

(2007) 07 AHC CK 0215
In the Allahabad High Court

S.K. Traders

APPELLANT

Vs

Additional Commissioner, Grade-I, Trade Tax and Assistant
Commissioner (Assessment), Trade Tax

RESPONDENT

Date of Decision : 13-07-2007

Acts Referred:

Constitution of India, 1950 — Article 220, 226
Income Tax Act, 1961 — Section 132, 142, 143, 147, 148

Citation : (2009) 26 VST 601

Hon'ble Judges : R.K. Agrawal, J;Bharati Sapru, J

Bench : Division Bench

Final Decision : Allowed

Judgement

R.K. Agrawal, J.—By means of the present writ petition filed under Article 226 of the Constitution the petitioner M/s S.K. Traders through its proprietress Smt. Kavita Maheshwari, seeks the following relief:

(i) to issue a writ, order or direction, in the nature of writ of certiorari quashing the notices dated 4.3.2002 (Annexure 4 to the petition) issued by respondent No. 2.

(ii) to issue a writ, order or direction, in the nature of writ of certiorari, quashing the order dated 1.6.2001 (Annexure 3 to the petition) passed by respondent No. 1.

(iii) to issue a writ, order or direction in the nature of writ of certiorari quashing the entire proceedings u/s 21(2) for the assessment year 1994-95.

(iv) to issue a writ, order or direction which this Hon"ble Court may deem fit and proper in the circumstances of the case.

(v) to award the cost of the petition to the petitioner.

FACTS OF THE CASE:

2. The brief facts of the case giving rise to the present petition are as follows:

The petitioner is a registered dealer under the provisions of U.P. Trade Tax Act, 1948 (hereinafter referred to as the Act) and is engaged in the business of broken glass, which has been carried in its own account as well as in commission agency. For the assessment year 1994-95 the petitioner had sold broken glass for Rs. 1,30,27,655.45 which it had purchased within the State of Uttar Pradesh from unregistered dealers in its commission agency business. According to the petitioner, complete details relating to sales of broken glass in its commission agency, which were purchased in Uttar Pradesh from unregistered dealers were disclosed in the course of assessment proceedings. The Assistant Commissioner (Assessment), Trade Tax, Modinagar, Ghaziabad- respondent No. 2, who was the assessing authority of the petitioner while making the assessment after examination of the transactions exempted the turnover of such broken glass on the ground that liability of tax was at the point of manufacturer or importer and not at the point of the petitioner. Thereafter the respondent No. 2 sought permission from the Additional Commissioner, Grade-1, Trade Tax, Zone, Ghaziabad-respondent No. 1 for reopening the assessment under the provisions of Sub-section (2) of Section 21 of the Act. A notice dated 18th April, 2001 was issued by the respondent No. 1 calling upon the petitioner to show cause as to why permission be not granted. The permission was granted by the respondent No. 1 vide order dated 1st June, 2001. The respondent No. 2 issued notice dated 4th March, 2002 under Sub-section (2) of Section 21 of the Act proposing reopening of the assessment in view of the decisions of this Court in the case of Commissioner of Sales Tax, U.P. v. Kabar Khana, Turkmanpur 1985 A.L.J. 73 wherein it has been held that the goods purchased from the Kabaries is not exempt and liable to tax as old unserviceable goods and further as the name and address of the principals are not mentioned, the entire transaction is to be taxed at the hands of the petitioner in view of the definition of word "manufacture" given in Section 2(ee) of the Act. The order dated 1st June, 2001 passed by the respondent No. 1 as also the notice dated 4th May, 2002 issued by the respondent No. 2 are under challenge in the present writ petition on the ground that neither any satisfaction nor any reason has been recorded while granting of the approval for reopening the proceedings beyond the period of limitation and the same has been passed illegally and without application of mind. The factual matrix on which the notice dated 4th March, 2002 has been issued is also non-existence as the petitioner has not collected broken glass through I Kabaries but has sold them in its commission agency purchased within the State of Uttar Pradesh from unregistered dealer and the petitioner cannot be treated as dealer or importer. There was no fresh material on the basis of "which a reasonable belief about escaped assessment could be formed and the entire proceedings having being initiated merely on account of change of opinion is "unwarranted. The decision in the case of Kabar Khana, Turkmanpur (supra) relied upon by the respondent No. 2 is not applicable in the present case. In the counter affidavit filed by Sri P.K. Goel, Assistant Commissioner (Assessment), Trade Tax,

Modinagar, Ghaziabad, it has been stated that the decision in the case of Kabar khana, Turkmanpur (supra) was not taken into consideration at the time of passing of the assessment order and, therefore, the respondent No. 1 had rightly authorized the respondent No. 2 to initiate proceedings under Sub-section (2) of Section 21 of the Act. The notice dated 4th March, 2002 has rightly been issued. The old broken glass is liable to tax at the point of sale to consumer vide Notification No. ST-II-5785/X(10)(1) dated 7.9.1981 and as such the petitioner was liable to pay tax @ 5% which was completely over looked due to non application of mind by the respondent No. 2 and thus there was prima facie reason to believe that the turnover of the petitioner has escaped assessment to tax and as such the impugned show cause notice has been issued u/s 21(2) of the Act. The petitioner is required to give explanation/reply to the respondent No. 2, which shall be considered in accordance with law. The proceedings u/s 21(2) of the Act has been justified on the ground that it can be initiated even on a change of opinion.

RIVAL SUBMISSIONS:

3. We have heard Sri Kunwar Saxena, learned Counsel for the petitioner and Sri M.R. Jaiswal, learned standing Counsel for the respondents.

4. Learned Counsel for the petitioner submitted that the petitioner had disclosed the sale of broken glass for Rs. 1,30,27,655.45 purchased from unregistered dealer within the State of Uttar Pradesh in its commission agency account which was duly examined and verified by the respondent No. 2 in the course of assessment proceedings as would be clear from the assessment order dated 18th November, 1996, a copy of which has been filed as Annexure 1 to the writ petition. According to him the respondent No. 2 has categorically held that the aforesaid transactions is liable to tax on the point of manufacturer/importer and therefore, there is no liability of tax upon the petitioner. He, thus, submitted that the present proceedings u/s 21(2) of the Act have been initiated without application of mind and there was no material on the basis of which the respondent could have any reason to believe that the turnover had escaped assessment of tax. He further submitted that the respondent No. 1 had accorded sanction without any application of mind as in the order dated 1st June, 2002 no reason has been assigned as to why he is satisfied that the proceedings under the provisions of Section 21(2) of the Act are warranted. He further submitted that the petitioner cannot be treated as a manufacturer within the meaning of Section 2(ee) of the Act. In support of his various pleas, he has relied upon a recent decision of the Apex Court in the case of Jhunjhunwala and Ors. v. State of U.P. and Ors. 2007 U.P.T.C. 11

5. In reply Sri M.R. Jaiswal, learned standing Counsel appearing on behalf of the respondent submitted that the notice dated 4th March, 2002 issued by the respondent No. 1 is only a show cause notice and the petitioner should submit his reply and contest the matter before the authorities constituted under the Act. Thus, the writ petition is not maintainable. He further submitted that in the

original assessment order the respondent No. 2 had held that liability of tax on sale of broken glass a fleeted by the petitioner through its commission agency is not upon the petitioner as it is neither manufacturer nor importer, whereas the respondent No. 2 had not considered the binding decision of this Court in the case of *Kabar Khana, Turkmanpur* (supra) in which this Court has held that sale of empty bottles is liable to tax under the notification No. S.T. II-5785/X-10(1)80 - U.P. Act No. 15/48 Order 81 dated September 7, 1981 which fixes the liability at the point of sale to consumer and as the petitioner had purchased broken glass from unregistered dealer within the state of Uttar Pradesh the liability of paying the tax would be of the petitioner. He further submitted that u/s 21(2) of the Act the assessment could be reopened on the change of opinion also and in any event in the assessment order the respondent No. 2 had not taken into consideration the decision of this Court in the case of *Kabar Khana, Turkmanpur* (supra) which is binding. He has justified the proceedings already imitated. In support of the various pleas he has relied upon the flowing decisions:

1. *Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa*,
2. *Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.*,
3. *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*,
4. *Additional Commissioner (Legal) and Anr. v. Jyoti Traders and Anr.* 1999 U.P.T.C. 45;
5. *Shyam Babu Vaishya and Co. and Anr. v. Assistant Commissioner of Trade Tax, Khand-2, Banda and Ors.* 2004 U.P.T.C. 210;
6. *State of U.P. and Anr. v. Anil Kumar Ramesh Chandra Glass Works and Ors.* (2005) SCC 451;
7. *Trade Tax Officer, Saharanpur v. Royal Trading Co.* (2005) SCC 5 18.
6. In rejoinder Sri Kunwar Saxena, learned Counsel for the petitioner in rejoinder submitted that neither in the notice dated 18th April 2001 nor in the order dated 1st June, 2001 any reason has been given, therefore both the notice and the order are liable to be set aside on this ground alone.

DISCUSSION:

7. We have given our anxious consideration to the various pleas raised by the learned Counsel for the parties.

ALTERNATIVE REMEDY:

8. Taking up the preliminary objection regarding the availability of alternative remedy by way of showing cause and submitting of reply by the petitioner, raised by the learned standing Counsel we find that the Apex Court in the case of *State of U.P. v. Anil Kumar Ramesh Chandra Glass Works and Anr.* (2005) SCC 451, has

held as follows:

this Court had repeatedly held that Article 226 should not be permitted to be invoked in order to challenge show cause notices unless accepting the fact in the show cause notices to be correct, either no offence is disclosed or the show cause notices are ex facie without jurisdiction.

9. In the case of Royal Trading Co. (supra) the Apex Court has held that the High Court ignoring, the well-sealed law that against a mere issuance of a show-cause notice a court should be reluctant to interfere, purported to go into the facts and quashed the show-cause notice in a mechanical way. It has also been held that in our view the approach of the High Court was entirely wrong. All that had been done was that a show cause was issued. After the respondents tiled their reply, the notice may have been dropped or if the reply was not satisfactory based on the reply further inquiries could have been made by the appellants. Adjudication proceedings must not be stalled in the manner done by the High Court.

10. The Apex Court in the case of Standard Chartered Bank and Others Vs. Directorate of Enforcement and Others, has held that-

It is settled by the decisions of this Court that a writ of prohibition will issue to prevent a Tribunal or Authority from proceeding further when the Authority proceeds to act without or in excess of jurisdiction; proceeds to act in violation of the rules of natural justice; or proceeds to act under a law which is itself ultra vires or unconstitutional. Since the basis of the claim for the relief is found not to exist, the High Court rightly refused the prayer for the issue of a writ of prohibition restraining the Authorities from continuing the proceedings pursuant to the notices issued. As indicated by this Court in State of Uttar Pradesh Vs. Brahm Datt Sharma and Another, when a show cause notice is issued under statutory provision calling upon the person concerned to show cause, ordinarily that person must place his case before the Authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. On the facts of this case, it cannot be said that these notices are palpably without authority of law. In that situation, the appellants cannot successfully challenge the refusal by the High Court of the writs of prohibition prayed for by them.

11. In the case of L.K. Verma Vs. H.M.T. Ltd. and Another, , the Apex Court has held as under:

20. The High Court in exercise of its jurisdiction under Article 226 of the Constitution, in a given case although may not entertain a writ petition inter alia on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. Despite existence of an alternative remedy, a writ court may exercise its discretionary jurisdiction of judicial review inter alia in cases where the court or the tribunal lacks inherent jurisdiction or for enforcement of a fundamental right or if there has been a violation of a principle

of natural justice or where vires of the act is in question in the aforementioned circumstances, the alternative remedy has been held not to operate as a bar. See *State of Rajasthan Vs. Prakash Chand and Others*, *Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd.*, *State of H.P. v. Gujarat Ambuja Cement Ltd. and Anr.* (2005) 6 SCC 499.

12. In the case of *Star Paper Mills Ltd. v. State of U.P. and Ors.* AIR 2000SCW 5782, the Apex Court has held as follows:

5. The issues relating to entertaining writ petitions when alternative remedy is available, were examined by this Court in several cases and recently in *State of Himachal Pradesh and Ors. v. Gujarat Ambuja Cement Ltd. and Anr.* 2005 SCC 499.

6. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

7. Constitution Benches of this Court in *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, ; *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, ; *Union of India (UOI) Vs. T.R. Varma*, ; *State of U.P. and Ors. v. Mohammad Nooh* AIR 1958 SC 86 ; and *K.S. Venkataraman and Co. Vs. State of Madras*, , held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

8. Another Constitution Bench of this Court in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in *N.T. Veluswami Thevar Vs. G. Raja Nainar and Others*, ; *Municipal Council, Khurai and Another Vs. Kamal Kumar and Another*, ,

Siliguri Municipality and Others Vs. Amalendu Das and Others, ; S.T. Muthusami Vs. K. Natarajan and Others, ; Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, ; Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, A. Venkatasubbiah Naidu Vs. S. Challappan and Others, ; anr L.L. Sudhakar Reddy and Others Vs. State of A.P. and Others, ; Shri Sant Sadguru Janardan Swami (Moingirid Maharaj) Sahakari Dugdha Utpadak Sanstha and Another Vs. State of Maharashtra and Others, Pratap Singh Vs. State of Haryana and Others and Shri Bhajan Lal and Others, and G.K.N. Dnveshafts (India) Ltd. v. Income Tax Officer and Ors. 2003 SCC 72.

9. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , this Court held, that: the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

10. In Veerappa Pillai Vs. Raman and Raman Ltd. and Others, ; Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, ; Shri Ramendra Kishore Biswas Vs. The State of Tripura and Others, ; Shivgonda Anna Patil and Others Vs. State of Maharashtra and Others, ; C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, ; Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, ; H.B. Gandhi v. Gopinath and Sons 1992 (Suppl.) 2 SCC 312 ; Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ; Tin Plate Co. of India Ltd. Vs. State of Bihar and Others, ; Sheela Devi Vs. Jaspal Singh, and Punjab National Bank Vs. O.C. Krishnan and Others, , this Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

11. If, as was noted in Ram and Shyam Company Vs. State of Haryana and Others, the appeal is from "Caesar to Caesar"s wife" the existence of alternative remedy would be a mirage and an exercise in futility. There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceeding- are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an above of process of law the High Court in an appropriate case can entertain a writ petition.

12. The above position was recently highlighted in U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, .

13. The question whether the Assessing Officer had reasons to believe is not a question of limitation only but is a question of jurisdiction, a vital thing, which can always be investigated by the Court in an application under Article 220 of the Constitution as held in *Daulatram Rawatmal Vs. Income Tax Officer and Another*, ; *Raja Pid Naik Vs. Agricultural Income Tax Officer, Yadgiri and Another*, ; *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, ; *C.M. Rajgharia v. ITO (1975) 98 1TR 486 (Pat)* and *Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur*, .

14. The words "has reason to believe" are stronger than the words "is satisfied". The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable or, in other words, it must be based on reasons which are relevant and material as held by the Apex Court in *Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others*, .

15. The expression "reason to believe" in Section 147 does not mean purely subjective satisfaction on the part of the Assessing Officer. The belief must be held in good faith; it cannot be merely a pretence. It is open to the Court to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Assessing Officer in starting proceedings u/s 147 is open to challenge in a Court of law as held in *S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore*, ; *Madhya Pradesh Industries Ltd. Vs. The Income Tax Officer, Nagpur*, ; *Sowdagar Ahmed Khan (Deceased) (By his Legal representatives) Vs. Income Tax Officer, Nellore*, , *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, ; *Income Tax Officer, Income Tax-cum-Wealth Tax Circle II, Hyderabad Vs. Nawab Mir Barkat Ali Khan Bahadur, Hyderabad*, ; *The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow*, and *State of Punjab v. Balbir Singh (1994) 3 SCC 2999*.

16. The formation of the required opinion and belief by the Assessing Officer is a condition precedent. Without such formation, he will not have jurisdiction to initiate proceedings u/s 147. The fulfillment of this condition is not a mere formality but it is mandatory. The failure to fulfill that condition would vitiate the entire proceedings as held by the Apex Court in the case of *Johri Lal (H.U.F.), Agra Vs. The Commissioner of Income Tax*, and *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta*, . The reasons for the formation of the belief must have rational connection with or relevant bearing on the formation of belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of his belief that there has been escapement of income of the assessee from assessment in the particular year. It is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to

escapement of income of the assessee from assessment, as held by the Hon'ble Supreme Court in the Case of Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, . 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 reasonably entertain the belief, the conclusion would be inescapable that the Assessing officer could not have reason to belief. 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. Vs. Income Tax Officer and Others,

17. In the case of GKN Driveshafts (India) Ltd. (supra) the Apex Court has held as follows:

When a notice u/s 148 of the Income Tax Act, 1961, is issued, the proper course of action for the notice is to file the return and, if he so desires, to seek reasons for issuing the notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notices is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order.

On receiving notices u/s 148 the appellant filed the returns. The appellant also received notices u/s 143(2) calling for further information on certain points in connection with the returns. Thereupon the appellant filed writ petitions challenging the notices. The High Court dismissed the writ petitions holding that the petitions were premature and the appellant could raise its objections to the notices by filing reply to the notices before the G.K.N. Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, . The appellant preferred appeals and the Supreme Court dismissed the appeals, observing that since the reasons for reopening of assessments u/s 148 had been disclosed in respect of five assessment years, the Assessing Officer had to dispose of the objections, if filed by passing a speaking order before proceeding with the assessments for those years.

18. The Constitution Benches of the Hon'ble Supreme Court in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, ; Union of India (UOI) Vs. T.R. Varma, ; State of U.P. and Ors. v. Mohammad Nooh AIR 1958 SC 86 and K.S. Venkataraman and Co. Vs. State of Madras, , has held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision could not be adopted.

19. It may be mentioned here that in the present case the petitioner has

challenged the order dated 1st June, 2001 passed by the Additional Commissioner, Grade I, Trade Tax, Zone, Ghaziabad - respondent No. 1 against which there is no provisions to prefer any appeal before any of the statutory authority. An appeal u/s 9 of the U.P. Trade Tax Act lies against an order passed by the Assessing Authority. The Additional Commissioner who is included in the definition of the word "Commissioner" is not the assessing authority. Further against the order dated 1st June, 2001 passed by the Additional Commissioner appeal cannot be preferred u/s 10 of the Act directly before the Trade Tax Tribunal. In the present case apart from the order dated 1st June, 2001 passed by the Additional Commissioner- respondent No. 1 the validity of the notice dated 4th March, 2002 issued u/s 21 of the Act has also been challenged on the ground that the respondent No. 2 who is the assessing authority did not have any reasons to believe for initiating proposal for reassessment. In view of the principle laid down by the Apex Court in the aforesaid decisions we are of the considered opinion that the plea of alternative remedy raised by the learned Counsel for the petitioner cannot be accepted.

20. The aforesaid two decisions relied upon by the learned standing Counsel would not be applicable to a case where an officer assumes to issue notice like the present one issued u/s 21(2) of the Act where in a case certain condition is a must for assuming the jurisdiction and where the very extent of conditions to be fulfilled is under challenge. The Court cannot exercise its power by declining to entertain the petition under its extraordinary jurisdiction under Article 226 of the Constitution. Notice u/s 21(2) of the Act is a jurisdictional notice and can be challenged.

21. Before going into the merits of the matter it would be apt to reproduce the relevant provisions of the Act which may have material bearing on the issues involved herein:

Statutory Provisions of the U.P. Trade Tax Act, 1948

Section 2. Definitions.

22. In this Act, unless there is anything repugnant in the subject or context:

(c) "Dealer" means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes-

(i) a local authority, body corporate, company, any co-operative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, arhti, commission agent, deputed agent, or any other mercantile agent, by whatever name called, and whether of the same description as here in before mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal, whether

disclosed or not;

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not, and whether the offer of the intending purchaser is accepted by him or by the principal or nominee of the principal;

(v) a Government which, whether the course of business or otherwise, buys, sells, supplies or distributes goods, directly or otherwise for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(v) every person who acts with in the State as an agent of a dealer residing outside the State, and buys, sells, supplies or distributes goods in the State of acts on behalf of such dealer as-

(A) a mercantile agent as defined in the Sale of Goods, Act, 1930, or

(B) an agent for handling of goods or documents of title relating to goods; or

(C) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or such payment;

(vi) a firm or a company or other body, corporate, the principal office or head quarter where of is outside the State, having a branch or office in the State, in respect of purchases or sales, supplies or distribution of goods; through such branch or office;

Provided that a person who sells agricultural or horticultural produce grown by himself or grown on any land in which he has interest, whether as owner, usufructuary mortgagee tenant, or otherwise, or who sells poultry or dairy products from fowls or animals kept by him shall in respect of such goods, be treated as a dealer.

(vii) every person who carries on the business of property in goods (whether as goods or in some other term) involved in the execution of a works contract;

(viii) every person who carries on business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.;

(e) "importer" in relation to any goods means the dealer who makes the first sale of such goods after their import into the state.

(e-1) "Manufacture" means producing, making, mining, collecting, extracting, altering, ornamenting, finishing, or otherwise processing, treating or adapting any goods; but does not include such manufacture of manufacturing processes as may be prescribed;

(ee) "Manufacture" in relation to any goods means the dealer who makes the first sale of such goods in the State after their manufacture and includes:

- (i) a dealer who sells bicycles in completely knocked down form;
- (ii) a dealer who makes purchases from any other dealer not liable to tax on his sale under the Act other than sales exempted u/s 4, 4-A and 4-AAA.

23. The aforesaid definition has been substituted by the U.P. Trade Tax (Amendment) Act, 1997 (U.P. Act No. 11 of 1997) published in the U.P. Gazette Extra-ordinary dated 8.8.1998.

24. Before its amendment the term manufacturer was defined as follows:

(ee) "Manufacturer" in relation to any goods means the dealer who makes the first sale of such goods in the State after their manufacture and includes a dealer who sells bicycles in completely knocked down form.

(h) "Sale" with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration and includes-

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods whether as goods or in some other form involved in the execution of a works contract;

(iii) the delivery of goods on hire purchase or any system of payment by installments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration; and

(v) the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and

(vi) the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration;

Explanation I-A sale or purchase shall be deemed to have taken place in the State,-

(i) in a case falling under Sub-clause (ii) if the goods are in the State at the time of transfer of property in such goods; whether as goods or in some other form involved in for the executing of the works contract, notwithstanding that the agreement for the works contract has been wholly or in part entered into outside the State;

(ii) in a case falling under Sub-clause (iv) if the goods are used by the lessee

within" the State during any period, notwithstanding that the agreement for the lease has been entered into outside the,; State or that the goods have been delivered to the lessee, outside the State.

Explanation-II - Notwithstanding anything contained in this Act, two independent sales or purchases shall, for the purposes of this Act, be deemed to have taken place-

(a) when the goods are transferred from a principal to his selling agent and from the selling, agent to his purchaser,

(b) when the goods are transferred from the seller to a buying agent and from the buying agent to his principal, if the agent is found, in either of the cases aforesaid,-

(i) to have sold the goods at one rate and passed on the sale proceeds to his principal at another rate; or to have purchased the goods at one rate and passed them on to his principal at another rate; or

(ii) to have purchased the goods at one rate and passed tin n on to his principal at another rate; or

(iii) not to have acceded, to his principal for the entire collection or deduction made by him, in the sales or purchases effected by him on behalf of his principal; or

(iv) to have acted for a fictitious or non-existent principal;

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 a rate lower than 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, full assessment as the case may be.

Explanation I:

Nothing in this Sub-section 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 passed 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 sub-section, 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 two years from the end of such year of March 31, 1998, 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 re-assessment may be from the en I of such year notwithstanding that such assessment or re-assessment may involve a change of opinion:

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

Provided also that if the eligibility certificate granted u/s 4-A has been amended or cancelled by the Commissioner under Sub-section (3) of Section 4-A, the order of assessment or re-assessment may be made within one year from the date of receipt by the assessing authority of the copy of the order amending or canceling she aforesaid certificate or by March 31, 1995, Whichever is later:

Provided also that the assessment or re-assessment for the assessment year 1989-90 may be made by March 31, 1995.

(3) Where the notice under Sub-section (1) for any assessment year has been served within the period specified in Sub-section (2), the order of assessment or reassessment in! pursuance thereof may be made within six months, after the expiration of such period.

(4) If an. order of assessment s set aside and the case is remanded for reassessment by any authority under the provisions of this Act or by a competent Court, the order of re-assessment may be m;le within one year from the date of receipt by the Assessing Authority of the copy of the order remanding the case, or by December 31, 1982, whichever is later.

(4-A) If an order of assessment is quashed on the ground of want of jurisdiction of the assessing authority on any other like ground, by any competent authority or Court, fresh order of assessment may be made by the assessing authority having jurisdiction within one year from the date of receipt by the assessing authority whose order is so quashed, of the copy of order of such authority or

court by March, 31 1993 whichever is later.

(5) If an order of assessment or reassessment for any assessment year is set aside u/s 30, a fresh order of assessment or reassessment for that year may be made within six months from the date on which such earlier order was set aside.

(5-A) If an expert order of assessment or reassessment or penalty passed against a sick unit is set aside by the State Government by an order under Sub-section (2) of Section 38, a fresh order of assessment or re-assessment or penalty, as the case may be, for that year may be made within one year from the date of receipt of such order of State Government by the assessing authority concerned.

(6) Where the proceeding for assessment or re-assessment for any assessment year remain stayed under the orders of any court or authority, the period commencing on the date of stay order and ending with the date of receipt by the Assessing Authority concerned of the order vacating the stay, shall be excluded in computing the period of limitation provided in this section:

Provided that if in so computing,, the period of limitation comes to less than six months, such assessment or re-assessment may be made within six months from the date of receipt by the Assessing Authority of the order vacating the stay.

(6-A) The period during which any appeal or other proceeding in respect of any other assessment; or re-assessment or any other matter of assessee remained pending before the High Court or the Supreme Court, involve a question of law having a direct bearing on the assessment or re-assessment; in question, shall be excluded in computing the period of limitation provided in this section.

(7) Where in the assessment or re-assessment of a dealer for any assessment year, any Assessing Authority.-

(a) has included any turnover and any superior authority or Court has, in exercise of the powers lawfully vested in it, held such turnover of relate to the assessment-

(a) of such dealer or any other assessment year, or

(iii) of such dealer under the Central Sales Tax Act, 1956, or

(b) has not included any turnover on the ground that it relates to assessment under the Central Sales Tax Act. 1956 and any superior Authority or Court has, in exercise of the powers lawfully vested in it, held such turnover to relate to the assessment of that dealer under his Act, whether for such assessment year or any other assessment year, then nothing contained in this Section limiting the time shall apply to assessment or re-assessment whether under this Act or under the Central Sales Tax Act, 1956 of such dealer or such other dealer, relating to such assessment year or such other assessment year, as tie case maybe.

25. From a perusal of the aforesaid provisions we find that very vide a d inclusive

meaning of the word "dealer" has been given under the Act. It, inter alia, includes the commission agent also. Importer has been defined to mean the dealer who makes the first sale of such goods after their import in the State where as manufacture has been given artificial meaning and includes even such process which ordinarily may not amount to manufacture. Manufacturer during the relevant period was defined to mean a dealer who makes first sale of goods in the State after their manufacture whereas sale under the Act had been, given, a very wide meaning and an inclusive definition has been given in Explanation II. Two independent sales or purchases are deemed to have taken place when the goods have been transferred to selling agent and from selling agents to the purchaser. u/s 21 of the Act the Assessing Authority upon having reasons 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 or where the tax rate applied is law or any deductions or exemptions have been wrongly allowed has been empowered to make assessment order or reassessment order as the case may be. However, under Sub-section (2) of Section 21 of the Act the limitation for making re-assessment is two years from the end of such assessment year or March 31, 1998 whichever is later. First proviso to Sub-section (2) of Section 21 of the Act provides for extended period of limitation of six years from the end of such year or March, 31, 2002 whichever is later. Under the said proviso action can be taken only after the Commissioner either suo motu or on the basis of the reasons, recorded by the assessing authority is satisfied and he authorizes the assessing authority to make assessment order or reassessment order which can also be in a case involving a change of opinion.

MERITS OF THE CASE

26. We find that in the original assessment order dated 18th November, 1996 the respondent No. 2 while dealing with the issue of tax liability on sale of broken glass of Rs. 1,30,27655.45 effected by the petitioner in its commission agency, he has held as follows:

blds :0 1]30]27]655 iS0 45 dh fcdzh deh"ku [kkrs es viath0 ls izkarh; [kjhn czksfdu Xykl dh fn[kk;h x;h gS ftl ij fuekZrk @ vk;krdrkZ ds fcUnq ij dj ns; gksus ds dkj.k dksbZ dj nkf;Ro O;kikjh ds Lrj ij ugh curk gS Abl deh"ku [kkrs es dh fcdzh ij nkf[ky izksfQV @ [kkrs ,dkm.V ds vuqlkj :0 2]85]052 iS0 65 dk deh"ku izkfIr fd;k tkuk fn[kk;k x;k gS] ftldk ys[kks ls lR;kiu fd;k x;k gS

Accordingly, no tax was imposed.

27. The Additional Commissioner - respondent No. 1 had granted approval to the proposal of respondent No. 2 to reopen the assessment under Sub-section (2) of Section 21 of the Act after issuing show cause notice dated 18th April, 2001. It appears that the petitioner had not submitted any objection/reply before the Additional Commissioner- Respondent No. 2 as there is nothing on record to show otherwise. The Additional Commissioner had granted approval vide order

dated 1st June, 2001, which appears to be a formal order. The order dated 1st June, 2001 is reproduced below:

vkns"k

dfe"kuj O;kikj dj] m0iz0 y[kum ds vkns"k la[;k fof/k& rhu?1?&4&/
kkjk&21&2000&2001@1541@O;kikj dj fnukad 16 uoEcj 2000 ds vuqikyu es]
eS ,fMf"kuy dfe"kuj xzsM&1 O;kikj dj tksu xkft;kckn] mRrj izns"k O;kikj dj vf/
kfu;e dh /kkjk 21?2? ds ijUrq es fn;s x;s vf/kdkjks ds vUrZxr fMIVh dfe0 ?dk;Z?
O;k0 dj laHkkx & ch xkft;kckn ds i= la[;k 5033 fnukad 22&3&2001 ds lUnHkZ es
loZJh ,l0 ds0 V?sMIZ esknhuxj ds dj fu/kkZj.k o"kZ 94&95 ds izkUrh;@dsfUnz;
okn ds /kkjk 21?2? ds vUrZxr dj fu/kkZj.k@iqu% dj fu/kkZj.k fd;s tkus dh
dk;Zokgh gsrq vuqefr jktLo fgr es iznku djrk gWw A

mijksDr ekeys ls lEcU/kr dk;Zokgh;ks ;fn lEHkkfor gksrh gS] rks mlds lEcU/k es
lEcU/kr vf/kdkjh;ks }kjk vyx ls voxr dj;k tk; rFkk O;kikjh vkfn dks fu;ekuqlkj
Ik;kZIr volj iznku djus ds mijkUr mDr okn dk fuLrkj.k fu/kkZfjr le;kof/k ds
vUrZxr fd;k tk; rFkk d`r dk;Zokgh ls bl dk;Zy; dks Hkh voxr dj;k tk; A

ts0 ih0 JhokLro ,fM"kuy dfe"kuj xzsM &1 O;kikj dj tksu] xkft;kckn

Coming to the notice dated 4th March, 2002 issued by the respondent No. 2 under the provisions of Section 21(2) of the Act we find that the notice has been issued on the following grounds:

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deh"ku [kkrs es dh x;h [kjhn&fcdzh dks djeqDr ekuuk vfu;fer ekuk gS ,oa bl ij
iqjkuh o fu"iz;kst; oLrqvks dh HkkWfr djns;rk ekuh x;h gSA

2& vkius deh"ku [kkrs es :0 1]30]27]655 iS0 45 dks czksdu Xykl dh djeqDr fcdzh
fn[kk;h gS D;ksfd vkids vuqlkj ;g eky izkUr ds vUnj ls [kjhnk x;k FkKA ftl ij
fuekZrk@vk;krdrkZ ds fcUnq ij djns; gSA deh"ku [kkrs es :0 2]95]052 iS0 65 dk
deh"ku de djds :0 1]27]42]602 iS0 80 dh fcdzh fn[kk;h x;h gS Avkr [kkrs es
fizafliy dk iwjk uke o irk vafdr ugh gS ,oa ;g Kkr ugh gksrk gS fd fdlus deh"ku
izkIr fd;k gS AO;kikj dj vf/kfu;e dh /kkjk &2 bZbZ es fuekZrk dh ifjHkk"kk
dks /;ku es j[krs gq, dckMh;ks ds ek;/e ls bdB~Bk dj;k;s x;s czksdu Xykl ds vki
fuekZrk ekus tk;sxs ,oa bl fcdzh ij vkidh dj ns;rk gksxh A

28. From the grounds mentioned in the notice it appears that even though reliance has been placed on the decision of the this Court in the case of Kabar Khana, Turkmanpur (supra) the emphasis is that the liability on sale of broken glass in commission agency for Rs. 1,30,27,655.45 is upon the petitioner as it has been purchased from within the State of Uttar Pradesh and is liable to tax at the point of manufacturer or importer in view of the definition given u/s 2(ee) of the Act. In the case of Kabar Khana, Turkmanpur (supra) this Court was considering a case where the assessee was dealing in plastic, chappals, sutli, empty bottles, scrap etc. He had not accepted any taxable turn over. A best judgment assessment was made and tax was imposed which was ultimately

upheld by the Tribunal. The Tribunal had held that the liability of tax could not be fastened on the assessee in the absence of any finding as neither the assessee was a manufacturer nor importer and as he is neither manufacturer nor importer of old and discarded plastic and glass goods and even though it has been sold to the consumer, no tax can be imposed on the assessee. This Court has relied upon the notification No. S.T. II-5785/X-10(1)80 ? U.P. Act No. 15/48 Order 81 dated September 7, 1981; wherein the 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 was liable to tax on the point of sale to Consumer. This Court had held that the Tribunal had committed an error in ignoring the aforementioned notification wherein the goods mentioned therein are liable to tax on the point sale to consumer. Even though in the aforesaid decision this Court had held old, discarded and unserviceable plastic and glass goods to be liable to tax on the point of sale to consumer. Even though in the aforesaid decision this Court had held that old, discarded and unserviceable plastic and glass goods are liable to tax on the point of sale to consumer under the notification dated 7th September, 1981, it appears that the respondent No. 2 has given proposal to impose tax on broken glass which have been purchased by the petitioner from unregistered dealer within the State of Uttar Pradesh and sold in its commission agency business on the ground that petitioner is the manufacturer or importer within the meaning of Section 2(ee) of the Act.

29. The provisions of Section 2(ee) of the Act as substituted in the year 1997 came up for consideration before the Apex Court in the case of *Jhunjunwala and Ors.* (supra) and the Apex Court has held as follows:

9. According to the High Court, the object of enacting amendment to Section 2(ee) was to prevent evasion of tax. Even if the aforesaid object is in any way relevant for the purpose of the present dispute, the object appears to be to levy tax on manufacturer-dealer and/or manufacturer-dealer who did not pay tax as his turnover did not exceed Rs. (sic) lakh in any assessment year.

10. It was, therefore, necessary to be established that the seller was a manufacturer-dealer, Commissioner's circular could not have created a liability by drawing inference that the purchases from fanners v ho have been grown, cut or sawn timbers, ballis, bamboos will bring them within the umbrella of expression "manufacturer". The view that tax liability has been prescribed at the manufacturers and importers point and therefore after the amendment traders who purchase the timber from unregistered dealers fall within the category of manufacturer is indefensible. There is no logic for such a conclusion, where the statutory definition does not say so. It needs no emphasis that the circular cannot create tax liability. That is precisely that has been done which the High Court has failed to notice. Therefore, to that extent the circular cannot be of any assistance for levying tax. The crucial words in the definition of "manufacturer" is the sale of goods "after their manufacture". As noted above, the expression "manufacture" cannot cover types of transactions referred to in the

Commissioner's circular whether an activity amounts to manufacture has to be factually determined. There cannot be a direction to treat a particular type of transaction to be a manufacturing activity without examining the factual scenario. There cannot be a generalization in such matters.

30. From the aforesaid decision of the Apex Court it is now well set led that there cannot be a direction to treat a particular type of transaction to be a manufacturing activity without examining the factual scenario and, therefore, there cannot be a generalization in such matters.

31. In the case of Maharaj Kumar Kamal Singh (supra) the Apex Court was dealing a case of reassessment made u/s 34(I)(b) of the India Income Tax Act, 1922 which empower the assessment authority to reopen the cases on information. It has held as follows.

On the other hand, one of the case specially mentioned in Section 34(I)(b) necessarily postulates that the word "information" must have reference to information as to law. Where in consequence of information in this possession, the Income Tax Officer has reason to believe that income has been assessed at too low a rate, he is empowered to revise the assessment; and there can be no doubt that the belief of the Income Tax Officer that any given income has been assessed at too low a rate may in many cases be due to information about the true legal position in the matter of the relevant rates. If the word "information" in reference to this class of cases must necessarily include information as to law, it is impossible to accept the argument that, in regard to the other cases falling under the same provision, the same word should have a narrower and a more limited meaning. We would accordingly hold that the word "information" in Section 34(I)(b) includes information as to the true and correct state of the law and so would cover information as to relevant judicial decisions. If that be the true position, the argument that the Income Tax Officer was not justified in treating the Privy Council decision in question as information within Section 34(I)(b) cannot be accepted.

32. In the case of Shyam Babu Vaishya and Co. (supra) this Court has held that Section 21 of the Act is wider than that of 147(a) of the Income Tax Act, 1961. The escapement envisaged by Section 21 of the Act need not necessarily spring from a source extraneous to the original record. Action u/s 21 can be taken on the basis of material already on record at the time of the original assessment, if the escapement of assessment to tax was a result of lack of care or inadvertence on the part of the assessing officer.

33. This Court in the case of Commissioner of Sales Tax v. M.R. Khan Traders, Ghaziabad 1987 U.P.T.C. 1520 was considering a case where the assessee was carrying on business in purchase and sale of empty bottles from Kabaris. The assessee denied his liability to tax in respect of sales of legally purchased bottles from Kabaris. The tax was imposed treating it to be a manufacturer. The tribunal held that the assessee had made purchases from hawkers and has not collected

empty bottles itself which is subjected to tax in its hands and, therefore, it was not covered by the definition of the term "manufacture" as contained in Section 2(e-1) of the Act. This Court while dismissing the revision has held as follows:

It is not necessary for me to go into details of the controversy raised in this case, inasmuch as this Court had an occasion to consider this question at several earlier occasion. Some of the decisions deciding this controversy are reported as Commissioner of Sales Tax v. Gram Udyog Lalitpur 1984 UPTC 501; Commissioner of Sales Tax v. Govind Ram Harbans Lal 1984 UPTC 1006 and Ram Lal Balak Ram, v. Commissioner of sales Tax U.P. 1986 UPTC 195. The proposition of law laid down in the above decisions squarely apply to the facts found in the instant case. Since the view taken by the Tribunal is in consonance with the view expressed by this Court, in the cases aforesaid, I do not find any merit in this revision. This revision is accordingly dismissed with costs.

34. In the case of Ram Lal Balak Ram v. Commissioner of Sales Tax 1986 UPTC 195 this Court has held as follows:

In the teeth of finding recorded by the Tribunal that poppy seeds were not imported by the assessee, the assessee cannot be held to be importer. Similarly, the assessee cannot also be held to be a manufacture inasmuch as, he did not collect the same. Collection in fact was made by the farmers and not by the assessee and the assessee only purchases those poppy seeds from the farmers.

35. In State of State of Karnataka and Others Vs. C. Lalitha, , the Apex Court has observed:

A judgment, as is well known, is not to be read as a statute. But, it is also well known that the judgment must be construed as if it had been rendered in accordance with Law.

36. In the case of Gajraj Singh and Others Vs. State of U.P. and Others, the Appex Court has held:

A doubt arising from reading a judgment of the Court can be resolved by assuming that the judgment was delivered consistently with the provisions of law and therefore a course or procedure in departure from or not in conformity with statutory provisions cannot be said to have been intended or laid down by the Court unless it has been so stated specifical.

37. In the case of Hiralal Rattanlal etc. etc. (supra) the Apex Court has held that a proviso may be separate provisions and may substantially alter the main section.

38. In the case of Parson Tools and Plants, Kanpur the Apex Court has held as follows:

16. If the legislature willfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a cases omissus in a statute, the language of which is otherwise plain and unambiguous; the Court is not

competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation, by analogy or implication, something that it thinks to be a general principle of Justice and equity. To do so "would be entrenching upon the preserves of Legislature", the primary function of a court of law being *jus dicere* and not *jus dare*.

39. In the case of *Joyti Traders* (supra) the Apex Court has held that when the provision of law is explicitly, it has to operate fully and there could not be any limit to its operation.

40. In view of the principles laid down by the Apex Court in the aforesaid cases, it has to be held that the cases of *Kabar Khana*, *Turkmanpur* (supra), *M.R. Traders* and *Ram Lal Balak Ram* (supra) have been decided in accordance with the relevant provisions.

41. The definition of word "manufacturer" in Section 2(ee) U.P. Trade Tax (Amendment) Act, 1997 is not retrospective in nature, therefore, the amended definition would not be applicable in the assessment in question which is 1994-95 and it shall be governed by the old definition. The word "importer" has been defined in Section 2(e) of the Act which reads as follows:

(e) "Importer" in relation to any goods means the dealer who makes the first sale of such goods after their import into the State.

42. From a reading of the aforesaid definition of the words manufacture and importer as it stood during the relevant period the petitioner cannot be treated either as an importer or as a manufacturer because he has not effected first sale of goods after their import or after its manufacture in the State of Uttar Pradesh.

43. So far as the question that the petitioner is being treated as manufacturer is concerned, we may mention here that the definition of word "manufacturer" as it stood during the relevant period, various processes mentioned therein should be done by the person concerned, i.e. the dealer either by itself or got done on its behalf. If the process is not being carried out by the dealer he would not be a manufacturer in respect thereof.

NATURAL JUSTICE:

44. The first proviso to Sub-section (2) of Section 21 or in that matter provisions of Section 21 of the Act do not provide for any opportunity of hearing to the dealer by the Additional Commissioner/Commissioner before he grants approval to the proposal if any made by the assessing authority for making the reassessment.

45. In the case of *Rajesh Kumar and Others Vs. D. Commissioner of Income Tax and Others*, the Apex Court was considering the provisions of Section 142(2-A) of the Act which Empowers the Assessing Officer after obtaining the approval of the Commissioner to direct for special audit of the books of account of the assessee. The provisions of Section 142(2-A) of the Act did not provide for giving

of any opportunity of hearing by the Commissioner to the assessee. The Apex Court has held as follows:

53. The factors enumerated in section 142(2A) of the Act, thus, are not exhaustive. Once it is held, that the assessee suffers civil consequences and any order passed by it would be prejudicial to him, principles of natural justice must be held to be implicit. The principles of natural justice must be required to be applied inter alia to minimize arbitrariness.

54. It is trite, even if there is a possibility that the Tribunal would correctly follow the statutory provisions, still compliance of principles of natural justice would be required. See *R. v. Kensington and Chelsea Rent Tribunal ex p. MacFarlane* (1974) 1 WLR 1486

55. Justice, as is well known, is not only to be done but must manifestly seem to be done. If the assessee is put to notice, he could show that the nature of accounts is not such which would require appointment of special auditors. He could further show that what the assessing officer considers to be complex in fact is not so. It was also open to him to show that the same would not be in the interest of the Revenue.

It further held as follows:

6. If a hearing is given, however, need not be elaborate. The notice issued may only contain briefly the issues which the assessing officer thinks to be necessary. The reasons assigned therefore need not be detailed ones. But, that would not mean that the principles of justice are not required to be complied with. Only because certain consequences would ensue if the principles of natural justice are required to be complied with, the same by itself would not mean that the court would not insist on complying with the fundamental principles of law. If the principles of natural justice are to be excluded, the Parliament could have said so expressly. The hearing given is only in terms of Section 142(3) which is limited only to the findings of the special auditor. The order of assessment would be based upon the findings of the special auditor subject of course to acceptance by the assessing officer. Even at that stage the assessee cannot put forward a case that power u/s 142(2A) of the Act had wrongly been exercised and he has unnecessarily been saddled with a heavy expenditure. An appeal against the order of assessment, as noticed hereinbefore, would not serve any real purpose as the appellate authority would not go into such a question since the direction issued u/s 142(2A) of the Act is not an appellate order.

46. In the case of *Manaktala Chemicals Pvt. Ltd. v. State U.P. and Ors.* 2006 UPTC 1128 this Court has held as follows:

9. Section 21(2) though specifically does not say that opportunity is to be afforded to the assessee before granting the sanction by the Commissioner but the principle is well recognized, that even if there is no specific provision in the Statute, such opportunity must be given to make the action taken or order

passed in consonance with the principles of natural justice, unless, of course, the Statute specifically excludes the applicability of principle of natural justice, such an opportunity is deemed to be inbuilt in the provision, in case an action taken or order passed would effect the rights of any person adversely. In the case of Indian Oil Corporation, Agra v. Commissioner Trade Tax, reported in 1999 UPTC . 365, a division bench of this Court after holding the Circular issued on 7th July, 1992 binding on the assessing authority held that the dealer should have been given a hearing in the matter before any reassessment order could have been passed, and since such an opportunity was not given, the order of approval granted by the higher authority was quashed.

10 There is one more reason for holding that the opportunity has to be given to the assessee or the dealer by the Commissioner before he grants approval for initiating proceedings u/s 21 in the extended period of limitation which stands spelt out from the language used in the first proviso Attached to Sub-section 2.

11. The proviso confers power and gives jurisdiction/authority to the Commissioner if he is Satisfied either on his own or on the basis of the reasons recorded by the assessing authority that it is just and expedient to either assess or re-assess the dealer, only then, he would authorize the assessing authority to make such assessment or re-assessment within the extended period of limitation. The plain and simple meaning of the aforesaid proviso is that the permission/approval for such re-assessment of alleged escaped turnover is to be granted by the Commissioner only on being satisfied either on his own or on the basis of the reasons recorded by the assessing authority that; it is just and expedient to re-open the assessment.

12. Once the proviso postulates recording of reasons by the assessing authority, it necessarily obligates the Commissioner or the Additional Commissioner to consider such reasons and make them known to the assessee, before he finally forms his satisfaction and even if the Commissioner or the higher authority on his own reasons feels satisfied that it is just and expedient to re-open the assessment, it would still require that such reason must be made known to the dealer also so that before the assessment is re-opened he may have an opportunity to satisfy the higher authority that the reasons assigned the assessing authority are not relevant or they are incorrect or they do not make out a legal ground for reopening of the assessment and likewise if the Commissioner or the higher authority proposes to authorize the assessing authority for reopening the assessment on his own, then also reasons for such satisfaction have to be supplied to the dealer, so that he may have a say to convince the higher authority for not authorizing the assessing officer for reopening the assessment.

13. Whether the Commissioner or the higher authority permits the assessing officer to proceed under the extended period of limitation either on his own or on the reason recorded by the assessing authority, in both cases, the dealer would have a right to put forward his defence for not reopening the assessment. This

opportunity, if is excluded or shredded out from the aforesaid proviso, it would leave tin dealer with no opportunity/remedy to challenge the very authority of the assessing officer to reopen the assessment nor there would be any opportunity to challenge the approval granted by the Commissioner under any of the remedies under the Act,

14. When an order is passed on the basis of the reasons recorded, it naturally means that the reason must be rationale, genuine and relevant. Any reason which cannot be termed as rationale, genuine or relevant would not make out a case reopening of the assessment and for that matter also, the dealer has to be associated in the proceedings initiated seeking approval from the Commissioner or the Additional Commissioner, as case may be.

15. Admittedly, the Commissioner before granting sanction/approval did not give any opportunity to the petitioner and obviously he has not recorded any reason for being satisfied that it is just and expedient to reopen the assessment while granting sanction on 29th March, 1993. The order passed by the Commissioner simply reproduces the language used in the aforesaid proviso but it does not disclose any reason for reaching the said conclusion. The order, thus, granting approval itself is liable to be quashed on the aforesaid ground alone.

47. The same view has been taken by this Court in the ease of Olympic Zippers Pvt. Ltd. v. Commissioner of Trade Tax and Anr. 2007 UPTC 146.

48. In the case of Manaktala Chemicals Pvt. Ltd. (supra) this Court has held that reasons are required to be given the Additional Commissioner while granting sanction. The Apex Court in the case of Rajesh Kumar (supra) has held as follows:

20. Principles of natural justice are based on two basic pillars:

(i) Nobody shall be condemned unheard (*audi alteram partem*).

(ii) Nobody shall be judge of his own cause (*nemo debet esse judex in propria sua causa.*)

23. We however, need not dilate on the said question being not very necessary for the purpose of this case. But it is beyond any cavil that ordinarily unless excluded by operation of a statute, the superior courts while exercising power of judicial review shall proceed on the basis that assignment of reasons is imperative in character. When an authority, be it administrative or quasi-judicial adjudicates on a dispute and if its order is appealable or subject to judicial review, it would be necessary to spell out the reasons therefore. While applying the principles of natural justice, however, the court must also bear in mind the theory of useless formality and the prejudice doctrine.

49. We are in respectful agreement with the view taken by this Court in the aforesaid cases and are, therefore, of the considered opinion that opportunity of hearing has to be given to every assessee by the Additional Commissioner or the Commissioner while considering the proposal for sanctioning/issuing of notice for

reassessment under the proviso to Sub-section (2) of Section 21 of the Act and reasons are also to be recorded while granting sanction. As the Additional Commissioner has not given any reasons for granting permission/sanction to proposal to reopen the assessment for the assessment year in question and to make the reassessment under the extended period of limitation, the order dated 1st June, 2001 cannot be sustained and is therefore set aside. Consequently all proceedings taken in pursuance of the said order also falls and are set aside.

CHANGE OF OPINION:

50. First proviso to Sub-section (2) of Section 21 of the Act empowers the authority to intimate proceedings for reassessment even in the case, where there is a change of opinion. The change of opinion may arise even if some material has been brought on record after assessment has been completed or it may be because of result of lack of care or inadvertence on the part of the Assessing Officer.

51. In the case of *Shyam Babu (Supra)* a Division Bench of this Court has held that Section 21 of the Act is wider than that of Section 147(a) of the Act and the escapement envisaged by Section 21 of the Act need not necessarily spring from a source extraneous to the original record and acting u/s 21 can be taken on the basis of material already on record at the time of the original assessment, if the escapement of assessment to tax was a result of lack of care or inadvertence on the part of the Assessing Officer. In the present case the escapement has resulted on account of lack of care or inadvertence on the part of the Assessing Officer. In the facts and circumstances of the case as there is binding decision of the this Court in the case of *Kabar Khana, Turkmanpur (Supra)* wherein it has been held that goods purchased from Kabaris is not exempt from tax but is liable to tax as unserviceable goods the proceedings can therefore be taken on mere change of opinion.

LIMITATION:

52. The question still remains as to what would be period of limitation for passing a fresh order by the Additional Commissioner after the same has been set aside by this Court under Article 226 of the Constitution of India on the ground of no reasons have been given.

53. In the case of *Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others*, the Apex Court has held:

Ordinarily where the High Court exercises such jurisdiction it merely quashes the offending order and the consequential legal effect is that but for the offending order the remaining part of the proceeding stands automatically revived before the inferior court or tribunal with the need for fresh consideration and disposal by a fresh order. Ordinarily, the High Court does not substitute its own order for the order quashed by it. It is, of course, a different case where the adjudication by the High Court establishes a complete want of jurisdiction in the inferior court or

tribunal to entertain or to take the proceeding at all. In that event on revival at all. But although in the former kind of case the High Court, after quashing the offending order, does not substitute its own order it has power nonetheless to pass such further order as the justice of the case requires. When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the court, by the mere circumstances that it has initiated a proceeding in the court, must be neutralized. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it.

54. In the case of *The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another*, the Apex Court has held that even if the period of time fixed u/s 132(5) of the Act is held to be mandatory that was satisfied when the first order was made. Thereafter, if any direction is given u/s 132(2) or by Court in writ proceedings, as in the case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed u/s 132(5) of the Act.

55. The aforesaid decision has been followed by the Madras High Court in the case *Deputy Commissioner of Commercial Taxes Tiruchirapalli Division, Tiruchirapalli v. A. Abdul Shukoor and Co.* (1977) 39 STC 137 wherein the Madras High Court has held as follows:

The Supreme Court had occasion to consider a similar imitation prescribed in Section 132(5) of; the Income Tax Act. Under the provision, the Income Tax Officer had to make an order within a period of 90 days. Such an order was made by the Income Tax Officer in a particular case within the period of 90 days. The assessee filed a writ petition in the Delhi High Court, which set aside that order on the ground that the principles of natural justice had been violated and directed the Income Tax Officer to reconsider the matter afresh. When a fresh order was made after complying with the principle of natural justice, the assessee challenged it on the ground that the latter order was made beyond the period of 90 days prescribed u/s 132(5). The Delhi High Court accepted his contention and said that the order would have to be made within the period of 90 days and that the assessee was not estopped from contending against its validity. The Supreme Court in *Director of Inspection of Income Tax v. Pooran Mall & Sons* held that if once an order was made within a period of 90 days the subsequent order made in pursuance of an order of remand or direction by the High Court could be at any time.

56. Recently a Division (Bench of this Court in Civil Misc. Writ Petition No. 563 of 2007 *King Agency v. State of U.P. and Ors.* decided on 11th May. 2007 has followed the aforesaid decision and had held that where proceeding has: been set aside by this Court in exercise of powers under Article 226 of the Constitution the period of limitation shall not apply while initiating proceeding thereafter We

are therefore of the considered opinion that the period of imitation provided under the first proviso to Sub-section 2 of Section 21 or Sub-section 4 of Section 21 would not be attracted in the present case both for passing a fresh order of sanction and reassessment. However, it would not mean that they could be passed at any time at the sweet will of the authorities. They are to be passed within a reasonable period and; what be the reasonable period would depend upon the facts of each case.

57. As we have already found that the Additional Commissioner has not given any reason in his order for granting approval, the order dated 1st June 2001 cannot be sustained and is hereby set aside and consequently the notice issued on 4th March, 2002 also cannot be sustained and is hereby set aside. The Additional Commissioner- Respondent No. 1 Is directed to pass fresh order in accordance with law after giving an opportunity of hearing to the petitioner and after recording reasons.

58. In view of the foregoing discussions, the writ petition succeeds and is allowed. In the facts and circumstances of the case there shall, however, be no order as to costs.