High Court shall, after hearing the parties to the revision, decide the questions of law involved therein, and where as A result of such decision, the amount of tax, fee or penalty is required to be determined afresh, the High Court may send a copy of the decision to the revising authority or the additional revising authority, as the case may be, for fresh determination of the amount, and such authority shall thereupon pass such orders as are necessary to dispose of the case in conformity with the said decision.

(9) The provisions of Section 5 of the Limitation Act, 1963, shall, mutatis mutandis, apply to every application for revision under this section.

Explanation.-For the purpose of this section, the expression "any person" includes the Commissioner of Sales Tax.

10. The same Act substituted with effect from 1st March, 1973, Sub-section (1) of Section 22 as follows :

(1) The assessing, appellate, revising or additional revising authority may, on its own motion or on the application of the dealer or any other interested person, rectify any mistake apparent on the record within three years from the date of the order sought to be rectified :

Provided that where an application under this section has been made within the said period of three years, the authority concerned may dispose it of even beyond three years :

Provided further that no such rectification, as has the effect of enhancing the assessment, shall be made unless the authority concerned has given notice to the dealer or the person concerned of his intention to do so and has allowed him a reasonable opportunity of being heard.

11. Further amendments were made by U. P. Act No. 12 of 1979, of which the relevant were these ; Section 10 of the Act was replaced by a new Section 10 in the following terms :

10. Sales Tax Tribunal.-(1) There shall be a Sales Tax Tribunal consisting of a President and such other members as the State Government may from time to time deem it necessary to appoint from amongst-

(a) The persons who have been, or are qualified to be Judges of the High Court; and

(b) the persons who hold or have held a post not below the rank of Deputy Commissioner of Sales Tax :

Provided that where the Tribunal consists of one or more persons who have been Judges of a High Court then he or one of them shall be appointed the President.

(2) Any person aggrieved by an order passed by an appellate authority u/s 9 or the revising authority u/s 10-B or by a decision given by the Commissioner of Sales Tax u/s 35 may, within six months from the date of service of copy of such order or decision on him, prefer an appeal to the Tribunal.

(3) Section 5 of the Limitation Act, 1963, shall apply to appeals under this section.

(4) The Tribunal may at any stage, after giving the appellant a reasonable opportunity of being heard, dismiss the appeal.

(5) The Tribunal may, if it has not already dismissed the appeal under Sub-section (4), call for and examine the relevant records, and after giving the parties a reasonable opportunity of being heard-

(a) confirm, cancel or vary such order, or

(b) set aside the order and direct the assessing or appellate or revising authority or the Commissioner of Sales Tax, as the case may be, to pass a fresh order after such further inquiry, if any, as may be specified, or

(c) order such amount of tax, fee or penalty or other money as may have been realised in excess of the due amount to be refunded according to the provisions of this Act.

Explanation.-The power to vary an order referred to in Clause (a) includes the power to vary the order by reducing or enhancing the amount of assessment or penalty.

(6) Where an appeal under this section has been filed, the Tribunal may, on the application of the appellant move within thirty days from the filing of such appeal, after giving the parties a reasonable opportunity of being heard, stay recovery of the disputed amount of any tax, fee or penalty payable, or refund of the amount due, under the order appealed against till the disposal of the appeal :

Provided that-

(i) no application for stay of recovery of any disputed amount of tax, fee or penalty shall be entertained unless the applicant has furnished satisfactory proof of the payment of not less than one-third of such disputed amount in addition to the amount required to be deposited under Sub-section (1) of Section 9 ;

(ii) the Tribunal may, for special and adequate reasons to be recorded in writing, waive or relax the requirement of the preceding clause regarding payment of the one-third of such disputed amount.

(7) Where an application u/s 11 is pending before the High Court, the Tribunal may, on an application in that behalf being made to it, likewise stay recovery of

such disputed amount or such refund until such date, as it thinks fit, not beyond the date of decision of the High Court under that section.

(8) No order passed under this section for the stay of recovery of tax, fee or penalty shall remain in force for more than thirty days unless the appellant furnishes adequate security to the satisfaction of the assessing authority concerned for payment of the outstanding amount.

(9) The members of the Tribunal shall sit in such benches of one, two or more members as may be constituted from time to time, and do such work of the Tribunal as may, subject to Sub-section (10) and the rules, be allotted to them, by order or in accordance with the directions of the President of the Tribunal.

(10)(a) An appeal against the order of appellate authority u/s 9 shall be heard and disposed of-

(i) by a bench of one member, where such order is passed by an Assistant Commissioner (Judicial) and the amount of tax, fee or penalty in dispute does not exceed five thousand rupees ;

(ii) by a bench of two members, in any other case.

(b) An appeal against an order passed u/s 10-B shall be heard and disposed of by a bench of two members.

(c) An appeal against an order passed u/s 35 shall be heard and disposed of by a bench of three members.

(d) The President may, if he so thinks fit,-

(i) direct an appeal to be heard and decided by a larger bench ;

(ii) transfer an appeal from one bench to another bench.

(11) The place of sitting and procedure of, and the manner of presenting appeals and other documents to the Tribunal shall, subject to the rules, be such as the Tribunal may deem fit to adopt.

(12) The decision of a case heard by a bench shall be in accordance with the opinion of the majority. Where the members are equally divided the President of the Tribunal may-

(a) if he was not a member of such bench, give his own opinion or refer the case for the opinion of another member, whereupon the case shall be decided in accordance with such opinion ; or

(b) from a larger bench.

12. A new Section 10-B was inserted as follows :

10-B. Revision by Commissioner of Sales Tax.-(1) The Commissioner of Sales Tax or such other officer not below the rank of Deputy Commissioner of Sales Tax as

may be authorised in this behalf by the State Government by notification may call for and examine the record relating to any order (other than an order mentioned in Section 10-A) passed by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order with respect thereto as he thinks fit.

(2) No order under Sub-section (1) affecting the interest of a party adversely shall be passed unless he has been given a reasonable opportunity of being heard.

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

(a) to revise an order, which is or has been the subject-matter of an appeal u/s 9, or an order passed by the appellate authority under that section.

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

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

(c) after the expiration of four years from the date of the order in question or after the expiration of two years from the date of commencement of Section 19 of the Uttar Pradesh Sales Tax (Amendment and Validation) Act, 1978, whichever is later.

13. Section 11 as now amended read thus :

11. Revision by High Court in special cases.-(1) Any person aggrieved by an order made under Sub-section (2) of Section 10 as it stood before its substitution by the Uttar Pradesh Sales Tax (Amendment and Validation) Act, 1978, or under Sub-section (4) or Sub-section (5) of Section 10 as substituted by the said Act or by an order passed u/s 22 by the Tribunal; may, within ninety days from the date of service of such order apply to the High Court for revision of such order on the ground that the case involves any question of law:

Provided that, where such order was served on the person concerned at any time before the date of the commencement of this section, as substituted by the Uttar Pradesh Taxation Laws (Amendment and Validation) Act, 1978 (hereinafter in this section referred to as the said date), and the period of one hundred and twenty days for making the application as referred to in this Sub-section, as it existed before the said date, had not expired on the said date the person aggrieved may apply for revision within sixty days from the said date.

(2) Any person aggrieved by an order made by the revising authority or an additional revising authority refusing to state the case under this section, as it stood immediately before the said date, may, where the limitation for making an application to the High Court under Sub-section (4) as it stood immediately before the said date, has not expired, likewise apply for revision to the High

Court within a period of ninety days from the said date.

(3) Where an application under Sub-section (1) or Sub-section (3), as they stood immediately before the said date, was rejected by the revising authority or an additional revising authority on the sole ground that the period of one hundred and twenty days for making the reference as specified in the said Sub-section (1) has expired, such applicant may apply for revision of the order made under Sub-section (2) of Section 10, to the High Court within sixty days from the said date on the ground that the case involves any question of law.

(4) The application for revision under Sub-section (1) shall precisely state the question of law involved in the case, and it shall be competent for the High Court to formulate the question of law or to allow any other question of law to be raised.

(5) Every application for making a reference to the High Court under Sub-section (1) or Sub-Section (3), as they stood immediately before the said date, pending before the revising authority or an additional revising authority, on the said date, shall stand transferred to the High Court. Every such application upon being so transferred and every application under Sub-section (4) as it stood immediately before the said date, pending before the High Court on the said date shall be deemed to be an application for revision under this section and disposed of accordingly.

(6) Where the High Court has, before the said date, required the revising authority or an additional revising authority to state the case and refer it to the High Court under Sub-Section (4) as it stood immediately before the said date, such authority shall, as soon as may be, make reference accordingly. Every reference so made, and every reference made by such authority before the said date in compliance with the requirement of the High Court under Sub-section (4), as it stood before the said date shall be deemed to be an application for revision under this section and disposed of accordingly.

(6-a) Where the revising authority or an additional revising authority has, before the said date, allowed an application under Sub-section (1) or Sub-Section (3), as they stood immediately before the said date, and such authority has not made reference before the said date, it shall, as soon as may be, made reference to the High Court. Every such reference and every reference already made by such authority before the said date and pending before the High Court on the said date, shall be deemed to be an application for revision under this section and disposed of accordingly.

1(7) Where an application under this section is pending, the High Court may, on an application in that behalf, stay recovery of any disputed amount of tax, fee or penalty payable, or refund of any amount due, under the order sought to be revised :

Provided that no order for the stay of recovery of such disputed amount shall

remain in force for more than thirty days unless the applicant furnishes adequate security to the satisfaction of the assessing authority concerned.

(8) The High Court shall, after hearing the parties to the revision, decide the questions of law involved therein, and where as a result of such decision, the amount of tax, fee or penalty is required to be determined afresh, the High Court may send a copy of the decision to the Tribunal for fresh determination of the amount, and the Tribunal shall thereupon pass such orders as are necessary to dispose of the case in conformity with the said decision.

(9) The provisions of Section 5 of the Limitation Act, 1963, shall, *mutatis mutandis*, apply to every application for revision under this section.

Explanation.-For the purpose of this section, the expression "any person" includes the Commissioner of Sales Tax.

14. Section 22 was amended to read thus :

22. Rectification of mistakes.-(1) The assessing, appellate or revising authority or the Tribunal may, on its own motion or on the application of the dealer or any other interested person, rectify any mistake in its order, apparent on the record within three years from the date of the order sought to be rectified :

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

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

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

15. The jurisdiction of the High Court u/s 11 continues to be to decide the questions of law, though it has been vested with the power of deciding questions of law involved in the case, unlike the power to render decision of questions of law preferred to it. If the decision of the High Court does not require determination of the amount of tax, fee or penalty afresh, that is, where the altered in spite of the decision of the High Court, nothing further is to be done to make the decision of the High Court effective (*sic*). The final order remains that of the Tribunal. Where, however, the amount is to be determined afresh as a result of the decision rendered by the High Court on the questions of law involved in the case, a copy of the decision of the High Court is to be sent to the Tribunal which shall "thereupon pass such orders as are necessary to dispose of the case in conformity with the said decision". That is to say, the matter is to be finally disposed of by the Tribunal in conformity with the decision of the High

Court. In either case, therefore, the order which effectively disposes of the controversy is the one passed by the Tribunal, because u/s 11, even as it stands today in order to bringing the controversy to a close, so far as it relates to the amount payable by a dealer, is the one passed by the Tribunal.

16. The High Court revises the order passed by the Tribunal u/s 11 by deciding the questions of law. The Commissioner of Sales Tax has been empowered to revise orders passed by any officer subordinate to him by Section 10-B "for the purpose of satisfying himself as to the legality or propriety of such order" and he may "pass such order with respect thereto as he thinks fit". The order passed by the Commissioner under this provision has been made subject to appeal before the Tribunal u/s 10(2) which provides that any person aggrieved by an order passed by the appellate authority u/s 9 or the revising authority u/s 10-B or by a decision given by the Commissioner of Sales Tax u/s 35, may prefer an appeal to the Tribunal. It is evident that the legislature gave the nomenclature of the revising authority to the Commissioner of Sales Tax while exercising powers u/s 10-B by the same Act by which it vested the Commissioner with revisional jurisdiction and brought about changes in Section 11 of the Act, apart from creating a Sales Tax Tribunal in place of a revising authority u/s 10.

17. The changes made in Section 22 are also suggestive of the fact that the High Court is not intended to be included in the category of the revising authority under Sub-section (1) of that section. The recital, that the assessing, appellate or revising authority or the Tribunal may rectify any mistake in its order, in Section 22(1) is also suggestive of the fact that the authority next above in the hierarchy was mentioned in succeeding order. It is obvious that Section 22 of the Act is not intended to enable the High Court with its power of revision u/s 11, to rectify any mistake in its order apparent on the record and that the power of rectification was conferred upon the assessing, appellate or revising authority (that is, the Commissioner acting u/s 10-B) and the Tribunal.

18. In the order impugned, the Tribunal has taken the view that since the order passed by the revising authority on 12 th June, 1980, was only to implement the one passed by this Court, the dealer was required to seek relief in this Court in whose order dated 19th October, 1979, the order of the revising authority dated 7th December, 1978, had merged. In taking this view, the Tribunal has overlooked the real character of the order passed by this Court u/s 11. It has been seen above that in spite of the change in the phraseology of Section 11, the High Court does not dispose of the case. The effective order disposing of the case is still the one passed by the Tribunal. The position in this regard remains the same as before when the High Court was called upon to express its opinion on questions of law arising from the statement of the case made to it. There is, therefore, no scope for taking the view that the earlier order of the revising authority merged in that of the High Court.

19. In *State of Madras Vs. Madurai Mills Co., Ltd.*, it was laid down that the doctrine of merger is not a doctrine of rigid and universal application, and it

cannot be said that wherever there are two orders, one by the inferior authority and the other by the superior authority, passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject-matter of the appellate or the revisional order and the scope of the appeal or the revision contemplated by the particular statute. The application of the doctrine depends on the nature of the appellate or the revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

20. In *Satish Chandra Nirmesh Kumar v. Additional Judge (Revisions), Sales Tax, U. P., Bareilly* [1974] 34 STC 304(UP) it was ruled by a Division Bench of this Court on 26th November, 1973, that an order passed by the revising authority did not merge in the one passed by the High Court u/s 11(6) of the Act (as it then stood). The legal position remains the same in spite of the change brought about in Section 11 by U. P. Acts Nos. 11 of 1978 and 12 of 1979. By these amendments, the procedural delays in seeking a reference to the High Court of questions of law arising in the case have been obviated by enabling the dealer or the Commissioner, Sales Tax, to approach the High Court directly for determination of those questions.

21. The Tribunal has not gone into the merits of the claim made by the dealer for rectification of the earlier order subjecting his turnover to tax at a higher rate on its view that the application for rectification made by him was incompetent. That view has not been found to be correct. As such, the Tribunal deserves to be required to go into the matter on merits.

22. The revision succeeds and is allowed. The impugned order of the Tribunal is set aside and the matter sent back for hearing and decision afresh in accordance with law.

23. The dealer would be entitled to costs which shall be Rs. 300.

1. Substituted by U. P. Act No. 2 of 1980, Section 7 (w. e. f. 4-12-1979).