

(2010) 04 AHC CK 0188

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 619 of 2006

Radico khaitan Ltd, bareilly Road, rampur

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 15-04-2010

Acts Referred:

Uttar Pradesh Trade Tax Act, 1948 — Section 21

Citation : (2010) 04 AHC CK 0188

Hon'ble Judges : Rajes Kumar, J and Pankaj Mithal, J

Final Decision : Allowed

Judgement

Rajes Kumar, J.

In the present writ petition, the petitioner seeks the following reliefs:

(i)"that a suitable writ, order or direction in the nature of mandamus or prohibition be issued restraining or prohibiting the respondent no. 3 from taking any reassessment proceedings under Section 21 of the U.P. Trade Tax Act for the assessment years 19992000 and 20002001;

(ii)that a suitable writ, order or direction in the nature of writ of certiorari be issued quashing the notices dated 22.3.2006 issued by Deputy Commissioner (Assessment) Trade Tax, Rampur, respondent no. 3 for the assessment years 19992000 and 20002001 (enclosed as Annexures14, 15, 16 and 17 respectively to this writ petition);

(iii)that a suitable writ, order or direction in the nature of certiorari be issued quashing the orders of permission dated 21.3.2006 passed by the respondent no. 2 for assessment years 19992000 and 20002001 (enclosed as Annexures12 and 13 to the present writ petition);

(iv)that any other suitable writ, order of direction which this Hon"ble Court may deem fit and proper in the circumstances of the case be also issued in favour of the petitioner."

The petitioner is a Public Limited Company incorporated under the Indian Companies Act, 1956 engaged in the manufacturing of Indian made country liquor and alcoholic goods from its factory situated at Rampur.

The petitioner is a registered dealer under the U.P. Trade Tax Act as well as under the Central Sales Tax Act. Apart from the sales of manufacturing goods, the petitioner had also sold waste Polyfilm, waste broken glass, waste scraps and rejected PP Seals etc. which had been damaged in the course of transit, loading, unloading, etc. In the assessment years 19992000 and 20002001, the petitioner had admitted the tax at the rate of 5% on the sales of such goods. The assessing authority in the assessment order passed under the U.P. Trade Tax Act for both the assessment years 19992000 and 20002001 had levied the tax at the rate of 5% admitted by the petitioner on the aforesaid goods.

It appears that the petitioner had charged outward freight from its customers for the transportation of the goods from the factory to the required destination in the bill separately and accordingly not included such freight in the turnover. The assessing authority after recording the finding that the freight had been charged separately in the bill has held that it would not be the part of the turnover.

After passing of the assessment order, it appears that the assessing authority was of the view that waste Polyfilm, waste broken glass, waste scraps and rejected PP Seals etc. would be liable to tax as an unclassified items at the rate of 10% and outward freight, advertisement charges and sale promotion amount would be the part of the turnover in view of the decision of the Allahabad High Court in the case of Modi Industries Limited v. Commissioner of Trade Tax, reported in 2000 UPTC149. Since the normal period of limitation had expired to initiate the proceeding under Section 21 of the U.P. Trade Tax Act (hereinafter referred to as the "Act"), a proposal had been sent to the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad for the approval under the proviso to Section 21 (2) of the Act to initiate the proceeding beyond the normal period of limitation for the assessment years 19992000 and 20002001 both under the U.P. Trade Tax Act and under the Central Sales Tax Act. On the proposal of the assessing authority, the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad had issued the notices under Section 21 (2) of the Act to the petitioner for the assessment years 19992000 and 20002001 both under the U.P. Trade Tax Act and under the Central Sales Tax Act to provide opportunity before granting approval. The petitioner filed reply and thereafter on a consideration of the reply and the proposal, the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad had granted the approval under the proviso to Section 21 (2) of the Act vide order dated 21.3.2006. Thereafter, the assessing authority issued notices under Section 21 of the Act on 22.3.2006 for the assessment years 19992000 and 20002001 both under the U.P. Trade Tax Act and under the Central Sales Tax Act. Under the U.P. Trade Tax Act for both the aforesaid years, the notices have been issued on the ground that in the original assessment orders, the turnover of P.V.C. Garbage,

etc. had been assessed to tax at the rate of 5% while it should be taxed as an unclassified items at the rate of 10%. Further it has been stated that outward freight and the sale promotion would be the part of the turnover in view of the decision of the Allahabad High Court in the case of Modi Industries Limited v. Commissioner of Trade Tax (Supra). Therefore, there is a escaped assessment. Under the Central Sales Tax Act for both the assessment years, the notices have been issued on the ground that outward freight, advertisement charges and sale promotion charges would be the part of the turnover in view of the decision of the Allahabad High Court in the case of Modi Industries Limited v. Commissioner of Trade Tax (Supra). Therefore, there is a escaped assessment.

Heard Sri Bharat Ji Agrawal, Senior Advocate appearing on behalf of the petitioner and Sri S.P. Kesarwani, learned Additional Chief Standing Counsel appearing on behalf of respondents.

Learned counsel for the petitioner initially submitted that in pursuance of the notices under Section 21 (2) of the Act by the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad, the petitioner has filed a detailed reply but without dealing with those submissions and giving the reasons for non acceptance, approval has been granted. Therefore, the order is vitiated and liable to be set aside but later on he has not pressed the said argument and proceeded to submit that notices issued under Section 21 of the Act by the assessing authority are only on account of change of opinion on the same material without there being any fresh material on the basis of which a belief could be formed about the escaped assessment. He submitted that in the original assessment orders, the assessing authority has examined the taxability of waste Polyfilm, P.P. Caps, P.V.C. Garbage, Polyfilm Scraps, etc. and has held liable to tax at the rate of 5%. Therefore, the view of the assessing authority that they are liable to tax at the rate of 10% as an unclassified items is only on account of change of opinion. He further submitted that in the assessment orders the assessing authority has held that the freight has been charged separately in the bills and, therefore, it is not the part of the turnover. He submitted that no case has been made out that the freight has not been separately charged. It is not the case of the revenue that the sale was FOR destination and, therefore, the decision of this Court in the case of Modi Industries Limited v. Commissioner of Trade Tax (Supra) is not applicable to the present case which was relating to the cement controlled under the Cement Control Order and under the Cement Control Order the prices fixed was FOR destination. He further submitted that the petitioner has not charged any amount towards advertisement charges and sale promotion which is apparent from the bills annexed along with the writ petition which has not been disputed. He submitted that the petitioner has incurred the expenditure towards advertisement and sale promotion on own account which is clear from the profit and loss account. In any view of the matter, no material has been brought on record to show that the petitioner has charged any amount from the customers towards advertisement and sale promotion and, therefore, the question of their inclusion in the turnover does not arise and the decision in the

case of *Modi Industries Limited v. Commissioner of Trade Tax (Supra)* is in applicable.

Sri S.P. Kesarwani, learned Additional Chief Standing Counsel submitted that under the proviso to Section 21 (2) of the Act, the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad does not exercise the judicial power in strict sense. Under the proviso to Section 21 (2) of the Act the, Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad has a power to grant approval on the basis of the reasons recorded by the assessing authority after being satisfied. Therefore, the order of the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad under the proviso to Section 21 (2) of the Act can be examined only on the ground that whether opportunity has been given or not and whether there is an application of mind while granting the approval. The Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad is not a adjudicating authority and, therefore, the detailed reasons are not required to be given for granting the approval. He submitted that in the present case, the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad has considered the reasons recorded by the assessing authority for seeking approval and also considered the reply and thereafter the approval has been granted. Therefore, it cannot be said that the approval has been granted mechanically without application of mind. He further submitted that in the counter affidavit in paragraph 3B (ii) it is stated that it came to the notice of the assessing authority that Canteen Stores Department of Government of India invites tender for supply of I.M.F.L. at its depots and the petitioner's company submitted tender and supplied I.M.F.L. of CSD and received payments including transportation cost but has shown in returns merely the cost of I.M.F.L. while the total amount inclusive of freight charges should be shown as sale price of I.M.F.L. The petitioner has not submitted copy of tender and agreement during the course of assessment proceedings. He submitted that said information received construed the material to form a belief that the sale to the Canteen Stores Department of Government of India through tender was FOR destination and, therefore, freight could be part of the turnover and this aspect of the matter has not been considered in the assessment order.

On the query being made that in the counter affidavit, the date of information has not been given and it is not clear that when such information has been received. Learned Standing Counsel sought time on 9.3.2010 to produce the record. Sri S.P. Kesarwani, learned Additional Chief Standing Counsel has produced the assessment record for both years on 15.3.2010 and we have perused the same.

We have considered the rival submissions of the parties and perused the record.

Sections 21 (1) and (2) of the Act read as follows:

Section 21. Assessment of tax on the turnover not assessed during the year.

(1) "If the assessing authority has reason to believe that the whole or any part of

the turnover of the dealer, for any assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at the rate of lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer or tax according to law:

Provided that the tax shall be charged at the rate at which it would have been charged had the turnover not escaped assessment, or full assessment as the case may be.

Explanation I :

Nothing in this subsection shall be deemed to prevent the assessing authority from making an assessment to the best of its judgment.

Explanation II :

For the purposes of this section and of section 22, "assessing authority" means the officer or authority who passes the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation III:

Notwithstanding the issuance of notice under this subsection, where an order of assessment or reassessment is in existence from before the issuance of such notice it shall continue to be effective as such, until varied by an order of assessment or reassessment made under this section in pursuance of such notice.

(2) Except as otherwise provided in this section, no order of assessment or reassessment under any provision of this Act for any assessment year shall be made after the expiration of three years from the end of such year or March 31, 1996, whichever is later:

Provided that if the Commissioner on his own or on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do authorises the assessing authority in that behalf, such assessment or reassessment may be made after the expiration of the period aforesaid but not after the expiration of eight years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion:

Provided further that the assessment or reassessment for the assessment year 1987-88 may be made by March 31, 1993:

Provided also that if the eligibility certificate granted under section 4A has been amended or cancelled by the Commissioner under subsection (3) of Section 4A, the order of assessment or reassessment may be made within one year from the date of receipt by the assessing authority of the copy of the order amending or

cancelling the aforesaid certificate or by March 31, 1995, whichever is later:

Provided also that the assessment or reassessment for the assessment year 198990 may be made by March 31, 1995."

Section 21 (2) of the Act provides that no order of assessment or reassessment shall be made after the expiration of three years from the end of such year. The proviso to Section 21 (2) of the Act provides that if the Commissioner on his own or on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do authorises the assessing authority to make the assessment or reassessment after the expiration of the period provided under Section 21 (2) of the Act.

The Division Bench of this Court in the case of M/s. S. K. Traders, Modi Nagar, Ghaziabad Versus Additional Commissioner, GradeI, Trade Tax, Zone Ghaziabad and another, reported in 2008 U.P. T.C.392 and Manaktala Chemicals Pvt. Ltd. Vs. State of U.P. and others, reported in 2006 U.P.T.C. 1128 have held that before granting the approval under the proviso to Section 21 (2) of the Act the opportunity should be given to the assessee. We are of the view that under the proviso the Commissioner does not exercise the judicial power in strict sense. He is not suppose to adjudicate the issue. He has to satisfy on the basis of the reasons recorded by the assessing authority that it is just and expedient to authorise the assessing authority to make the assessment or reassessment beyond the period of limitation prescribed under Section 21 (2) of the Act. Therefore, we are of the view that a detailed reasoning is not required to be given while granting the authorisation. What is required under the proviso is that there should be an application of mind to arrive at the satisfaction on the consideration of the reasons recorded and the submissions of the assessee. We have gone through the order passed by the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad under the proviso to Section 21 (2) of the Act. The order reveals that he has considered the reasons recorded by the assessing authority and also considered the reply and after being satisfied granted the approval. Therefore, the order cannot be said to be mechanical and without application of mind. Learned counsel for the petitioner has rightly withdrew his submission challenging the order under Section 21 (2) of the Act passed by the Additional Commissioner, Grade1, Trade Tax, Moradabad Zone, Moradabad.

Now coming to the next submission of the learned counsel for the petitioner that the initiation of the proceeding is only on account of change of opinion without any fresh material on the basis of which a belief of escaped assessment alleged to have been formed. We have gone through the assessment orders. The assessment orders under the U.P. Trade Tax Act for both the assessment years reveal that the assessing authority has considered the sale of P.P. Seals, etc. and has held that their turnover are liable to tax at the rate of 5%. The tax at the rate of 5% was applicable to the entry "old, discarded, unserviceable or obsolete machinery, stores or vehicles including waste products except cinder, coal ash

and such items as are included in any other notification issued under the Act." It is disputed question whether the aforesaid items are covered under the said entry or not. Once the assessing authority in the original assessment order has considered the question of levy of tax on the same existing material the view of the assessing authority to reopen the proceeding that such goods are liable to tax as an unclassified items is only on account of change of opinion.

Further in the original assessment proceedings for both the assessment years, the assessing authority has examined the bills relating to the sales of the goods and in the assessment orders recorded a categorical finding that onwards freights have been charged separately in the bills and accordingly held that it would not be the part of the turnover. We have perused the assessment records. Some of the copies of the bills are available on record. The bills relating to the supply of Canteen Stores Department of Government of India are also available on record. This shows that while passing the original assessment orders, the bills relating to Canteen Stores Department of Government of India have also been examined. There is nothing in the bills to show that the sales were FOR destination. In any view of the matter, the bills relating to the sales were duly examined during the course of the assessment proceedings and on a consideration that the outward freights were charged separately in the bills it has been held that they were not the part of the turnover. Learned Standing Counsel is not able to show from the record that after passing the assessment orders, any fresh material or any kind of information has been received to show that the sales were FOR destination. In this view of the matter, it is apparent that the assessing authority on the basis of the same material which were in existence and considered at the time of original assessment orders, merely on account of change of opinion formed a belief that outward freights would be the part of the turnover. It is not disputed that onwards freights have been charged separately in the bills. Therefore, in view of the Explanation to Section 21 of the Act which defines "Turnover" the freights charged separately in the bills would not be a part of the turnover. Therefore, the belief formed by the assessing authority is based on no material and merely on account of change of opinion. Learned Standing Counsel is also not able to produce any material to substantiate that the petitioner has charged any amount from the customers towards advertisement charges and promotional charges. Some of the copies of the bills are available on record in which the advertisement charges and promotional charges have not been charged. Therefore, the opinion of the assessing authority that the advertisement charges and promotional charges are the part of the turnover is without any basis and material.

In view of the above, we are of the view that the proceedings under Section 21 of the Act have been initiated merely on account of change of opinion on the basis of the same material which were in existence and considered at the time of the original assessment proceedings and there is no material on record on the basis of which a belief of escaped assessment would be formed. Therefore, the initiation of proceedings are patently illegal and liable to be set aside.

It is settled principle of law that the proceedings under Section 21 of the Act cannot be initiated merely on account of change of opinion.

Section 21 (1) of the U.P. Trade Tax Act contemplates assessment and reassessment is equivalent to Section 147 of the Income Tax Act, 1961. Both the sections relate to the assessment of the escaped assessment to tax. In both the sections the proceeding can be initiated only if the assessing authority "has a reason to believe" that there is escaped assessment.

Under Section 21 (1) of the Act the words are "has reason to believe" and not "reason to suspect". The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable and based on reasons, which are relevant. It must be in good faith and not in mere pretence, should have a rational connection and relevant bearing on the formation of the belief, and should not be extraneous or irrelevant. The material should be relating to the particular year for which the assessment is sought to be reopened. It is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of income.

Perusal of Section 21 (2) of the Act reveals that the proceedings can only be initiated if there is reason to believe that there is escaped assessment. The word "reason to believe" came up for consideration before the Apex Court and various High Courts in several decisions. Apex Court held that the belief must be formed on the basis of the material, which has a nexus to the escaped turnover.

In Joti Prashad Versus State of Haryana J.T. 1992 (6) S.C. 94 the Hon''ble Supreme Court while dealing with the meaning of expression ""reason to believe" in Section 26 of the Indian Penal Code held that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned.

It is settled principle of law that in a writ jurisdiction under Article 226 of the Constitution of India, this Court can not look into the sufficiency of the material on the basis of which a believe has been formed and notice under Section 21 of the Act has been issued. This Court can only examine whether there was any material and whether the material is relevant to form the believe of escaped income. (Vide Income Tax Officer Vs. Lakhani Mewal Dutt, (1976) 103 ITR 437, Indra Prastha Chemicals Pvt. Ltd. Vs. Commissioner of Income Tax, reported in 2005 UPTC, 53).

In the case of Commissioner of Income Tax, Gujarat II Versus Kurban Hussain Ibrahimji Mithiborwala, reported in (1971) 82 ITR 821, the Apex Court has held that it is well settled that the Income Tax Officer's jurisdiction to reopen an assessment under section 34 of the Income tax Act, 1922, depends upon the issuance of a valid notice. If the notice issued by him is invalid for any reason the entire proceedings taken by him would become void for want of jurisdiction.

In the case of *Johri Lal (HUF) Versus Commissioner of Incometax, U.P.* reported in (1973) 88 ITR 439 (SC), the Apex Court has held as follows:

" The formation of required belief by the Income Tax Officer before proceedings can be validly initiated under section 34 (1) (a) is a condition precedent: The fulfillment of this condition is not a mere formality, it is mandatory, and failure to fulfill that condition would vitiate the entire proceedings. Further, the formation of the required belief is not the only requirement: The officer is further required to record his reasons for taking action under Section 34 (1) (a) and obtain the sanction of the Central Board or the Commissioner, as the case may be."

In *Income Tax Officer Versus Lakhani Mewal Dutt*, (1976) 103 ITR 437, 1976 UPTC 809 (SC), the Hon"ble Supreme Court held that the reasons for the formation of the belief contemplated by reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief. The Hon"ble Supreme Court further observed that though it is true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, however, vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment.

The question whether the Assessing Officer had reasons to believe is a question of jurisdiction, a vital thing, which can always be investigated by the Court under Article 226 of the Constitution as held in *Daykatran Rawatmal v. Income Tax Officer*, (1960) 38 I.T.R. 301 (Cal); *Jamna Lal Kabra v. Income Tax Officer*, (1968) 69 I.T.R. 461 (All); *Calcutta Discount Co. Ltd. v. Income Tax Officer*, (1961) 41 I.T.R. 191 (SC); *C.M. Rajgharia v. Income Tax Officer*, (1975) 98 I.T.R., 486 (Pat) and *Madhya Pradesh Industries Ltd. v. Income Tax Officer*, (1965) 57 I.T.R. 637 (SC).

If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonable entertain the belief, the conclusion would be inescapable that the Assessing Officer could not have reason to believe. In such a case, the notice issued by him would be liable to be struck down as invalid as held in the case of *Ganga Saran and Sons P. Ltd. v. Income Tax Officer*, (1981) 130 I.T.R. 1 (SC).

In the case of *Indra Prastha Chemicals Pvt. Ltd., Versus Commissioner of Income tax* reported in 2005 UPTC, 53, this court held as follows:

" Thus, it is well settled that the ""reason to believe" under section 147 must be held in good faith and should have a rational connection and relevant bearing on the formation of the belief and should not be extraneous or irrelevant. Further

this Court in proceedings under Article 226 of the Constitution of India can scrutinize the reasons recorded by the Assessing Officer for initiating the proceedings under Section 147/148 of the Act. The sufficiency of the material cannot be gone into but relevancy certainly be gone into."

In the case of M/s Royal Trading Co. Saharanpur Vs. Trade Tax Officer, Saharanpur, reported in 2000 NTN (Vol.16), 290, the Division Bench of this Court while considering the Section 21 of U.P. Trade Tax Act held as follows:

It is settled principle of law that the notice under section 21 of the Act cannot be issued on account of change of opinion on the basis of material available on record.

"Therefore, action under Section 21 of the Act cannot be taken on the whims of the assessing officer by resorting to conjecture of imagination. He has to have before him the facts which are germane to the issue and on the basis of which a rational man can have reason to believe that the whole or any part of the turnover has escaped assessment or has been underassessed. In Income Tax Officer Vs. Madnani Engineering Works Ltd. (1979) 118 I.T.R., 1 the Hon'ble Supreme Court while dealing with some what similar provision under section 147 of the Income Tax Act, 1961 held that the existence of reason to believe on the part of the ITO was a justifiable issue and it was for the court to be satisfied whether in fact the ITO had reason to believe that income had escaped assessment. In Joti Parshad vs. State of Haryana J.T. 1992 (6) S.C., 94 the Hon'ble Supreme Court while dealing with the meaning of expression "reason to believe" in section 26 of the Indian Penal Code held that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probabale reasoning conclude or infer regarding the nature of the thing concerned. In Income Tax Officer vs. Lakhmani Mewal Das (1976) 103 I.T.R. 437 the Hon'ble Supreme Court held that the reasons for the formation of the belief contemplated by section 147 (a) of the Income Tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of this belief. The Hon'ble Supreme Court further observed that though it is true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. This view was reiterated by the Hon'ble Supreme Court while dealing with the provisions of Section 21 of the U.P. Trade Tax Act in Commissioner of Sales Tax vs. Bhagwan Industries (P) Ltd. (1973) 31 S.T.C. 293 in which it was held that reasonable grounds necessarily postulate that they

must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under this section. If however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under this Section."

In the case of *Kalpana Kala Kendra, Kanpur Versus Sales Tax Officer, Circle 20, Kanpur*, reported in [1989 U.P.T.C.597], the Division Bench held as follows:

"Section 21 of the Act is based upon the theory that the taxes must be collected by the statutory machinery. The escapement from assessment whether it results on account of a concealment practised or fraud played by the assessee or as a result of negligence or ignorance of the assessing authority, in our opinion, is of no consequence, provided the action to reopen the assessment is otherwise justified and the assessing officer is not acting arbitrarily or in a capricious manner. The escapement of assessment contemplated under that section may be due to various reasons. The term "turnover has escaped assessment to tax" which includes under assessment, may as well be result of lack of care on the part of the assessing officer or by reason of his inadvertence on his part. Section 21 does not prohibit obtaining of information from investigation of material on record of the original assessment. The scope of that section is not circumscribed by a rider like the one that exists in Section 147 (a) of the Income Tax Act, 1961, namely the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that year, income chargeable to tax has escaped assessment for that year. The escapement envisaged by Section 21 of the Act for the purposes of reassessment need not necessarily spring from a source, extraneous to the original record. However, a second thought or a mere change of opinion, by the assessing authority on the same set of facts and material on record would not clothe the assessing authority with a valid jurisdiction.

We are not impressed by the argument that the instant case is a case of change of opinion. The change of opinion necessarily postulates that the assessing authority had an occasion to consider the material earlier, and on the same set of facts another opinion was sought to be formed. The question of change of opinion cannot arise where there has been no previous proceeding of assessment in respect of a turnover in dispute. As pointed out by the Calcutta High Court in *Income Tax Officer v. Mahadev Lal Tulayan*, (1978) 111 ITR 25, a change of opinion by the Assessing Officer contemplated, formation of two different opinions or to make two different inferences at two stages on the same set of primary facts. The distinction between an inadvertent mistake or omission and change of opinion was pointed out by one of us after reviewing a large number of decided cases, both by this Court and by the Supreme Court, in *Commissioner of Sales Tax, U.P. v. Madhu Chemical Works, Bareilly*, 1998 UPTC 230. It was held

that in a case where a particular point has been considered on merits, and a view is taken, it would not be a case of inadvertent mistake or omission, if it is found that the view taken earlier was wrong. It would be a case of change of opinion, but if it is not so, then it would be a case of nonapplication of mind and an action would be justified under Section 21 of the Act."

In the case of Commissioner of Sales Tax Vs. M/s Gopalji Varanasi, reported in 1974 UPTC, 277, Sales Tax Officer got second thought about the applicability or effect of the survey and hence notice under Section 21 was issued. It was held that this would not constitute reason to believe within the meaning of Section 21 of the said Act. Hence notice under section 21 was held invalid.

In the case of M/s Palco Lining Co. Vs. State of U.P. and others, reported in 1983 UPTC, 1116. In this case assessment order recorded that the assessing authority has after elaborately considering the evidence taken the view what was being sold by the petitioner was nothing but collar lining and its turnover of sale was held exempt from the Sales Tax Act. Under a notification the assessing authority, however, issued notice under Section 21 of the said Act for reassessing the same matter, hence it was held notice under Section 21 to be invalid.

In the case of Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and others, reported in AIR 1980 SC 1552, the Apex Court held as follows:

"It does not permit reassessment of turnover which after the due consideration, had been found exigible to tax merely because the assessing authority subsequently comes to take different view of the matter."

To the similar effect is another decision where we find under Section 34 of the Income Tax Act, 1922 which is similar to the provision of Section 21 of the U.P. Sales Tax Act, after considering the provision of Section 34 of the said Act the following observation has been made by the Apex Court in the case of Commissioner of Income Tax Vs. Bhanji Lavji, (1971) 79 ITR 582, which is quoted as under :

"When the primary facts necessary for assessment are fully and truly disclosed to the Income Tax Officer at the stage of original assessment proceedings, he is not entitled, on a change of opinion, to commence proceedings for reassessment under Section 34 (1)(a)."

To the similar effect is also the decision reported in (1971) 82 ITR, 367, Commissioner of Income Tax Vs. Dinesh Chandra H.Shah and others, wherein it is held that :

"It appears that the Income Tax Officer clearly sought to justify the reopening of the assessment under Section 34 (1) (b) merely on the ground of change of opinion. It is well settled by now, and Mr. Desai quite rightly does not dispute the proposition, that mere change of opinion could not be a valid ground for reopening the assessment under Section 34 (1)(b) of the Act. We would accordingly uphold the answer returned by the High Court on the short ground

that the reassessment for the year in question was sought to be reopened for the reason that the successor of the Income Tax Officer who had made the original assessment had changed his opinion which did not furnish a justifiable reason for taking action under Section 34 (1)(b)."

While considering Section 147 of the said Act in the case of the Income Tax Officer Vs. Nawab Mir Barkat Ali Khan Bahadur, reported in AIR 1975 SC 703, the same view has been taken. Having second thought on the same material does not warrant initiation of proceedings under Section 147 of the Income Tax Act.

In the case of M/s Harbans Lal Malhotra Versus Assistant Commissioner of Sales Tax, Ghaziabad reported in 1994 UPTC, 1041, the Division Bench of this Court held that the authority cannot issue any notice on account of change of opinion nor in the absence of any material for the year in question. It has been further held that in the original assessment order all the documents of the petitioner including the agreement in question the transfer of the goods has been held as stock transfer. The notice under section 21 of the Act has been held amounts to reexamining the same matter again and to make fresh enquiry in the same matter, which is not permissible.

In the case of Ratan Industries Pvt. Ltd. Agra Versus Additional Commissioner of Trade Tax, Agra and another reported in 2004 NTN (24) 384, the Division Bench of this Court in paragraph 22 observed that " it is well settled principle of law that the question which has been examined in detail in the original assessment proceeding and thereafter the assessment order has passed, then the said assessment order cannot be reopened under section 21 of the Act on mere change of opinion".

In the case of F.S. Investment Manager Versus I.T.O. Reported in (2007) 209 CTR, 1 Bombay, the Bombay High Court held that the proceeding cannot be reopened merely because the Assessing Authority is of the view that the depreciation has been wrongly allowed merely on change of opinion.

In the case of Anil Kumar Bhandari Versus Joint Commissioner of Income Tax reported in (2007) 294 ITR, 222 (Calcutta), the deduction was allowed under section 80HHC the case has been reopened on the ground that the deduction has been wrongly allowed. The Division Bench of the Calcutta High Court held that the initiation of reassessment proceeding by the Assessing Authority purported to reopen the assessment upon the change of opinion; the same fact is not justified.

On the facts and circumstances of the case, referred hereinabove, we are of the view that it is the case of change of opinion of the assessing officer on the same material which was in existence and considered at the time of original assessments. The proposals do not reveal any fresh material on the basis of which believe was formed that the claims had been wrongly allowed and the same are liable to tax. The orders under Section 21 (2) of the Act also do not reveal that there was any fresh material on the basis of which believe has been formed.

In the facts and circumstances, we are of the view that the orders passed under Section 21 (2) of the Act are not sustainable and are liable to be set aside, inasmuch the notices under Section 21 of the Act have been issued merely on account of change of opinion without there being any fresh material of escaped assessment.

In the result, the writ petition is allowed. The notices dated 22.3.2006 issued by the Deputy Commissioner (Assessment), Trade Tax, Rampur under Section 21 of the Act for the assessment years 19992000 and 20002001 both under the U.P. Trade Tax Act and under the Central Sales Tax Act and consequential proceedings in pursuance thereof are quashed.