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Court No. 3

Case : WRIT TAX No. 511 of 2017

Petitioner : M/S Ansaldo STS Transports System India Pvt. Ltd.
Respondent : State Of U.P. And 3 Others
Counsel for Petitioner : Nishant Mishra
Counsel for Respondent : C.S.C.

Hon'ble Naheed Ara Moonis,J.
Hon'ble Saumitra Dayal Singh,J.

1. Heard Sri Nishant Mishra, learned counsel for the petitioner and Sri Manu Ghildayal, learned counsel for the Revenue.

2. Originally, the present petition was filed to challenge the notice dated 29.05.2017 issued to the petitioner by its assessing authority, under Section 31 of the U.P.V.A.T. Act, 2008 (hereinafter referred to as the "Act") for the A.Y. 2008-09, seeking to rectify the order dated 22.02.2014 passed by the then assessing authority of the petitioner, under Section 32 of the Act. During pendency of this petition, proceedings pursuant to that notice concluded. Thus, the order dated 21.06.2017 came into existence. Thereby, the assessing authority of the petitioner concluded, the order dated 22.02.2014 and consequentially, the orders dated 18.07.2014 and 3.10.2015 [for A.Y. 2008-09 (U.P., Central and, Entry Tax)] suffered from a mistake apparent on the face of record. The order dated 21.06.2017 has been challenged through amendment made to this writ petition. It may be noted, by composite order dated 18.07.2014 the third *ex-parte* assessment order had been framed against the petitioner. That *ex-parte* order had been recalled by the order dated 03.10.2015. Thus, at present, the second composite *ex-parte* assessment order dated

18.09.2013, framed in the case of the petitioner for A.Y. 2008-09 (U.P., Central and, Entry Tax), has been revived.

3. Briefly, the petitioner is a duly incorporated company. It is a registered dealer engaged in executing works contracts, mainly for the Indian Railways. For the A.Y. 2008-09, it was first subjected to *ex-parte* assessment orders, all dated 30.6.2012, framed under the Act, the Central Sales Tax Act, 1956 (hereinafter referred to as the "Central Act") and the Uttar Pradesh Tax on Entry of Goods Act, 2007 (hereinafter referred to as the "Entry Tax Act"). The petitioner filed applications under Section 32 of the Act, to set aside the aforesaid first *ex-parte* assessment orders dated 30.06.2012. Those applications were allowed by orders dated 11.01.2013. The *ex-parte* assessment orders dated 30.06.2012 were set aside. Thereafter, on 18.09.2013, the second - composite *ex-parte* assessment order was framed against the petitioner, for the A.Y. 2008-09 (U.P., Central and, Entry Tax Act). Thereby, tax was assessed – under the Act, Rs. 18,20,000/-; under the Central Act, Rs. 1,08,40,000/- and under the Entry Tax Act, Rs. 52,01,708/-. Against that order, the petitioner filed (within time), another application under Section 32 of the Act. It was allowed on 22.02.2014 and the aforesaid second-composite *ex parte* order dated 18.09.2013 was set aside. Consequently, the third - composite *ex-parte* assessment order came to be framed against the petitioner for the A.Y. 2008-09 (U.P., Central and, Entry Tax), on 18.07.2014. Upon further application filed by the petitioner under Section 32 of the Act, that *ex-parte* assessment order was also set aside by order dated 03.10.2015. Apparently, no further assessment order/s was/were framed in the case of the petitioner for A.Y. 2008-09 (U.P., Central and, Entry Tax) up to 30.09.2016. Thereafter, those assessment proceedings became time barred.

4. In these facts, on 19.12.2017, the petitioner was served with an *ex-parte* order dated 16.08.2016 passed under Section 31 of the Act referable to the power of the assessing authority to rectify mistakes apparent on the face of the record - in the order dated 22.02.2014 i.e., the order passed under Section 32 of the Act, to recall the second - composite *ex-parte* assessment order for A.Y. 2008-09 (U.P., Central and, Entry Tax). Therein, the petitioner's assessing authority took a view that the order dated 22.02.2014 had been passed outside the prescribed period of limitation to frame a fresh/second assessment order. It was therefore, time barred. Consequently, the assessing authority also passed order under Section 32 of the Act (referable to the power of the assessing authority to recall an *ex-parte* order), and dismissed the further applications filed by the petitioner to recall the order dated 18.09.2013. If sustained, those orders would attach finality to the second - composite *ex-parte* assessment order dated 18.09.2013.

5. That order dated 16.08.2016, was challenged by the petitioner in Writ Tax No.97 of 2017 *(M/S Ansaldo STS Transports System India Pvt. Ltd. Noida Vs. State of U.P. And 3 Others)*. It was allowed vide order dated 21.2.2017. For ready reference that order is quoted below:

> *"We have heard Sri Nishant Mishra, learned counsel for the petitioner and Sri C.B. Tripathi, the special counsel for the State.*
>
> *An ex parte assessment order was passed on 18.09.2013 for the year 200809. The said ex parte assessment order was set aside by the order dated 22.02.2014, on the ground that it was an ex parte order and no notice was given to the petitioner.*
>
> *Subsequently, assessment order of 18.07.2014 the petitioner again moved recall application which was allowed and the ex parte assessment order dated 18.07.2014 was set aside by an order dated 03.10.2015. Subsequently, the Assessing Authority passed ex parte two orders dated 16.08.2016. One of them is purported to an order under Section 31 of the U.P Vat Act, 2008 modifying the earlier order.*
>
> *In paragraph 41 of the writ petition, it has been stated that the impugned orders passed under Section 31 & 32 are ex parte orders without issuing any notice to the petitioner and without giving any opportunity of hearing.*

Sri C.B. Tripathi, learned counsel for the State upon instructions received to him and upon a perusal of the impugned order fairly concedes that the impugned orders have been passed ex parte without giving opportunity of hearing to the petitioner.

It is settled law that when an order has been passed and if the same requires modification, it is necessary for the Assessing Authority to issue a notice and give an opportunity of hearing before recalling the order or modifying the said order. Since the same was not given the impugned orders are clearly in violation of the principles of natural justice as embodied under Article 143 of the Constitution of India.

Consequently, without going into any other grounds, we allow the writ petition at the admission stage itself.

We quash the impugned orders at the admission stage itself without calling for a counter affidavit.

The writ petition is allowed.

It would be open to the Assessing Authority to pass fresh order after giving due notice and opportunity of hearing to the petitioner."

6. Thereafter, the petitioner's assessing authority issued fresh/impugned notice to the petitioner, on 29.05.2017, under Section 31 of the Act, again seeking to rectify the order dated 22.02.2014. No other order was sought to be set-aside or rectified. By the impugned order dated 21.06.2017, the assessing authority has reasoned, since the limitation to frame the second assessment order for A.Y. 2008-09 (U.P., Central and, Entry Tax), expired on 30.09.2013, the order dated 22.02.2014 passed thereafter, was beyond the time limitation prescribed under Section 29(6) of the Act. Hence, the further assessment proceedings (reopened in the case of the petitioner) for the A.Y. 2008-09 (U.P., Central and, Entry Tax) were *void-ab-initio*. Consequently, he has cancelled the subsequent orders dated 18.07.2014 & 03.10.2015. Thus, the second - composite *ex-parte* assessment order dated 18.09.2013, for A.Y. 2007-08 (U.P., Central, and, Entry Tax) has been revived and rendered final.

7. Relying on the provisions of Section 31, 32 & 29(6) of the Act, learned counsel for the petitioner first submitted, the order dated 21.06.2017 was passed well beyond the statutory period

of three years prescribed under Section 31(1) of the Act. It is time barred. Then, it is his submission, while allowing the earlier writ petition vide order dated 21.02.2017, this Court did not grant or create any fresh period of limitation as may have allowed the assessing authority to pass any order under Section 31 of the Act, beyond the original period of limitation that expired on 22.02.2017. In the context of *suo moto* exercise of power, the limitation of three years must be computed from the date 22.02.2014 when the order sought to be rectified was passed. In absence of consent or waiver by the petitioner, such limitation did not exist/survive. Therefore, the order dated 21.06.2017 is wholly time barred, for reason of it being passed after the date 22.02.2017.

8. Reliance has been placed on a division bench decision of this Court in the case of **CST Vs. Sukhlal Ice & Cold Storage Co., 2008 NTN (Vol. 36) 30**, wherein, a co-ordinate bench had, in the context of *pari materia* provisions of Section 22 of the U.P. Trade Tax Act, 1948, held - power to rectify any order could be exercised *suo-motu,* by the competent authority/Court within a period of three years from the date of such order being passed.

9. Next, reliance has also been placed on a five-Judge Constitution bench decision of the Supreme Court in **Padma Sundara Rao (Dead) & Ors. Vs. State of T.N. & Ors., (2002) 3 SCC 533** to submit, a Writ Court could not, and, in the present facts, it did not create any fresh period of limitation, while allowing the petitioner's earlier writ petition on 21.2.2017.

10. Then, reliance has been placed on another five-Judge Constitution bench decision of the Supreme Court in **Supdt. Of Taxes, Dhubri & Ors. Vs. Onkarmal Nathmal Trust, (1976) 1 SCC 766** to submit, jurisdiction could neither be waived nor created and that, issue of notice under the provisions of an Act

relates to exercise of jurisdiction. In the present facts, the limitation expired on 22.02.2017. The notice dated 29.05.2017, issued thereafter was wholly without jurisdiction.

11. Also, reliance has been placed on another decision of the Supreme Court in **Baswaraj & Anr. Vs. Special Land Acquisition Officer, (2013)14 SCC81** to submit, the Courts cannot extend the period of limitation that had otherwise expired.

12. Next, reliance has been placed on a seven-Judge Constitution bench decision of the Supreme Court in **P. Ramachandra Rao Vs. State of Karnataka, (2002) 4 SCC 578,** to submit, the Court cannot legislate - specifically, to provide for the period of limitation, that may otherwise not exist.

13. In view of the above law, a distinction has been claimed to the ratio in **Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal & Sons and Another, (1975) 4 SCC 568**. Therein, the bar of limitation was found to have been specifically waived by the assessee. It has been thus submitted, in absence of any consent or waiver granted by the present petitioner, the bar of limitation exists in the undisputed facts of the present case.

14. With reference to the decision in the case of the Supreme Court in **Grindlays Bank Limited Vs. Income Tax Officer, Calcutta & Ors., (1980) 2 SCC 191**, it has been submitted, the said decision may not come to the aid of the revenue in face of the clear position of law arising from the larger/Constitution bench decision of the Supreme Court.

15. Then, with respect to the decision of another coordinate bench of this Court, in the case of **S.K. Traders Vs. Additional Commissioner 2007 NTN (Vol. 34) 345**, it has been similarly submitted, that decision is also distinguishable. According to learned counsel for the petitioner, the correct position of law was laid down in another division bench decision of this Court

in **Ram Nivas Vs. State of U.P. and Others (2019) SCC OnLine All 3537**. Therein, after taking note of the entire gamut of law, the division bench applied the law laid down by the Constitution bench of the Supreme Court, in **Padma Sundara Rao (supra)** and distinguished the ratio arising from the decision of the Supreme Court in **Director of Inspection of Income Tax Vs. Pooran Mal (supra)** and the division bench decision of this Court in **S.K. Traders (supra)**.

16. Further, it has been submitted, even otherwise, the order dated 22.02.2014 did not suffer from any mistake apparent from the face of record. Reliance has been placed on a decision of the Supreme Court in **Deva Metal Powders (P) Ltd. Vs. CTT (2008) 2 SCC 439** to submit, a debatable question cannot be subjected to proceedings to rectify a mistake apparent from the face of record.

17. Last, it has been submitted, the limitation to frame the third and all subsequent assessment order/s in consequence of order/s passed under Section 32 of the Act, would be the same as prescribed to frame the second assessment order, under Section 29(6) of the Act read with the first and the second provisos thereto. The order to set-aside the first *ex-parte* orders (dated 30.06.2012) was passed on 11.01.2013. Therefore, the limitation to frame the fresh/second assessment order existed up to 30th September 2013. The second - composite *ex-parte* assessment order was framed on 18.09.2013. Upon the application to set aside that assessment order/s filed within time, the assessing authority did not commit any jurisdictional error in setting aside that order on 22.02.2014. Occasioned by that order, the limitation to pass the fresh/third assessment order/s for A.Y. 2008-09 (U.P., Central and Entry Tax), existed up to 30.09.2014. The third composite assessment order was framed on 18.07.2014. Similarly, upon a further application filed by the petitioner (within time), under section 32 of the Act, the

assessing authority did not commit any mistake in setting aside that order on 03.10.2015.

18. Opposing the writ petition, learned standing counsel for the revenue has strongly urged - in the present case, the order dated 28.07.2017 did not suffer from any lack of limitation. This Court had clearly permitted the assessing authority to pass a fresh order in accordance with law. That direction had been issued by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. Therefore, indisputably, the consequential notice was issued within reasonable time therefrom i.e., almost within three months. Hence, the bar of limitation claimed by the petitioner, did not exist, or arise. He would also submit, by virtue of the second proviso to section 29 (6) of the Act, the limitation to frame the third assessment order (after the second – composite *ex-parte* assessment order had been set aside), would stand curtailed to the balance period of limitation that survived on the date of the second *ex-parte* assessment order being framed i.e., up to 30.09.2013, only. Therefore, the application to set aside the second – composite *ex-parte* assessment order dated 18.09.2013 could not be allowed after the date 30.09.2013.

19. In short, it has been submitted, in absence of surviving period of limitation to frame a fresh assessment order, the order seeking to recall the second - composite *ex-parte* assessment order could not be passed, beyond the date 30.09.2013. Consequentially, the order dated 22.02.2014 setting aside the second - composite *ex-parte* assessment order dated 18.09.2013 was wholly time barred and therefore lacking in jurisdiction. Hence, the assessing authority has not committed any error in setting aside such order. That mistake was clearly a mistake apparent on the face of record.

20. Having heard learned counsel for the parties and having perused the record, as to the first limb of submission advanced

by learned counsel for the petitioner, it is true, there was no express consent given or waiver granted by the petitioner and no such consent or waiver may be inferred from a plain reading of the order dated 21.02.2017 passed in Writ Tax No. 97 of 2017. Therefore, that part of the ratio of the decision of the Supreme Court in **Director of Inspection of Income Tax Vs. Pooran Mal & Sons (supra)** is inapplicable to the facts of the present case. However, this reasoning was taken note of in **Grindlays Bank Limited Vs. ITO (supra)**. It may be discussed a little later.

21. At the same time, the five-Judge Constitution bench decision of the Supreme Court in the case of **Padma Sundara Rao (Dead) Vs. State of Tamil Nadu and Ors. (supra)** had arisen on different facts and law. There, an issue had arisen, whether upon the High Court having set aside the earlier declaration made under Section 6 of the Land Acquisition Act 1894, any fresh or further period of limitation existed or could be claimed under Clause (ii) of the first proviso to Section 6 (1) of that Act. For ready reference, provisions of Section 6 of that Act are quoted below:

> *"6. Declaration that land is required for a public purpose.*
>
> *(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under section 5A, subsection (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4 subsection (1), irrespective of whether one report or different reports has or have been made (wherever required) under section 5A subsection (2)*
>
> *Provided that no declaration in respect of any particular land covered by a notification under section 4 subsection (1) –*
>
> *(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 but before the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of three years from the date of the publication of the notification; or*

> *(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:*
>
> *Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.*
>
> *Explanation. – In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under section 4 subsection (1), is stayed by an order of a Court shall be excluded."*

22. Considering that language of the proviso to Section 6 of the Land Acquisition (Amendment) Act, 1894 and the complete absence of any statutory remedy of appeal etc. provided against a declaration made under Section 6 of the Act, the Supreme Court reasoned - it was a distinctive feature *viz-a-viz* Section 132(5) read with Section 132 (11) of the Income Tax Act, 1961. It was held, under the Income Tax Act, a power existed to remit a case to the original authority or, for a fresh order to be passed. Thus, besides the distinction arising on account of lack of consent or waiver granted by the petitioner (in that case), it was recognized, even otherwise, the period of limitation may survive in the context of a proceeding under Section 132 (5) of the Income Tax Act. Thus, it was observed as under:

> *"Learned counsel for the respondents referred to some observations in Pooran Mal case [(1975) 4 SCC 568 : 1975 SCC (Tax) 346 : (1975) 2 SCR 104] which form the foundation for decisions relied upon by him. It has to be noted that Pooran Mal case [(1975) 4 SCC 568 : 1975 SCC (Tax) 346 : (1975) 2 SCR 104] was decided on entirely different factual and legal backgrounds. The Court noticed that the assessee who wanted the Court to strike down the action of the Revenue Authorities on the ground of limitation had himself conceded to the passing of an order by the Authorities. The Court, therefore, held that the assessee cannot take undue advantage of his own action. Additionally, it was noticed that the time-limit was to be reckoned with reference to the period prescribed in respect of Section 132(5) of the IT Act. It was noticed that once the order has been made under Section 132(5) within ninety days, the aggrieved person has got the right to approach the notified authority under Section 132(11) within thirty days and that authority can direct the Income Tax Officer to pass a fresh*

order. That is the distinctive feature vis-à-vis Section 6 of the Act. The Court applied the principle of waiver and inter alia held that the period of limitation prescribed therein was one intended for the benefit of the person whose property has been seized and it was open to that person to waive that benefit. It was further observed that if the specified period is held to be mandatory, it would cause more injury to the citizens than to the Revenue. A distinction was made with statutes providing periods of limitation for assessment. It was noticed that Section 132 does not deal with taxation of income. Considered in that background, ratio of the decision in Pooran Mal case[(1975) 4 SCC 568 : 1975 SCC (Tax) 346 : (1975) 2 SCR 104] has no application to the case at hand."

23. That view had been taken by the Supreme Court in its earlier decision in **Grindlays Bank Limited Vs. ITO (supra)** in the context of a proceeding under the Income Tax Act, 1961. Therein, after taking note of its earlier decision in **Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal & Sons (supra)**, with reference to an assessment order passed consequent to an earlier direction issued by the High Court, in writ jurisdiction, the Supreme Court reasoned as under:

"7. ….....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 the quashing of the proceeding by the High Court there is no 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 orders 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 circumstance that it has initiated a proceeding in the court, must be neutralised. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. The present case goes further. The appellant would not have enjoyed the advantage of the bar of limitation if, notwithstanding his immediate grievance against the notice under s. 142(1) of the Income Tax Act, he had permitted the assessment proceeding to go on after registering his protest before the Income Tax Officer, and allowed an assessment order to be made in the normal course. In an application under section 146 against the assessment order, it would have been open to him to urge that the notice was unreasonable and invalid and he was prevented by sufficient cause from complying with it and therefore the assessment order should

be cancelled. In that event, the fresh assessment made under section 146 would not be fettered by the bar of limitation. Section 153(3)(i) removes the bar. But the appellant preferred the constitutional jurisdiction of the High Court under Article 226. If no order was made by the High Court directing a fresh assessment, he could contend as is the contention now before us, that a fresh assessment proceeding is barred by limitation. That is an advantage which the appellant seeks to derive by the mere circumstance of his filing a writ petition. It will be noted that the defect complained of by the appellant in the notice was a procedural lapse at best and one that could be readily corrected by serving an appropriate notice. It was not a defect effecting the fundamental jurisdiction of the Income tax Officer to make the assessment. In our opinion, the High Court was plainly right in making the direction which it did. The observations of this court in Director of Inspection of Income Tax (Investigation), New Delhi vs. Pooran Mall & Sons are relevant. It said:

> *"The court in exercising its powers under Article 226 has to mould the remedy to suit the facts of a case. If in a particular case a court takes the view that the Income Tax Officer, while passing an order under section 132(5), did not give an adequate opportunity to the party concerned it should not be left with the only option of quashing it and putting the party at an advantage even though it may be satisfied that on the material before him the conclusion arrived at by the Income Tax Officer was correct or dismissing the petition because otherwise the party would get an unfair advantage. The power to quash an order under Article 226 can be exercised not merely when the order sought to be quashed is one made without jurisdiction in which case there can be no room for the same authority to be directed to deal with it. But, in the circumstances of a case, the court might take the view that another authority has the jurisdiction to deal with the matter and may direct that authority to deal with it or where the order of the authority which has the jurisdiction is vitiated by circumstances like failure to observe the principles of natural justice, the court may quash the order and direct the authority to dispose of the matter afresh after giving the aggrieved party a reasonable opportunity of putting forward its case. Otherwise, it would mean that where a court quashes an order because the principles of natural justice have not been complied with, it should not while passing that order permit the tribunal or the authority to deal with it again irrespective of the merits of the case."*

The point was considered by the Calcutta High Court in Cachar plywood Ltd. v. Income Tax Officer and the High court, after considering the provisions of section 153 of the Income Tax Act, considered it appropriate, while deposing of the writ petition, to issue a direction to the Income Tax Officer to complete the assessment which, but for the direction of the High court, would have been barred by limitation."

(emphasis supplied)

24. Therefore, the distinction drawn by the five-Judge Constitution bench decision of the Supreme Court in **Padma Sundar Rao (Dead) Vs St. of Tamil Nadu (supra)** is material and pertinent to the facts of the present case, as well. In the context of an order passed under Section 32 of the Act, there clearly existed a remedy of appeal under Section 55 of that Act. In such appeal (where preferred), by virtue of Section 55 (5)(b)(ii) of the Act, the appellate authority would be vested with jurisdiction and power to set aside the order impugned before it and to direct the assessing authority to pass a fresh order, after conducting such inquiry as may be specified by the appeal authority. For ready reference, provisions of Section 55 of the Act may be noticed as under:

> ***Section 55. Appeal***
>
> ***(1)*** *Any dealer or other person aggrieved by an order made by the assessing authority, other than an order mentioned in subsection (7) of section 48 may, within thirty days from the date of service of the copy of the order, after serving a copy of appeal memo on the assessing authority or the Commissioner, appeal to such authority (hereinafter referred to as appellate authority), as may be prescribed:*
>
> *Provided that where due to any reason, any appellant fails to serve a copy of appeal memo on the assessing authority before filing appeal, he may serve copy of such appeal memo within a time of one week from the date on which appeal has been filed or within such further time as the appellate authority may permit.*
>
> ***(2)*** *Where an appeal has been filed against an order referred to in subsection (1), the Commissioner may apply to the appellate authority to examine the legality and propriety of such order on such point as may be mentioned in the application. A copy of such application shall be served on the appellant and shall be decided along with the appeal filed by the appellant:*
>
> *Provided that no application for examination of legality and propriety shall be entertained after the disposal of appeal:*
>
> *Provided further that where the Commissioner has filed an application, the appellant shall not be entitled to withdraw appeal filed by him.*
>
> *Explanation For the purposes of this section Commissioner includes an officer authorised to file appeal on behalf of the Commissioner before the Tribunal under section 57.*
>
> ***(3)*** *No appeal against an assessment order under this Act*

shall be entertained unless the appellant has furnished satisfactory proof of the payment of the amount of tax or fee due under this Act on the turnover of sale or purchase, or both, as the case may be, admitted by the appellant in the tax returns filed by him or at any stage in any proceedings under this Act, whichever is greater.

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

(5)*The appellate authority may, after calling for and examining the relevant records and after giving a reasonable opportunity of being heard to the appellant and the Commissioner*

(a) in the case of an order of assessment and penalty.

(i) confirm or annul such order ; or

(ii)vary such order by reducing or enhancing the amount of assessment or penalty, as the case may be, whether such reduction or enhancement arises from a point raised in the grounds of appeal or otherwise ; or

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

(iv) direct the assessing authority to make such inquiry and to submit its report within such time as may be specified in the direction or within such extended time as it may allow from time to time, and on the expiration of such time the appellate authority may, whether the report has been submitted or not decide the appeal in accordance with the provisions of the preceding sub-clauses; or

(b) in the case of any other order

(i) confirm, cancel or vary such order; or

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

Provided that nothing in this subsection shall preclude the appellate authority from dismissing the appeal at any stage with such observations as it deems fit where the appellant applies for withdrawal of the same and no request for examination of legality or propriety of order under appeal has been made by the Commissioner.

(6) *The appellate authority, may, on the application of the appellant and after giving the Commissioner a reasonable opportunity of being heard stay, except the operation of order appealed against, the realisation of the disputed amount of tax, fee or penalty payable by the appellant till the disposal of the appeal :*

Provided that –

(i) where an order under appeal involves dispute about tax, fee or penalty, no stay order shall remain in force after thirty days from the date on which the same has been granted, if the appellant does not furnish security to the satisfaction of the assessing authority for payment of the amount, the realisation whereof has been stayed within the aforesaid period of thirty days;

(ii) no such application shall be entertained unless it is filed along with the memorandum of appeal under subsection (1);

(7) *Section 5 of the Limitation Act, 1963, shall apply to appeals or other applications under this section.*

(8)*The appellate authority shall be under the superintendence and control of the Commissioner:*

Provided that in the exercise of such superintendence and control, no order, instructions or directions shall be given by the Commissioner so as to interfere with the discretion of the Appellate Authority in the exercise of its appellate functions.

(9) *For the purposes of this section service of an order passed by appellate authority under this section and service of memo of appeal on the State Representative, as defined in the rules framed under this Act, shall be deemed to be service on the Commissioner.*

(10) *All appeals arising out of the same cause of action in respect of an assessment year, as far as possible, shall be heard and decided together."*

25. Thus, it cannot be disputed, the petitioner had a remedy of appeal against the orders dated 16.08.2016. Therefore, it also cannot be further disputed, if those appeals had been filed, the appellate authority would have been within its jurisdiction to set aside the orders dated 16.08.2016 on a reasoning similar to that adopted by this Court, in its order dated 21.02.2017. The consequence of such a finding would naturally be - the matter would have been remitted to the assessing authority to pass a fresh order. Merely because the petitioner chose to approach this Court under Article 226 of the Constitution of India against the order dated 16.08.2016, it can never be said, the petitioner was entitled to any better or other relief or rights.

26. It would have been one thing if while quashing the order dated 16.08.2016, this Court had found, the said order suffered from an inherent lack of jurisdiction. In that case, there would be no question or occasion for any further proceedings to arise. That is not the case here. On the contrary, the order dated 21.02.2017 passed by this Court distinctly records - the order dated 16.08.2016 was laconic on account of non-compliance of the rules of natural justice. Logically therefore, that order was

found competent in jurisdiction, but defective on procedural aspects.

27. Looked in that light, the further direction issued by the Court requiring the assessing authority to conduct fresh proceeding in accordance with law clearly is an order that drew on the inherent powers of this Court, consistent to the statutory scheme arising from the plain language of Section 55 (5)(b)(ii) of the Act. Therefore, that further direction would inhere in and it would automatically attach to the order passed by the Writ Court. The rule of expiry of limitation to pass the impugned order dated 21.06.2017 (invoked by the petitioner), has no applicability to the present facts.

28. Next, the ratio of the five-Judge Constitution bench of the Supreme Court in **Supdt. Of Taxes, Dhubri & Ors. Vs. Onkarmal Nathmal Trust (supra)** is also inapplicable and distinguishable to the facts of the present case. There an issue arose, if assessment notices could be first issued beyond the statutory period prescribed. The State contended, the stay/injunction against the assessment proceedings protected the statutory period of limitation. Rejecting that objection, the Supreme Court reasoned, an injunction order did not amount to waiver of the statutory provisions. Further, issuance of notice to assess was held to be related to exercise of jurisdiction. Only the conduct or continuance of the assessment proceedings was stayed/injuncted but not the exercise of jurisdiction to undertake that journey. That not done during the available limitation, the assessment notices subsequently issued were found not protected on principle of waiver or consent. Illustratively, it was held in paragraph 28 to 30 of that decision, as below:-

> *"**28.** In the present case, the respondent cannot be said to have waived the provisions of the statute. There cannot be any waiver of a statutory requirement or provision which goes to the jurisdiction of assessment. The origin of the assessment is*

either an assessee filing a return as contemplated in the Act or an assessee being called upon to file a return as contemplated in the Act. The respondents challenged the Act. The order of injunction does not amount to a waiver of the statutory provisions. The issue of a notice under the provisions of the Act relates to the exercise of jurisdiction under the Act in all cases. Revenue statutes are based on public policy. Revenue statutes protect the public on the one hand and confer power on the State on the other.

29. *The decision in William Shepard v. O.E.D. Barron on which the Solicitor general relied for the proposition that the constitutionality of a rule of assessment can be waived does not have any application in the present case. In the American decision (supra) an objection against the frontage rule of assessment for a public improvement, prescribed by the State laws, was not allowed to be urged to defeat the collection of the assessments. The reason was that the abutting owners who petitioned for the improvement under the Act, actively participated in carrying out the work, recognized the justice of the assessments from time to time during its progress, and signed a statement for the purpose of inducing the issuance and purchase of country improvement bonds to the effect that the work had been properly done. In the American decision the work was done at the instance and request of the owners. The Court found an implied contract arising from facts that the party at whose request and for whose benefit the work had been done would pay for it in the manner provided for by the Act under which the work was done.*

30. *It is against principle to suggest that the appellants did anything wrong or, they are taking advantage of anything wrong Jessel, M.R. In Re. Hallett's Estate Knatchbull v. Hallett said:*

> *Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that act was intentionally and in fact done wrongly.*

The respondents were entitled to impeach the statue under which they were made liable. The respondents have done no wrong. The respondents are not taking any advantage of any act of theirs. The State was entitled to resist the respondents. The State did so by contending that the Act was valid, but the State took no steps during the pendency of the litigation to take directions from the Court to serve notices of demand upon the appellants to keep alive the right of the respondents."

(emphasis supplied)

29. In the present case, undisputedly, the prior notices leading to the orders dated 16.08.2016 were issued well within time. Those were not quashed by this Court in Writ Tax No. 97 of 2017. Such notices were therefore valid. Thus, the

jurisdiction had been exercised within time prescribed by law. Upon the resulting orders dated 16.08.2016 being set aside by this Court on 21.02.2017 and, the matter being remitted to the assessing authority, strictly, there did not arise an issue or question of jurisdiction being exercised outside limitation. Therefore, the ratio in **Supdt. Of Taxes, Dhubri & Ors. Vs. Onkarmal Nathmal Trust (supra)** is wholly inapposite.

30. As already discussed above, owing to completely dissimilar legislative scheme under the Act and the Land Acquisition Act, 1894, the reasoning obtaining with respect to limitation to conduct proceedings in remand under the Land Acquisition Act, 1894 is wholly inapplicable to the facts of the present case. Thus, the ratio obtaining in **Baswaraj & Anr. Vs. SLAO (supra)** as also the division bench decision of the Court in **Ram Nivas Vs. State of U.P. and Others (supra)**, are wholly distinguishable and inapplicable to the present case.

31. Consequently, the ratio in the seven-Judge Constitution Bench decision of the Supreme Court in **P. Ramachandra Rao Vs. State of Karnataka (supra)** relied upon by learned counsel for the petitioner to submit - limitation cannot be created and the Court cannot legislate to fill up *casus omissus* is found to be distinguishable in the context of the clear and undisputed facts of the present case discussed above and the clear language of the provisions of Section 32 read with Section 29(6) of the Act.

32. For the above reasons, we do not find the proceedings instituted by notice dated 29.05.2017 or the consequent order dated 28.07.2017 to be lacking in inherent jurisdiction, on account of the bar of limitation.

33. As to the next submission of learned counsel for the petitioner, there can be no two opinions on the issue. A disputed or debatable question cannot be gone into in a proceeding

seeking to rectify a mistake apparent on the face of record. Such a mistake or error must be glaring or self-apparent and not one that may be established upon elaborate argument or debate. This principle was recognized and applied in the context of taxation laws in **Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh, AIR 1964 SC 1372**. It has been consistently followed and applied in **T.S. Balram Vs. Volkart Bros. (1971) 2 SCC 526 (SC)** and **CIT Vs. Hero Cycles Pvt. Ltd. (1997) 8 SCC 502**, amongst others. Applying that rule, we now consider the reasoning adopted by the assessing authority - the limitation to pass the order to recall the second composite *ex-parte* order would be the balance period of limitation that survived upon the second-composite *ex-parte* assessment order being passed on 18.09.2013 i.e., up to 30.09.2013 only. Here, it would be apposite to take note of the language of Section 29(6) and Section 32(1) of the Act. For ready reference, Section 32(1) of the Act reads as under:

> *"**Section 32. Power to set aside ex-parte order of assessment or penalty***
>
> ***(1)** In any case in which an order of assessment or reassessment or rejection of application for registration or order of penalty is passed ex-parte, the dealer may apply to the assessing authority within thirty days of the service of the order to set aside such order and reopen the case; and if such authority is satisfied that the applicant did not receive notice or was prevented by sufficient cause from appearing on the date fixed, it may set aside the order and reopen the case for hearing:*
>
> *Provided that no such application for setting aside an ex-parte assessment order shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax to be due under this Act on the turnover of sales or purchases, or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceeding under this Act, whichever is greater".*

34. Then, Section 29(6) of the Act reads as under:

> ***"29. Assessment of tax of turnover escaped from assessment. (6)**. Where an order of assessment or re-assessment has been set aside by the assessing authority himself under section 32, a fresh order of assessment or re-assessment may be made before expiry of the assessment year in which such order of*

assessment or reassessment has been set aside:

Provided that if an order of assessment or re-assessment made ex parte is set aside on or after first day of October in any assessment year, fresh order of assessment or re-assessment may be made on or before thirtieth day of September of the assessment year succeeding the assessment year in which such ex parte order of assessment or re-assessment was set aside.

Provided further that where second or subsequent time any order of assessment or reassessment is made ex parte and where such second or subsequent ex parte order of assessment or reassessment is to be set aside and a fresh order of assessment or reassessment may be made within the time aforementioned when the first ex parte order is set aside."

35. Thus, in the first place, under the Section 29(6) of the Act, the limitation to pass the fresh/second assessment order/s existed up to the end of the Assessment Year in which such (first) *ex-parte* assessment order was set aside. Since the first *ex-parte* assessment order was set aside on 11.01.2013, such limitation existed up to 31.03.2013. However, by virtue of the first proviso to Section 29(6), that limitation stood extended up to 30.09.2013. It was so because of the language of the first proviso to Section 29(6) of the Act and the fact the order dated 11.01.2013 was passed after the cut-off date 1st October day of the A.Y. 2013-14, prescribed under Sub-Section (6) of Section 29 of the Act.

36. The second proviso to Section 29(6) of the Act is only clarificatory. It enforces that rule of limitation as exists under Section 29(6) of the Act read with the first proviso thereto, to all the subsequent assessment orders that may be passed, upon further orders to set aside any/all subsequent or successive *ex-parte* assessment order/s. Thus, the limitation to pass the fresh assessment order/s after setting aside the second, third, fourth or any other subsequent *ex-parte* assessment order would be determined applying the rule contained in Section 29(6) of the Act read with the first proviso thereto. The second proviso to Section 29(6) of the Act does not prescribe a new or different period of limitation.

37. Thus, as explained above, if the second or any subsequent *ex-parte* assessment order was set aside (under Section 32 of the Act), on or before 30th September of an Assessment Year, the limitation to pass a fresh assessment order thereafter, would exist up to 31st March of that Assessment Year. If, however, the order to set aside the second or the subsequent ex-parte assessment order was passed on or after 1st October of an Assessment Year, the limitation to pass the fresh assessment order would stand extended up to 30th September of the next Assessment Year.

38. Clearly, the above rule is a rule of prudence and procedure to ensure compliance of rules of natural justice and to ensure a minimum time of six months to the concerned assessing authority, to conclude an assessment proceeding/s, reopened upon an earlier *ex-parte* assessment order being set aside under Section 32 of the Act. Unless that reasonable time is allowed, the power/authority of such an assessing authority to pass a third or other subsequent assessment order would be defeated. Also, an undue benefit would arise to the concerned assessee, unintendedly as no assessment order may come to be framed in his case, owing to absence of time.

39. At the same time, the exercise of power to set aside an *ex parte* assessment order, is statutorily governed by provisions of Section 32(1) of the Act. It has been quoted above. Plainly, that provision does not provide for any period of limitation to pass the order on an application filed to recall an *ex parte* assessment order. It only prescribes for a fixed limitation of thirty (30) days (computed from the date of service), to file an application to recall an *ex-parte* assessment order.

40. That provision does not restrict the right of an assessee to seek recall of an *ex parte* assessment order, only once or twice, with respect to an Assessment Year. In fact, the statute

contemplates or allows the assessee to seek recall of each and every *ex parte* assessment order, every time such an order comes into existence, irrespective of and, unaffected by the fact that the assessee may have suffered such an *ex parte* assessment order, for that Assessment Year, many times earlier. Thus, every time an *ex parte* assessment order was framed against the petitioner, for the A.Y. 2008-09 (U.P., Central and, Entry Tax), a right accrued to the petitioner to seek its recall, subject to the condition that such application seeking recall be filed within thirty (30) days of service of such an *ex parte* order.

41. There is nothing in the language of Section 32 and/or Section 29(6) of the of the Act as may be read to introduce a time limit on the power of the assessing authority to deal with and/or allow an otherwise validly filed application. In the instant case, it is not even alleged by the revenue that the application filed by the petitioner to recall the *ex parte* order dated 18.09.2013 was filed beyond thirty (30) days of that order being served. Therefore, it may be safely assumed that that application was filed in time. Consequently, it had to be dealt with and decided on its own merits, unaffected by any other or further consideration of limitation to frame a fresh assessment order. That stage had not yet arrived. That limitation would arise under Section 29(6) of the Act, only in the event and at the stage of the application filed under Section 32 being allowed. It would be governed by Section 29(6) (read with the first proviso thereto), of the Act.

42. Thus, both for reason of grammar as also to keep the provision workable, the interpretation made by the assessing authority and as canvassed by the learned Standing Counsel cannot be accepted. An interpretation that makes the provision

unworkable or leads to absurd results must always be rejected. In view of the above, we find that the assessing authority had not committed any mistake less so a mistake apparent on the face of record in passing the order dated 22.02.2014.

43. The last date to pass the second-composite ex-parte assessment order was 30.09.2013. That order was passed within time, on 18.09.2013. At the same time, those dates and facts did not limit the exercise of power of the assessing authority to set-aside that second-composite ex-parte order, on or before the date 30.09.2013. There being no allegation of the application dated 21.02.2014 filed beyond the period of thirty days from the date of service of the order dated 18.09.2013, the order dated 22.02.2014 was wholly within time.

44. As noted above, no limitation was prescribed under Section 32 of the Act - to pass an order on an application filed within time, under that Section, to recall the second-composite *ex parte* assessment order dated 18.09.2013, for the A.Y. 2008-09 (U.P., Central and Entry Tax). Therefore, the order dated 22.02.2014 was not time barred, on any count.

45. The time limitation to pass the subsequent/third set of assessment order/s arose under Section 29(6) of the Act only upon the order dated 22.02.2014 being passed. That limitation arose with reference to that date, under Section 29(6) read with the first and the second provisos thereto. As discussed above it existed up to 30.09.2014. Hence, the surviving period of limitation to pass the second set of assessment orders was wholly extraneous to the issue involved in this case.

46. Consequently, the ratio in **CST Vs Sukhlal Ice & Cold Storage Co. (supra)**, is also irrelevant to the issue before us. Therefore, the reasoning offered by the assessing authority purportedly to rectify the order dated 22.02.2014 is wholly

unacceptable and contrary to law. Consequently, that order has not been shown to suffer from any mistake apparent from the face of record. No other reason has been stated in the order dated 28.07.2017 or canvassed in the Counter Affidavit, to justify the recall of the orders dated 22.02.2014, 18.07.2014 and 03.10.2015.

47. The fact that in the instant case the assessment proceedings for A.Y. 2008-09 (U.P., Central and, Entry Tax) became time barred on 30.09.2016 or that no assessment order came to be passed in the case of the petitioner and therefore taxable transactions performed by the petitioner may have remained from being assessed, is of no concern to this Court, in the facts of the present case. In a proverbial cat-and-mouse game enacted by the revenue and the taxpayer, the Writ Court sits an umpire. It may be guided strictly by the law alone. Equity has less or no role to play. Therefore, it is not for us to judge if the ‘mouse’ deserved to be caught by the ‘cat’. If the ‘cat’ has been lazy or mistaken, so be it. The ‘mouse’ lives. We may only ensure strict adherence to the rule of law. That done, the fact that revenue has suffered a loss due to an error on its part, falls outside the domain of this Court, in these proceedings. Remedial action lies elsewhere.

48. Accordingly, the impugned order dated 21.06.2017 passed under Section 31 of the Act, for the A.Y. 2008-09 (U.P., Central and, Entry Tax), is hereby quashed. The writ petition succeeds and is accordingly ***allowed***. No order as to costs.

Order Date : 26.10.2021

M. Tariq