

(2005) 04 GUJ CK 0076

In the Gujarat High Court

Case No : Misc. Civil Application No. 1104 of 2004 in Special Civil Application No. 3891 of 1997, Miscellaneous Civil Application No. 1105 of 2004 in Special Civil Application No. 3893 of 1997 and Miscellaneous Civil Application No. 1106 of 2004 in Special Civil Ap

Sales Tax Officer (Enforcement)

APPELLANT

Vs

Fag Precision Bearings Ltd.

RESPONDENT

Date of Decision : 04-04-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 265
Gujarat Sales Tax Act, 1969 — Section 139, 140, 140A, 140A(1), 142
Gujarat Sales Tax Rules, 1970 — Rule 37A

Citation : (2005) 141 STC 339

Hon'ble Judges : K.M. Mehta, J;A.R. Dave, J

Bench : Division Bench

Advocate : S.N. Shelat and Siraj Gori, AGP for Petitioner No. 1-3, for the Appellant; K.H. Kaji, for the Respondent

Judgement

K.M. Mehta, J.—Rule. Mr. K.H. Kaji, learned counsel waives service of rule on behalf of respondent.

2. These review applications have been filed by the Sales Tax Officer for review of the judgment and order delivered by this Court on 27th February, 2003, in Special Civil Application No.3891-93/97 quashing the assessment orders passed by the Sales Tax Officer for various assessment years on the ground that the orders for extension of time for passing assessment orders were invalid (since reported in 131 STC 298 Guj). The Court further directed that the sales-tax paid with the returns filed by the petitioners be refunded with interest at 12% from the date of payment till the date of refund. The Court further directed the Sales Tax Department to carry out the directions for refunding the sales-tax paid along with interest to the petitioners within four months from the date of the judgment dated 27th February, 2003. The said period expired on 27th June, 2003.

3. Subsequently, the Sales Tax Officer filed Misc. Civil Applications No.1272-74 of 2003 for extension of time for carrying out the order of this Court and the said applications were allowed on 10th July, 2003, granting the refund along with interest.

4. The Sales Tax Officer has now filed these review applications on various grounds set out in the said applications.

5. The background of the matter is as under:-

5.1 It may be noted that originally petitioner challenged the assessment for the period 1.9.1976 to 31.8.1984 on the ground that the Deputy Commissioner of Sales Tax, Baroda, passed various orders from time to time purporting to extend time for making assessment under the Local Act which Act provided time limit of three years upto 31.3.1979 and later on for two years for completing assessment. The said extension orders were passed by the second respondent i.e. Sales Tax Officer under Sec. 42 of the Gujarat Sales Tax Act (Local Act) read with Rule 37A of the Gujarat Sales Tax Rules. The Sales Tax Officer issued show-cause-notice and thereafter the final order was passed by the Deputy Commissioner of Sales Tax in this behalf.

5.2 Being aggrieved and dissatisfied with the said action, the petitioner filed Special Civil Application No. 5343 of 1987. The said petition was heard by a Division Bench of this Court (Coram: G.T. Nanavati, J. (as he was then) and Y.B. Bhatt, J.) on February 12/13. 1992. The said decision is reported in(1993) 90 STC 294 Guj. The Division Bench, after considering various contentions raised by the learned counsel for the petitioner and the learned counsel for the Revenue, dismissed the petition of the petitioner.

5.3 It may be noted that in that matter the revenue alternative contended that no relief should be granted to the petitioner as that would result into unjust enrichment. On page 308 the Division Bench against that contention has observed as under:

"As we are not inclined to agree with the contentions raised on behalf of the petitioner, it is not necessary for us to consider the alternative contention of the learned Advocate General that no relief should be granted to the petitioner as that would result in unjust enrichment."

5.4 Being aggrieved and dissatisfied with the said judgment of this Court, the petitioner filed appeal before the Hon"ble Supreme Court. It may be noted that during the pendency of the petition before the High Court there was stay of assessment for the period covered by the said order. However, when Special Leave to appeal was granted by the Hon"ble Supreme Court, stay was refused. Consequently, assessment orders were passed against the assessee for some years within the period 1.9.1976 to 31.12.1984 both under the Central Act and Local Act.

5.5 The Hon"ble Supreme Court in the case of Fag Precision Bearings v. Sales

Tax Officer (I) and Anr. reported in (1996) 104 STC 143 SC reversed the decision of this Court and allowed the appeal of the assessee. The Hon'ble Supreme Court considered Sec. 42 and Rule 37A of the Gujarat Sales Tax Rules and made certain observations on page 147. The Hon'ble Supreme Court did not approve the judgment of this Court and reversed the judgment of this Court. Ultimately on page 148 in the operative order the Hon'ble Supreme Court has observed as under:

"In the premises, the impugned order must be set aside. Consequently, all proceedings taken and assessment orders passed on the strength thereof must also be set aside. The Commissioner of Sales Tax shall be entitled, if so advised, to issue to the appellant a notice to show cause why assessments for the period 1st September, 1976 to 31st August, 1984, should not be stayed for a stated period for the reasons and in the circumstances to be set out therein, and he may proceed thereafter in the manner laid down above. This notice he must issue, if so minded, within 16 weeks. If this is not done within 16 weeks, all amounts collected as and by way of sales tax for the period 1st September, 1976 to 31st March, 1984, shall forthwith be refunded to the appellant."

5.6 It may be noted that before the Hon'ble Supreme Court when the main matter was heard, the revenue did not raise the contention of unjust enrichment.

5.7 When the present Special Civil Application No.3891 of 1997 which was heard by this Court, the learned advocate for the petitioner relied upon the aforesaid judgment of the Supreme Court and various judgments in this behalf. In view of the judgment of the Apex Court, this Court allowed the appeal and in para 4.1C(iii), 4.1D on page 27 and 4.1D(i) the Court observed as under:

"(iii) Assessment orders pursuant to fresh extension orders dated 15.3.1997 during the pendency of this Special Civil Application are quashed. All amounts collected as and by way of Sales tax from 1.9.1976 to 31.3.1984 be refunded to the appellant (as per the Supreme Court order) and interest at the rate of 12% from the date of payment till date of refund is granted. 4.1D So far as Special Civil Application No. 3892 of 1997 for assessment period 1985, 1988-89 to 1990-91 is concerned, assessment orders for 1988-89 and 1990-91 are passed. Against the said orders the petitioner filed appeals before the Assistant Commissioner of Sales tax (Appeals), Vadodara, which are pending. Assessment orders and the demand raised thereunder are required to be quashed as extension orders are not valid. Tax paid with returns be refunded as per the decision of the Hon'ble Supreme Court for earlier years. Interest at the rate of 12% is awarded from the date of payment till date of refund.

(i) No assessment orders are passed for 1985, 1989-90. Tax paid with return be refunded as per the decision of the Supreme Court for earlier years. Interest at the rate of 12% is awarded from the date of payment till date of refund."

6. These review applications have been filed by the State. The review sought for is inter alia, on the ground that an error has crept in passing final direction by

directing "tax paid with returns be refunded". The applicants inter-alia contended that there was no challenge before the Court about the tax paid with the returns; every dealer is under obligation under the provisions of Secs. 40 and 47 of the Act to make payment with the return. Even in the decision of the Supreme Court, there was no direction to return the tax paid with the return; the tax paid with the return is collected from the purchaser and deposited into the Government Treasury as required under the Act. There appears to be a mistake or an error apparent on the face of the record through oversight while giving the final direction in the judgment.

7. As regards power of review is concerned, we have to consider Order 47, Rule 1 of CPC which reads as under:

"Rule 1. Application for review of judgment - (1) Any person considering himself aggrieved, -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

"Explanation :- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

8. It may be noted that what is power of review has been considered by the Hon'ble Supreme Court in the case of Lily Thomas, Vs. Union of India and Others, after relying upon certain judgments of the Hon'ble Supreme Court, the Hon'ble Supreme Court has held as under:

"para 56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised."

9. Before this Court the revenue has submitted that the directions of this Court that the tax paid with returns be refunded is erroneous and contrary to the well settled principle of this which has been given in para 4.1D and 4.1D(i). In support of the same, the revenue has first relied upon the Full Bench judgment of this Court in the case of Saurashtra Cement and Chemical Industries Ltd. Vs. Income Tax Officer, where particularly on page 674, 675 this Court has held as under:

"..... It would, thus, be clear that, not only the liability to be subjected to tax arises under the charging section 4, but the liability to pay tax also arises immediately on determination of the rates of taxes with effect from the date on which such rates are made applicable and the liability to pay crystallizes in the context of such rates when the total income is computed in accordance with the provisions of the Act. On filing of the return u/s 139, wherein such total income is indicated, section 140A, providing for self-assessment, comes into operation and it becomes obligatory on the part of the assessee to discharge his liability which has arisen to pay the tax together with the interest that may be payable for late furnishing of returns. The tax payable on the basis of the returns filed by the assessee is treated as "assessed tax". It is not at all made dependent on any regular assessment being made though, in the event of regular assessment, the amount paid under sub-section (1) of section 140A is deemed to have been paid towards the regular assessment. Therefore, by no stretch of imagination, can the tax paid and collected u/s 140A be described as a mere ad hoc or interim payment which can be said to fail in the absence of a regular assessment, as was sought to be contended on behalf of the petitioners.

9.1 Thereafter again on page 677 the Court has observed as under:

"..... We are, therefore, of the view that, on failure of a regular assessment being made within the time prescribed or in the event of annulment of the assessment order pursuant to which any further demand is required to be made u/s 156, no consequence of refund of the entire tax collected according to the total income shown in the returns filed by the assessee can ensue and such tax which is collected on the basis of the return filed by the assessee remains a valid and legal recovery in accordance with the provisions of the said Act and there is no question of any violation of article 265 of the Constitution of India in respect of the tax so recovered on the basis of the total income shown by the assessee in his return."

9.2 It may be noted that the aforesaid Full Bench judgment of this Court has been approved by the Hon"ble Supreme Court in the case of Commissioner of Income Tax, Bhopal Vs. Shelly Products and Another, the Hon"ble Supreme Court considered the Full Bench judgment and ultimately on page 381 the Court has observed as under:

".. We find considerable force in the submission of the Revenue and it must be upheld. We have earlier noticed the scheme of the Act. Section 4 of the Act

creates the charge and provides, inter alia, for payment of tax in advance or deduction of tax at source. The Act provides for the manner in which advance tax is to be paid and penalises any assessee who makes a default or delays payment thereof. Similarly, the deduction of tax at source is also provided for in the Act and failure to comply with the provisions attracts the penal provisions against the person responsible for making the payment. It is, therefore, quite apparent that the Act itself provides for payment of tax in this manner by the assessee. The Act also enjoins upon the assessee the duty to file a return of income disclosing his true income. On the basis of the income so disclosed, the assessee is required to make a self-assessment and to compute the tax payable on such income and to pay the same in the manner provided by the Act. Thus the filing of the return and the payment of tax thereon computed at the prescribed rates amounts to an admission of tax liability which the assessee admits to have incurred in accordance with the provisions of the Finance Act and the Income Tax Act. Both the quantum of tax payable and its mode of recovery are authorised by law. The liability to pay income tax chargeable under Sec. 4(1) of the Act thus, does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. The assessee is himself required to compute his total income and pay the income tax thereon which involves a process of self-assessment. Since all this is done under the authority of law, there is no scope for contending that Article 265 is violated."

10. The revenue, therefore, contended that challenge before this Court is only with regard to the extending the period of limitation under Sec. 42 of the Act which is according to the original petitioner without any justifiable cause.

11. It may be noted that the court held that no such extension was justified. It is, therefore, necessary to substitute our direction to the extent that the impugned orders were quashed and the tax collected pursuant to the assessment were required to be refunded and, therefore, this Court substitutes that direction that the amount paid along with returns be refunded.

12. It may be noted that the Hon''ble Supreme Court has approved the ratio laid down in Saurashtra Cement and Chemical Industries Ltd. Case (supra). In view of the same, the revenue contended that, in view of this legal position there is some inaccurate or slip on the face of the judgment and therefore there was a sufficient reasons for the revenue to obtain and review of the judgment passed against them and, therefore, they have applied for the review of the judgment. The Revenue is conscious of the explanation provided under Order 47 and, therefore, they are not merely relied upon the judgment of the Hon''ble Supreme Court but they contended that there was mistake or error when this Court observed that revenue has to refund the amount which was paid with returns when there is no averments in the petition. In support of the same they relied upon the Full Bench judgment of this Court as well as Hon''ble Supreme Court and therefore they contended that this Court may review the judgment of this Court.

12A. As far as Income Tax Act is concerned, Section 4 provides charge of Income Tax which reads as under:

"Sec. 4 Charge of Income Tax : (1) Where any Central Act enacts that Income Tax shall be charged for any assessment year at any rate or rates, Income Tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income tax) of, this Act in respect of the total income of the previous year ***, of every person:

Provided that where by virtue of any provision of this Act Income Tax is to be charged in respect of the income of a period other than the previous year, Income Tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), Income Tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."

12B. Chapter XIV of the Income Tax Act starting with Sec. 139 provides Procedure for assessment. Sec. 139 provides return of income which reads as under:

"Return of income:- (1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to Income Tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be described."

12C. Sec. 140 of the Act provides return by whom to be signed. Sec. 140A provides Self-assessment. Sec. 142 provides inquiry before assessment.

12D. Sec. 143 provides assessment which reads as under:

"Assessment :- (1) Where a return has been made u/s 139, or in response to a notice under sub-section (1) of section 142, -

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued u/s 156 and all the provisions of this Act shall apply accordingly; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee."

"(2) Where a return has been made u/s 139, or in response to a notice under

sub-section (1) of section 142, the Assessing Officer shall, if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, *** serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return."

12E. Section 145 provides Method of accounting. Section 153 provides time limit for completion of assessments and reassessments. Section 154 provides Rectification of mistake. Section 155 provides other amendments.

12F. As regards Gujarat Sales Tax Act is concerned, Section 3 provides incidence and levy of tax i.e. liability created under the Act. Section 4 provides liability of dealer registered under the Act. Section 6 provides taxes payable by a dealer. Section 7 provides levy of sales tax on goods, in Schedule II, part A. Section 8 provides levy of general sales tax on goods in Schedule II, part B.

12G. Chapter IV provides Registrations, Licences, Recognitions and Permits.

12H. Chapter V provides Declarations, Returns, Assessments, Payments, Penalty, Recovery and Refund of Tax.

Sec. 40 provides Declarations and Returns:

"(1) Every Registered dealer shall furnish declarations or returns for such period, by such dates, and to such authority, as may be prescribed.

Provided that the Commissioner may, subject to such terms and conditions as may be prescribed exempt any such dealer from furnishing such declarations or returns or permit any such dealer, -

(a) to furnish them for such different periods, or

(b) to furnish a consolidated declaration or return relating to all or any of the places of business of the dealer in the State for the said period, or for such different period, to such authority, as he may direct."

Sec. 41 provides Assessment of taxes:

"(1) The amount of tax due from a Registered dealer shall be assessed separately for each year during which he is liable to pay the tax or, on an application by any such dealer to that effect, for such period exceeding one year during which he is so liable as is specified in the application;

Provided that when such dealer fails to furnish any declaration or return relating to any period of any year by the prescribed date, the Commissioner may, if he thinks fit, assess the tax due from such dealer separately for different parts of such year.

Provided further that the Commissioner may, subject to such conditions as may

be prescribed, and for reasons to be recorded in writing, assess the tax due from any dealer during a parts of a year.

(2) If the Commissioner is satisfied that the declarations or returns furnished in respect of any period are correct and complete, he shall assess the amount of tax due from the dealer on the basis of such declarations or returns.

(3) If the Commissioner is not satisfied that the declarations or returns furnished in respect of any period are correct and complete, and he thinks it necessary to require the presence of the dealer or the production of further evidence; he shall serve on such dealer in the prescribed manner a notice requiring him on a date and at a place specified therein, either to attend and produce or cause to be produced all evidence on which such dealer relies in support of his declarations or returns, or to produce such evidence as is specified in the notice."

Sec. 41B provides Provisional Assessment.

Sec. 42 provides time limit for completion of assessment.

(1) No order of assessment for a year commencing on the 1st day of April, 1998, or part of such year or any year thereafter or part of such year shall be made under sub-section (3) or (4) of section 41 at any time after the expiry of three years from the end of the year in which the last monthly, quarterly or, as the case may be, annual return is filed.

(2) Where the Commissioner issues a notice under sub-section (6) of section 41, to any dealer for assessment of tax in respect of any period, no order of assessment shall be made for such part of the period, if any, as is prior to -

(a) a period of eight years ending on the last date of the year immediately preceding the year in which such notice is issued, in a case where the Commissioner has reason to believe that such dealer has failed to apply for registration with intention to defraud Government revenue; and

(b) a period of four years ending on the last date as aforesaid, in any other case:

Provided that for the purpose of this section if it is considered necessary so to do, the State Government may, subject to such conditions as it may deem fit, and the Commissioner may, subject to such conditions as may be prescribed by a general or special order, extend, either generally or specially, the period specified in sub-section (1):

Provided further that where a fresh assessment is required to be made in pursuance of any order u/s 65, 67 or 69 or in pursuance of any order of any court or authority, such fresh assessment shall be made at any time within three years from the date of such order.

Provided also that in computing the period of limitation for the purpose of this section, any period by which the period of limitation is extended under the first proviso or any period during which assessment proceedings are stayed by an

order or injunction of any court or authority shall be excluded."

Sec. 47 provides Payment of tax and deferred payment of tax etc.

"(1) Tax shall be paid in the manner herein provided, and at such intervals as may be prescribed.

(2) A registered dealer furnishing declarations or returns as required by sub-section (1) of section 40, shall first pay into a Government treasury, in the manner prescribed, the whole amount of tax due from him according to such declaration or return along with the amount of any penalty payable by him u/s 45..

(3) A Registered dealer furnishing a revised declaration or revised return in accordance with sub-section (3) of section 40 which revised declaration or revised return shows that a larger amount of tax than already paid is payable, shall first pay into a Government treasury the extra amount of tax.

(4) (a) The amount of tax:- (i) due where declarations or returns have been furnished without full payment therefor, or (ii) assessed or reassessed for any period u/s 41 or section 44 less any sum already paid by the dealer in respect of such period, or assessed under sec. 50.

(iii) provisionally assessed for any period u/s 41B less any sum already paid by the dealer in respect of such period.

(b) the amount of penalty (if any) levied u/s 45 or 26 [and]

(c) the amount of interest, if any, under sub-section (4A) Shall be paid by the dealer or the person liable therefore into a Government treasury by such date as may be specified in a notice issued by the Commissioner for this purpose, being a date not earlier than [ten days] from the date of service of the notice.

Provided that the Commissioner or an appellate authority in an appeal u/s 65 may, in respect of any particular dealer or person, and for reasons to be recorded in writing, extend the date of payment, or allow him to pay the tax or penalty (if any) by instalments:

[Provided further that notwithstanding anything contained in this Act or in the rules made there-under but subject to such conditions as the State Government or the Commissioner may be general or special order specify, where a dealer to whom incentives by way of deferment of sales tax or purchase tax or both have been granted by virtue of an Eligibility certificate granted by the Commissioner of Industries, Gujarat State or any offer authorised by him in this behalf and where a loan liability equal to the amount of any such tax payable by such dealer has been raised by the Gujarat Industrial Investment Corporation Limited or the Gujarat State Financial Corporation Limited, then such tax shall be deemed, in the public interest to have been paid.]"

Sec. 48 provides special mode of recovery.

Sec. 50 provides liability to pay tax in the event of breach of condition of exemption.

13. We have quoted the provisions of Income Tax as well as Sales-tax Act only for the limited purpose. Though both the judgments of Hon''ble Supreme Court in Shelly's case as well as the judgment of Full Bench of this Court are with reference to the provisions of Income Tax Act, the principle laid down therein will be equally applicable to the situation arising under the Gujarat Sales Tax Act. So far as the provisions of Sales Tax Act is concerned, the same is in pari-materia with the provisions of Income Tax Act though Income Tax Act is a direct tax and Sales Tax is an indirect tax. However, for the purpose of assessment is concerned, the basic scheme of both the act is similar.

13.1 Under the Gujarat Sales-tax Act, the dealer is required to pay sales-tax with the returns which are required to be filed either monthly or quarterly or annually. The said payments are made on the basis of sales mentioned in the return which, according to the dealer, were taxable sales. These payments were required to be made under the relevant statutory provisions contained in the Gujarat Sales-tax Act. The ratio of the Hon''ble Supreme Court judgment would, therefore, be applicable also in the case of sales-tax paid with the returns. In view of this judgment it was the contention of the revenue that there was mistake or error apparent on the face of the record.

14. The original petitioner contends that, subsequent decision of the Hon''ble Supreme Court would not be a valid ground for review. It is true that in view of explanation to sec. 47 merely a subsequent pronouncement of the Hon''ble Supreme Court is not valid ground for entertaining the review application filed by the revenue. However, the revenue has only relied upon the judgment of the Apex Court but the decision of the law that the refund cannot be granted when the amount is paid with the returns. It may be noted that the judgment of the Apex Court would operate not only prospectively but would declare the law as it always was.

15. In our opinion, therefore, so far as the directions contained in the said judgment requiring the Sales-tax Authority to refund the sales-tax paid with the returns are concerned, they are required to be modified to the extent that, only the sales-tax paid after filing of the return and pursuant to the assessment orders is required to be refunded along with interest at 12% from the date of such payment till the date of refund. The original petitioners are not entitled to refund of tax which were paid with the return. We, therefore, modify the directions given in para 4.1(C) accordingly. We are further informed by both the parties that, sales tax paid subsequent to the filing of returns has already been refunded with interest except for the years 1989-90 & 1990-91.

16. The Sales Tax Officer has further contended in this review application that the assessment proceedings for the period 1990-91 were not time barred as a bar for limitation was lifted by amendment of sec. 42 of Gujarat Sales Tax Act

with effect from 31.3.1994. Therefore, it is contended that quashing of the assessment order in this behalf for 1990-91 for the said period requires to be reviewed.

16A. In our opinion, the contention raised by the revenue with regard to the year 1991 has no substance. In the first place, in the course of the hearing of the aforesaid matter and in the affidavits-in-reply filed by the revenue it was nowhere contended that the bar of limitation was not applicable to the year 1990-91. On the contrary, emphasis in the course of arguments and in the affidavits-in-reply was on the issue that the extension orders extending the period of limitation were validly passed. It is obvious that if there was no bar of limitation as contended for by the revenue, the extension orders were not necessary to be passed and were superfluous. The revenue cannot be permitted to raise a totally new issue for the first time by way of review. Therefore, it cannot be contended by the revenue that the judgment of this Court is erroneous and requires to be reviewed on the ground that there was no period of limitation for the year 1990-91. In fact, the original petitioner contended at the hearing of the Special Civil Applications that all the assessment orders were barred by limitation as the extension orders were passed after the period of limitation had expired in respect of the assessment years. It was, therefore, contended by the original petitioner that, once the period of limitation has expired, the said period could not be extended by any extension order (See para 3.4 & 3.5 page 311 of STC). It was further contended that the judgment of this Court did not decide the question of limitation. We have clearly stated that we do not express any opinion as regards limitation as the Court was holding in favour of the original petitioner on the first issue regarding the validity of the extension order (See para 6 page 131 STC 316 Guj). Therefore contention raised by the sales tax authority cannot be a valid ground for review.

17. This would require consideration of the facts as well as law. The exercise of review jurisdiction is very limited and we are of the view that we would not be justified in appreciating the contention which was never advanced before this Court.

18. It may be noted that, during the course of hearing of aforesaid applications, and in the affidavits-in-reply filed by the revenue, it was nowhere contended that the bar of limitation was not applicable to the year 1990-91. On the contrary, emphasis in the course of arguments and in the affidavits-in-reply was on the issue that the extension orders extending the period of limitation were validly passed. It is obvious that, if there was no bar of limitation, as contended for by the revenue, the extension orders were not necessary to be passed and were superfluous. The revenue cannot be permitted to raise a totally new issue for the first time by way of review. Therefore, it cannot be contended by the revenue that the judgment of this Court is erroneous and requires to be reviewed on the ground that there was no period of limitation for the year 1990-91. In fact, the original petitioner contended at the hearing of the Special Civil Applications that

all the assessment orders were barred by limitation as the extension orders were passed after the period of limitation had expired in respect of the assessment years. It was, therefore, contended by the original petitioner that once the period of limitation has expired, the said period could not be extended by any extension order.

19. The judgment of this Court did not decide the question of limitation and in the penultimate para of the judgment we have clearly stated that we do not express any opinion as regards limitation as the Court was holding in favour of the original petitioner on the first issue regarding the validity of the extension order. Therefore contention raised by the Sales Tax Officer cannot be a valid ground for review. (See: para 6 on page 316 of 131 - STC).

20. The applications are partly allowed to the extent only that the direction by this Court to refund the tax paid with the returns is required to be substituted which was contended in para 4.1(C)(iii) which we have set out. We, therefore, reject the contention of the revenue that the order of this Court quashing the assessment order for the year 1990-91 requires to be reviewed and set aside, and therefore, direction in para 4.1D would be substituted as under:

" The assessment orders and demand raised thereunder are required to be quashed as extension orders are not valid. The amount of tax paid pursuant to the demand notices be refunded as per the decision of the Hon'ble Supreme Court for earlier years. The interest rate at 12% is awarded from the date of payment till the date of refund."

21. It has been pointed out by the learned advocate for the respondent that the revenue has not complied with the mandatory directions issued by this Court in the said judgment with regard to refund of taxes paid for the years 1989-90 and 1990-91 though the extended period for making the refund expires on 1.9.2003. We, therefore, direct the sales-tax officer to refund the sales tax paid for the years 1989-90 and 1990-91 after filing of the return within three weeks from the date of this order along with interest at 12% from the date of payment of taxes till the date of refund. The learned advocate for the revenue is present and we have informed him that he may inform the officer of the Sales Tax Department that the refund of sales tax paid with 12% interest from date of payment till refund received for the years 1989-90 and 1990-91. The amount should be paid within three weeks from the date of receipt of writ of this Court.

22. It may be noted that in the present applications the revenue has raised the contention of unjust enrichment. However, it may be noted that, when the main matter was heard, in the affidavit-in-reply, the revenue did not raise the contention of unjust enrichment. Even, at the time of hearing the main petition, the revenue did not raise the contention of unjust enrichment. In view of the same, in the review applications we will not allow the revenue to raise the contention of unjust enrichment in this behalf and, therefore, we have not considered the principle of unjust enrichment.

23. In the result, the applications are partly allowed and disposed of as set out above. Rule is partly made absolute with no order as to costs.

I am in agreement with the final conclusion arrived at by my brother, K.M.Mehta, J. that the tax paid alongwith the returns of sales tax could not have been directed to be returned with interest to the petitioner assessee in view of the law laid down by this Court in the case of Saurashtra Cement and Chemical Industries Ltd. Vs. Income Tax Officer, , which has been now approved by the Hon''ble Supreme Court in the case of Commissioner of Income Tax, Bhopal Vs. Shelly Products and Another,