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COMMERCIAL TAX REVISION NO 389 OF 2014

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M/s Ram Sewak Madan Mohan
Vs
The Commissioner, Commercial Taxes, U P Lucknow

Appearance:

For the Revisionist: Mr S D Singh, Senior Advocate
Mr Rahul Agarwal, Advocate

For the Respondent: Mr B K Pandey, Advocate

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Hon'ble Dr Dhananjaya Yeshwant Chandrachud, Chief Justice
Hon'ble S P Kesarwani, J
Hon'ble Yashwant Varma, J

(Per : Dr D Y Chandrachud, Chief Justice)

On 25 February 2015, a learned Single Judge has referred the following questions of law for adjudication by the Full Bench:

> "1. Whether in view of the judgments of the Supreme Court in **Hari Shanker versus Rao Girdhari Lal Chowdhury**[1] and **Shiv Shakti Cooperative Housing Society versus Swaraj Developers**[2] declaring the power of revision as not a substantive right but merely an enabling provision, the provision for a revision under Section 10B of the U.P. Trade Tax Act, 1948 would on the repeal of that Act not be saved under Section 81 (2) of the U.P. Value Added Tax Act, 2008; and

1 AIR 1963 SC 698
2 (2003) 6 SCC 659

2. Whether the view expressed by the Division Benches of this Court in **Dharma Rice Mill versus State of U.P.**[3] and **Kumar Rice Mills versus State of U.P.**[4] taking a contrary view lay down the correct law, having been expressed upon non-consideration of the judgments of the Supreme Court in the case of **Hari Shanker versus Rao Girdhari Lal Chowdhury (supra)** and **Shiv Shakti Cooperative Housing Society versus Swaraj Developers (supra).**"

The facts in the context of which the revision arises fall in a narrow compass. During the period 1 April 2007 to 31 December 2007, comprised in assessment year 2007-08, the revisionist purchased wheat in the amount of Rs 15,38,264/- for sale to a flour mill. The revisionist is engaged in the business of purchasing and selling food grains on retail and on commission. The flour mill for whom the revisionist had purchased the wheat opted for compounding its tax dues purportedly under a scheme floated by the State of Uttar Pradesh under Section 7-D of the Uttar Pradesh Trade Tax Act, 1948[5]. In the assessment proceedings, the purchases and sales made by the revisionist were treated to be exempt from tax. No tax was in consequence imposed on the revisionist. An order of assessment was made on 9 November 2009 for assessment year 2007–08. On 17 June 2010, a notice was issued under Section 10-B by the Joint Commissioner (Executive), Commercial Tax, Kanpur to the revisionist alleging that the entire sale of wheat made by it to the flour mill was not supported by Form–IIIB and was a taxable transaction. The revisionist filed a reply contending that Section 7–

3 2010 UPTC 648
4 2010 UPTC 1594
5 UP Trade Tax Act

D superseded the other provisions of the Act because of which Section 10–B was not applicable. On 1 July 2010, the Joint Commissioner (Executive) declined to accept the submission of the revisionist and directed the Assessing Authority to reassess the transactions of the revisionist. In an appeal which the revisionist filed before the Commercial Tax Tribunal[6] against the order of the Joint Commissioner (Executive), its contention was that the UP Trade Tax Act having been repealed on 1 January 2008, the power of revision under Section 10-B under the repealed legislation had ceased to exist. In the submission of the revisionist, the power under Section 10-B was in the nature of an enabling provision and did not confer a substantive right. Hence, in the submission, it had not been saved by the Uttar Pradesh Value Added Tax Act 2008[7] and could not have been exercised after 1 January 2008 when the repeal of the UP Trade Tax Act took effect. The revisionist also contended that upon repeal, Form–IIIB had lost its existence and hence the proceedings could not continue on the ground that it had failed to produce Form–IIIB in support of its transaction. By an order dated 27 March 2007, the Tribunal at Kanpur rejected the appeal filed by the revisionist. The Tribunal relied upon two decisions of the Division Benches of this Court in **Dharma Rice Mill Vs State of U P**[8] and in **Kumar Rice Mill Private Limited Vs State of UP**[9] to hold that even after the repeal of the UP Trade Tax Act on 1 January 2008, the power under Section 10–B could be exercised by the Joint Commissioner and the Assessing Authority could be directed to examine the circumstances in which the wheat was sold

6 Tribunal
7 UP VAT Act
8 2010 UPTC 648
9 2010 UPTC 1594

by the revisionist.

When the revision preferred by the revisionist against the decision of the Tribunal came up before a learned Single Judge, the submission which was urged on behalf of the revisionist was that the view which was taken by the Division Benches of this Court in **Dharma Rice Mill (supra)** and **Kumar Rice Mill (supra)** failed to notice that the provision for a revision in Section 10–B of the UP Trade Tax Act was in the nature of an enabling provision and is not a substantive right. Reliance was sought to be placed on the ambit of the remedy of a revision as enunciated in the decisions of the Supreme Court in **Hari Shankar Vs Rao Girdhari Lal Chowdhury**[10] and **Shiv Shakti Co-op Housing Society Vs Swaraj Developers**[11]. The judgments of the Division Benches, it was submitted, having not examined the effect of the binding judgments of the Supreme Court, they did not constitute binding precedents. Consequently, it was urged that the provisions of Section 81 (2) of the UP VAT Act did not save the revisional remedy provided by Section 10–B of the Act. The learned Single Judge while adverting to this submission has formed the view that the decisions of the two Division Benches of this Court require reconsideration.

On behalf of the revisionist, three submissions have been urged by learned Senior Counsel:

(i) The revisional power under Section 10-B of the UP Trade Tax Act is not a right which is conferred in favour of the department or revenue but is an enabling provision. Being merely in the nature of an enabling power, Section

10 AIR 1963 SC 698
11 (2003) 6 SCC 659

10-B did not survive the repeal of the UP Trade Tax Act by the UP VAT Act;

(ii) In the alternative, before the repeal and saving provision contained in Section 81(2)(b) of the UP VAT Act can apply, a right ought to have accrued on the date of the repeal. In other words, an order of the Commissioner under Section 10-B should have been passed prior to the date of repeal and, if only a notice was issued, it would amount to a legal proceeding but not a right accrued; and

(iii) There is a difference in the language of Section 6 of the General Clauses Act 1897 and the provisions of Section 6 of the U P General Clauses Act 1904 since the words "commenced before the repealing Act shall have come into operation" in the state legislation do not find place in the central enactment. Hence, it is only where the power under Section 10-B had been invoked prior to the date of repeal, that the remedy would stand saved.

On the other hand, the following submissions have been urged on behalf of the respondent:

(i) In view of the provisions of Section 6 of the U P General Clauses Act 1904 read with the savings clause contained in Section 81(2)((b) of the UP VAT Act and having due regard to the fact that the earlier Act was repealed and has been reenacted by substituted provisions, the power under Section 10-B survives the repeal; and

(ii) The period to which the dispute in the present case relates, was 1 April 2007 to 31 December 2007. No assessment can be framed unless the period with reference to which the assessment is made, has come to an end. In the meantime, the UP VAT Act came into force on 1 January 2008. The power of

revision is part and parcel of the process of rendering a correct assessment and if any illegality remains, it can be cured in the form of the exercise of the revisional power by the Commissioner.

These submissions fall for consideration.

Section 10–B of the UP Trade Tax Act provides for a revision by the Commissioner. Section 10B was in the following terms:

> "**Section 10-B. Revision by Commissioner.**
>
> (1) The Commissioner or such other Officer not below the rank of Deputy Commissioner as may be authorised in this behalf by the State Government by notification may call for and examine the record relating to any order (other than an order mentioned in section 10-A) passed by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order with respect thereof as he thinks fit.
>
> **(2)** No order under sub-section (1) affecting the interest of a party adversely shall be passed unless he has been given a reasonable opportunity of being heard.
>
> (3) No order under sub-section (1), shall be passed -
>
> (a) to revise an order, which is or has been the subject matter of an appeal under section 9, or an order passed by the Appellate Authority under that section:
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> *Explanation* - Where the appeal against any order is withdrawn or is dismissed for non-payment of fee payable under section 32 or for non-compliance of sub- section (1) of section 9, the order shall not be deemed to have been the subject-matter of an appeal under section 9;

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

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

The UP VAT Act repealed the UP Trade Tax Act with effect from 1 January 2008. Section 81 contains a repeal and saving provision in the following terms:

"**Section 81. Repeal and saving.–**

(1) The Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948) (hereinafter in this section referred to as the repealed enactment) is hereby repealed.

(2) Notwithstanding such repeal, –

(a) any notification, rule, regulation, order or notice issued, or any appointment or declaration made, or confiscation made, or any penalty or fine imposed, any forfeiture, cancellation or any other thing done or any action taken under the repealed enactment, and in force immediately before such commencement shall, so far as it is not inconsistent with the provisions of this Act, be deemed to have been issued, made granted, done or taken under the corresponding provisions of this Act.

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act, shall not be affected and manufacturing units enjoying benefit of exemption from

payment of tax under Section 4-A of the repealed Act or the units enjoying facility of moratorium for payment of tax under Section 8(2-A) of the said Act shall be entitled to claim moratorium for payment of tax in accordance with provisions of Section 42.

(3) Any officer, authorised by the Commissioner under the repealed enactment, to exercise powers under Section 10-B and sub-section (6) of Section 13-A thereof, shall be deemed to have been authorised by the Commissioner to exercise such powers under Section 56 and sub-section (7) of Section 48 respectively.

(4) Any order made or direction issued by the State Government or by the Commissioner under the repealed Act, for carrying out purposes thereof, to the extent the same are not inconsistent with the provisions of this Act, shall be deemed to have been issued under the provisions of this Act.

(5) Any security or additional security, furnished under the provisions of the repealed Act, shall be deemed valid for the purposes under this Act only upon furnishing an undertaking from the surety to this effect in the prescribed form and manner within thirty days from the date of the commencement of the Act:

PROVIDED that, in appropriate cases, the assessing authority may extend the time for furnishing undertaking from sureties.

(6) The mention of particular matters in this section shall not be held to prejudice or affect general application of Section 6 of the Uttar Pradesh General Clauses Act, 1904, with regard to the effect of repeals."

Section 56 of the UP VAT Act provides for the remedy of a revision to the Commissioner and is in the following terms:

> **"Section 56. Revision by the Commissioner.--**
>
> (1) The Commissioner or such other officer not below the rank of Joint Commissioner, as may be authorised in this behalf by the Commissioner may call for and examine the record relating to any order, passed by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order and may pass such order with respect thereto as he thinks fit.
>
> **(2)** No order under sub-section (1) affecting the interest of a party adversely shall be passed unless he has been given a reasonable opportunity of being heard.
>
> (3) No order under sub-section (1), shall be passed–
>
> (a) to revise an order, which is or has been the subject matter of an appeal under section 55, or an order passed by the appellate authority under that section.
>
> (b) before the expiration of sixty days from the date of the order in question;
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> (c) after expiration of four years from the date of the order in question.
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> EXPLANATION – Where the appeal against any order is withdrawn or is dismissed for non-payment of fee payable under section 72 or for non-compliance of sub-section (3) of section 55, the order shall not be deemed to have been the subject-matter of an appeal under section 55;
>
> (4) No dealer or any other person, aggrieved by

> an order against which appeal lies under section 55, shall be entitled to present an application for review of such order under this section."

Sub-section (1) of Section 56 of the UP VAT Act is pari materia with sub-section (1) of Section 10–B of the erstwhile Trade Tax Act save and except for the modification that the authorisation for an officer not below the rank of Joint Commissioner to exercise the power of revision is now to be issued by the Commissioner (as distinct from an authorisation of the State Government which was required by the erstwhile Act).

Section 81 is the repeal and saving provision. Sub section 1 repeals the UP Trade Tax Act. Sub-section (2) ensures that certain consequences which would have ensued purely as a result of the repeal do not ensue. In other words, it saves certain situations from the consequences of a repeal. Clauses (a) and (b) of sub-section (2) of Section 81 provide for distinct situations or eventualities. The savings clause operates with respect to them, notwithstanding the repeal of the UP Trade Tax Act under sub-section (1) of Section 81 of the UP VAT Act. Clause (a) saves (i) notifications, rules, regulations, orders or notices issued; (ii) any appointment or declaration made; (iii) a confiscation made; and (iv) any penalty or fine imposed under the Trade Tax Act. Clause (a) also stipulates that any forfeiture, cancellation or any other thing done or action taken under the repealed enactment which is in force immediately before the commencement of the UP VAT Act shall, insofar as it is not inconsistent with the provisions of the latter Act, be deemed to have been issued, made, granted, done or taken under the

provisions of the new Act. Clause (b) of sub-section (2) of Section 81 stipulates that a right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act shall not be affected. The emphasis is on the expressions acquired, accrued or incurred. Sub-section (3) inter alia provides that an officer who has been authorized by the Commissioner under the repealed enactment to exercise powers under Section 10–B shall be deemed to have been authorized by the Commissioner to exercise such powers under Section 56.

Sub-section (6) of Section 81 provides that the general application of Section 6 of the U P General Clauses Act 1904 with regard to the effect of repeals shall not be affected by the mentioning of particular matters in the section. Section 6 of the U P General Clauses Act, 1904 provides as follows:

> "**6. Effect of repeal.--**Where any Uttar Pradesh Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--
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> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
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> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
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> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
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> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
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> (e) affect any remedy, or any investigation or legal

> proceeding commenced before the repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;
>
> and any such remedy may be enforced any any such investigation or legal, proceedings may be continued and concluded, and any such penalty, forfeiture or punishment imposed as if the repealing Act had not been passed."

Section 6 of the U P General Clause Act 1904 provides for the general principles to be applied where an enactment has been repealed unless a different intention appears from the repealing statute. Clause (c) provides that the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. This provision broadly corresponds to Section 81(2)(b) of the UP VAT Act. Clause (e) stipulates that the repeal shall not affect any remedy or any investigation or legal proceeding commenced before the repealing Act came into operation in respect of any such right, privilege, obligation or liability and a penalty, forfeiture or punishment. The reference to "such" right, privilege, obligation or liability is in the context of those expressions in clause (c). Similarly "such" penalty, forfeiture or punishment is that which is adverted to in clause (d). Any such remedy may be enforced and investigation or legal proceeding may be continued and concluded and a penalty, forfeiture or punishment may be imposed as if the repealing Act has not been passed. Clause (e) refers to a remedy, investigation or legal proceeding. A remedy in respect of a right, privilege, obligation or liability

acquired, accrued or incurred may be enforced even after the repeal of the UP Trade Tax Act. If an investigation or legal proceeding has commenced before the repealing Act came into operation, the investigation or legal proceeding may be continued and concluded. Justice G P Singh in his seminal treatise on the Interpretation of Statutes observes that:

> "The effect of clauses (c) to (e) of Section 6, General Clauses Act is, speaking briefly, to prevent the obliteration of a statute in spite of its repeal to keep intact rights acquired or accrued and liabilities incurred during its operation and permit continuance or institution of any legal proceedings or recourse to any remedy which may have been available before the repeal for enforcement of such rights and liabilities."[12]

In **Bansidhar Vs State of Rajasthan**[13], a Constitution Bench of the Supreme Court considered the question as to whether proceedings for fixation of a ceiling area with reference to the appointed date under Chapter III-B of the Rajasthan Tenancy Act 1955 could be initiated and continued after the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 1973 repealed Chapter III-B of the earlier Act. It was urged before the Supreme Court that even if the provisions of the earlier Act were held to have been saved, neither had a right accrued in favour of the state nor was any liability incurred by the landholders in the determination of the ceiling area so as to attract to their cases the provisions of the old law. Hon'ble Mr Justice M N Venkatachaliah (as the learned Chief Justice of India then was) explained the difference between what is and what is not a right preserved by Section 6 of

12 13th edition 2012 p. 710
13 (1989) 2 SCC 557

the General Clauses Act in the following observations:

> "For purposes of these clauses the "right" must be "accrued" and not merely an inchoate one. The distinction between what is and what is not a right preserved by Section 6 of the General Clauses Act, it is said, is often one of great fineness. What is unaffected by the repeal is a right 'acquired' or 'accrued' under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right."[14]

The Constitution Bench held that the right of the state to take over excess land vested in it as on the appointed date and only a quantification remained to be worked out. In the circumstances, the view of the High Court was upheld to the effect that the right of the state to the excess land "was not merely an inchoate right"[15] but was a right accrued within the meaning of Section 6 (c) of the Rajasthan General Clauses Act 1955 and the liability of the land owner to surrender excess land was a liability incurred within the meaning of the provision.

In **Gajraj Singh Vs State Transport Appellate Tribunal**[16], a Bench of three learned Judges of the Supreme Court held that the renewal of a permit under the Motor Vehicles Act 1939 was not a vested or accrued right but a privilege to get a renewal according to the law in operation and after complying with the preconditions of the law. This was held not to constitute a right which had accrued:

> "There is a distinction between right acquired or

14 At para 30 p 570 and 571
15 At para 39 p 574
16 (1997) 1 SCC 650

> accrued, and privilege, hope and expectation to get a right, as rightly pointed out by the High Court in the impugned judgment. A right to apply for renewal and to get a favourable order would not e deemed to be a right accrued unless some positive acts are done, before repeal of Act 4 of 1939 or corresponding law to secure that right of renewal."[17]

In **Ambalal Sarabhai Enterprises Ltd Vs Amrit Lal & Co**[18], a Bench of two learned Judges of the Supreme Court construed the provisions of the Delhi Rent Control Act under which the landlord had filed an eviction petition against the tenant on the ground of subletting. During the pendency of the petition, an amendment was made which excluded the jurisdiction of the Rent Controller with respect to tenancies fetching a monthly rent exceeding Rs 35,000/-. Following this, the tenant contended that it was only the civil court which had the jurisdiction after the amendment and not the Rent Controller. The Supreme Court held as follows:

> "At the most, such a provision can be said to be granting a privilege to the landlord to seek intervention of the Controller for eviction of the tenant under the statute. Such a privilege is not a benefit vested in general but is a benefit granted and may be enforced by approaching the Controller in the manner prescribed under the statute. On filing the petition for eviction of the tenant the privilege accrued with the landlord is not affected by repeal of the Act in view of Section 6(c) and the pending proceeding is saved under Section 6(c) of the Act."[19]

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17 At para 42 p 672
18 (2001) 8 SCC 397
19 At para 27 p 410

In other words, it was held that since the proceeding for eviction was pending when the repealing Act came into operation, Section 6 of the General Clauses Act would be applicable. The words “any right accrued” in Section 6 included the landlord's right to evict a tenant in case a proceeding was pending when the repeal came in.

In **State of Punjab Vs Bhajan Kaur**[20], the Supreme Court held that the existing right of a party which is saved under Section 6 of the General Clauses Act has to be determined on the basis of the statute which was applicable and not under the new statute.

When a repeal is followed by fresh legislation on the same subject, it is necessary to consider the provisions of the new legislation for the purpose of determining whether they indicate a 'different intention' within the meaning of Section 6 of the General Clauses Act. The line of inquiry is not whether the new enactment expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them (**State of Punjab Vs Mohar Singh**[21] followed in **Gammon India Ltd Vs Special Chief Secretary**[22]). In other words, whenever there is a repeal of an enactment the consequences which are enunciated in Section 6 of the U P General Clause Act – in relation to the State of Uttar Pradesh – will follow unless a different intention appears in the repealing statute. Where the repeal has been followed by fresh legislation on the same subject, the purpose of considering the provisions of the new legislation is to determine whether they indicate a different intention. As the Supreme Court held in **Gammon India Ltd**

20 (2008) 12 SCC 112
21 AIR 1955 SC 84
22 (2006) 3 SCC 354

(supra) "the question is not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them"[23]. Explaining the position, the Supreme Court held as follows:

> "When there is a repeal and simultaneous re-enactment, Section 6 of the General Clauses Act would apply to such a case unless contrary intention has been gathered from the repealing Act. Section 6 would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the section. When the repeal is followed by a fresh legislation on the same subject, the court would undoubtedly have to look to the provisions of the new Act only for the purpose of determining whether the new Act indicates different intention. The object of repeal and re-enactment is to obliterate the repealed Act and to get rid of certain obsolete matters."

Applying this principle, the Supreme Court made a distinction between a situation where the effect of a repeal is to obliterate the statute and to destroy its operation in future or to suspend the operation of the common law on the one hand and on the other hand a situation where a repeal does not contemplate either a substantive common law or statutory right but merely a procedure is prescribed. The Supreme Court held as follows:

> "Since the effect of a repeal is to obliterate the statute and to destroy its effective operation in future, or to suspend the operation of the common law, when it is a common law principle which is abrogated, any proceedings which have not culminated in a final judgment prior to the repeal are abated at the

23 At para 53 pp 368 & 369

> consummation of the repeal. When, however, the repeal does not contemplate either a substantive common law or statutory right, but merely the procedure prescribed to secure the enforcement of the right, the right itself is not annulled but remains in existence enforced by applying the new procedure."

In **Gammon India**, the appellant after obtaining a construction contract in the State of Andhra Pradesh obtained the benefit of concessional tax available to registered dealers purchasing from other registered dealers in the State of Andhra Pradesh. Notices to show cause were issued to the appellant on 26 February 2005 and 12 April 2005 alleging that the appellant had falsely issued Form-G and claimed a reduced rate of tax from the sellers. The Andhra Pradesh Value Added Tax Act came into force on 1 April 2005 and the Andhra Pradesh General Sales Tax Act[24] was repealed. Notices were issued to the appellant for the imposition of a penalty and the Assistant Commissioner of Commercial Taxes confirmed the demand of additional tax and penalty. The High Court dismissed the writ petition. Section 80 (3) of the Andhra Pradesh VAT Act provided for the application of Section 8 of the Andhra Pradesh General Clauses Act, 1891, which dealt with the consequences of a repeal of an Act. The Supreme Court held that in that case there was a simultaneous repeal and re-enactment and the VAT Act had saved the earlier provisions. Hence, all rights and liabilities which had accrued or incurred under the GST Act would continue even after repeal.

The substratum of the case of the revisionist is founded on the nature of a revision as explained in the judgment of the Supreme Court in **Hari**

24 GST Act

Shankar (supra). Construing the provisions of Section 35(1) of the Delhi and Ajmer Rent Control Act 1952, the Supreme Court emphasized the basic distinction between an appeal and a revision:

> "The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeals arising under the Code of Civil Procedure. **The power to hear a revision is generally given to a superior Court so that it may satisfy itself that a particular case has been decided according to law. Under s. 115 of the Code of Civil Procedure. the High Court's powers are limited to see whether in a case decided, there has been an assumption of jurisdiction where none existed, or a refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other acts, the power is not so limited, and the High Court is enabled to call for the record of a case to satisfy itself that the decision therein is according to law and to pass such orders in relation to the case, as it thinks fit.**" (emphasis supplied)

The same principle was enunciated in a subsequent decision in **Shiv Shakti Co-op Housing Society (supra)** where it was held that whereas the right of appeal is a substantive right, there is no such substantive right under Section 115 of the Code of Civil Procedure. Section 115, it was held, is essentially a source of power for the High Court to supervise the subordinate

courts and does not confer a right on a litigant aggrieved by an order of a subordinate court to approach the High Court for relief. The scope for making a revision under Section 115 was held not to be linked with a substantive right. In that context, the Supreme Court observed as follows:

> "Right of appeal is statutory. Right of appeal inherits in no one. When conferred by statute it becomes a vested right. In this regard there is essential distinction between right of appeal and right of suit. Where there is inherent right in every person to file a suit and for its maintainability it requires no authority of law, appeal requires so. As was observed in *State of Kerala v. K.M. Charia Abdulla and Co*[25]. The distinction between right of appeal and revision is based on differences implicit in the two expressions. An appeal is continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four-Judges Bench in *Hari Shankar v. Rao Girdhari Lal Chowdhury*[26] that the distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of re-hearing on law as well as fact, unless the statute conferring the right of appeal limits the re-hearing in some way, as has been done in second appeals arising under the Code. The power of hearing revision is generally given to a superior Court so that it may satisfy itself that a particular case

25 AIR 1965 SC 1585
26 AIR 1963 SC 698

> has been decided according to law. Reference was made to Section 115 of the Code to hold that the High Court's powers under the said provision are limited to certain particular categories of cases. The right there is confined to jurisdiction and jurisdiction alone."

These decisions were rendered in the context of construing the ambit of the revisional remedy under Rent Control Legislation (in the first case) and under the CPC (in the second). The decisions highlight the basic difference between an appeal, which is a substantive right involving a rehearing on issues of fact and law (subject to such restrictions as may be imposed by the enabling statute) and a revision, the scope of which is to determine whether there has been a want of, excess or refusal to exercise jurisdiction. These decisions lay down that a revision is in the nature of an enabling provision and is not in the nature of a substantive right.

In every case where a legislation has been repealed by a subsequent enactment and the nature and ambit of a savings provision in the later enactment falls for construction, it is necessary to have due regard to the intent expressed by the legislature while enacting the subsequent legislation. The intent of the legislature is gathered from the statutory provisions. An instance where this came up for consideration was before the Delhi High Court in **International Metro Civil Contractors Vs Commissioner of Sales Tax/VAT**[27]. Following an order of assessment under the Delhi Sales Tax Act, the assessee applied for a refund which was rejected. A notice of reassessment was issued following which an order of reassessment was

27 [2008] 16 VST 329 (Delhi)

passed. The rejection of the refund application and order of reassessment were challenged before a Division Bench. The Division Bench set aside both the orders and directed the Commissioner to pass appropriate orders on the refund application. The Commissioner passed an order by which he came to the conclusion that the original order of assessment was erroneous and prejudicial to the interest of the revenue and directed the Assistant Commissioner to revise the assessment order under Section 46. In the meanwhile, on 31 March 2005, the Delhi Sales Tax Act was repealed and on 1 April 2005 the Delhi VAT Act was brought into force. Section 106 of the Delhi VAT Act made a repeal and savings provision. The Delhi High Court noticed that no power of revision was conferred upon the Commissioner of Value Added Tax under the Delhi VAT Act. The revisional power which existed under the Delhi Sales Tax Act was not saved under the Delhi VAT Act and was brought in only subsequently with effect from 16 November 2005 by the introduction of Section 74A. The issue which fell for consideration before the Delhi High Court was whether after the Delhi Value Added Tax Act had come into force, the revenue could have issued a notice to show cause seeking to revise the assessment order. The absence of a provision for revision was an important circumstance which was emphasised in the judgment of the Division Bench of the Delhi High Court. In paragraph 15, this important circumstance was noted by the Division Bench in the following terms:

> "Secondly (and this is important in so far as the petitioner is concerned) no power of revision was conferred upon the Commissioner of Value Added Tax under the

> DVAT Act. The revisionary power, which earlier existed under the DST Act, was not saved under the DVAT Act. It came into existence under the DVAT Act only by an amendment brought into force with effect from November 16, 2005 by the inclusion of Section 74A in the DVAT Act. In other words, the power of revision conferred upon the Commissioner under the DST Act was omitted under the DVAT Act and conferred on the Commissioner only on November 16, 2005."[28]

Again, after adverting to the decisions of the Supreme Court, the Delhi High Court held as follows:

> "Applying the law laid down by the Supreme Court, it must be held that by virtue of Section 106(2) of the DVAT Act since the previous operation of the DST Act and the Works Contract Act was saved, the assessment order being a transaction past and closed under those statutes, was also saved. As far as Section 106(3) of the DVAT Act is concerned, the deeming provision only means that an order passed under the repealed statute would have to be dealt with as if the repealing Act was in force on that day and the powers and jurisdiction of the authorities under the repealing Act must also be deemed to have been in force on the date when that order was passed. But, it must be remembered that the DVAT Act did not provide for any revisionary power and so, no such power or jurisdiction was available on the date of the assessment order, if the deeming fiction is taken to its logical conclusion."[29]

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28 At para 15 p 339
29 At para 67 p 352

The Court clarified, however, that it was not necessary to go to that extent because the next issue which required consideration was whether the right or entitlement of the revenue, if any, to revise an order of assessment was saved by the Delhi VAT Act. This was answered in the negative, relying upon the decisions of the Supreme Court in **Hari Shankar (supra)** and **Shiv Shakti Co-op Housing Society** (**supra**). The Delhi High Court held as follows:

> "The power of revision is an enabling power available to a superior authority to correct an error committed by a subordinate authority. Shiv Shakti [2003] 6 SCC 659 is not limited in its application to Section 115 of the Code of Civil Procedure but follows the law earlier laid down, generally, on the revisionary power of an authority.
>
> The power of revision being only an enabling power and not a substantive right, it is not saved by Section 106(2) of the DVAT Act, which only saves a "right" or an "entitlement", both being synonymous. Consequently, whichever way one considers the problem, the assessment order dated March 31, 2003 could not have been re-opened by the Revenue in the manner that we are concerned with."[30]

The judgment of the Delhi High Court in the aforesaid case, as a close reading of the judgment would indicate, places a considerable degree of reliance on what was described as "the effect of the omission of a provision in a legislation enacted subsequent to the repeal of an earlier legislation."[31] The Delhi High Court emphasised that:

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30 At paras 77 and 78 p 355
31 At para 79 p 355

> "The intention of the legislature was clear on April 1, 2005 that it did not wish the Commissioner to have the power of revision, otherwise it would certainly have been provided for. In any event, we cannot read into the repealing statute a substantive provision that is not provided for.
>
> ....
>
> The consequence of this is that the repeal of the DST Act and the Works Contract Act coupled with the omission of the revisionary power of the Commissioner under the new enactment, that is, the DVAT Act completely obliterated or effaced that power such that it did not survive after April 1, 2005. There is nothing in the DVAT Act to suggest that the power was intended to survive or be acted upon."[32]

The Delhi High Court held that while a revisional power was brought in by way of an amendment by introducing Section 74A on 16 November 2005, this "did not resuscitate or resurrect the long-dead revisionary power conferred on the Commissioner under Section 46 of the Delhi Sales Tax Act" and "had no retrospective effect."[33] These observations indicate that the predominant consideration which weighed in the judgment of the Delhi High Court was that after the repeal of the Delhi Sales Tax Act by the Delhi Value Added Tax Act on 31 March 2005, the new legislation had not conferred a revisional power on the Commissioner. The conferment of a revisional power came in much later on 16 November 2005 but this, as was noted in the judgment, was not with retrospective effect.

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32 At paras 89 and 91 p 358
33 At para 92 p 358

The provisions of the Delhi Value Added Tax Act which fell for consideration before the Division Bench of the Delhi High Court in **International Metro Civil Contractors (supra)** must clearly be distinguished from the provisions contained under the UP VAT Act which applies in the State of Uttar Pradesh. Unlike the situation which prevailed under the Delhi VAT Act, a power of revision is and has been available at all material times under Section 10–B of the UP Trade Tax Act as well as under Section 56 of the UP VAT Act. In Delhi, until the legislature intervened to incorporate it under Section 74A subsequently, there was no conferment of a revisional power on the Commissioner. In the State of Uttar Pradesh, a revisional power has been conferred on the Commissioner both under the erstwhile UP Trade Tax Act as well as under the UP VAT Act which repealed the former Act. Moreover, as we have noticed earlier, the revisional power in Section 56 of the UP VAT Act is pari materia with that which is contained in Section 10–B of the erstwhile Act save and except that now an authorisation for the exercise of the power by the Joint Commissioner is to be made by the Commissioner and not by the State Government as was the case under the previous legislation. Both the erstwhile legislation as well as the new legislation provide for a remedy of a revision to the Commissioner. The intent of the new Act was evidently not to abrogate that remedy of a revision.

As we have observed above, the crucial issue in each case is the nature of the provision which has been made in the repealing legislation. In a case which fell for consideration before a Division Bench of the Punjab

and Haryana High Court – **Hindustan Construction Company Ltd Vs State of Haryana**[34], the Haryana General Sales Tax Act 1973 had been repealed by the Haryana Value Added Tax Act, 2003. Section 61(2)(a) of the repealing Act saved any application, appeal, revision or other proceedings which were pending at the commencement of the repealing Act which could be then disposed of by the officer or authority who would have had the jurisdiction to entertain it under the new Act. The Division Bench of the Punjab and Haryana High Court held as follows:

> "....By virtue of section 61 of the VAT Act, the Legislature, while repealing the 1973 Act saved the pending application, appeal, revision and other proceedings made or preferred to any authority under that Act and transferred the same for disposal by the officer or authority, who would have had jurisdiction to entertain such application, etc., under the new Act. It is, thus, clear that while enacting Section 61 of the VAT Act, a different intention has been expressed by the Legislature. Thus, the effect of the aforesaid repealing clause clearly excludes operation of section 4 of the General Clauses Act..."[35]

These observations would indicate that in the view of the High Court, the provisions of Section 4 of the General Clauses Act had been excluded because while enacting the VAT Act and repealing the earlier Act, the legislature had saved only pending applications, appeals, revisions and other proceedings. This was held to amount to the expression of "a different intention" by the legislature.

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34 (2005) 141 Sales Tax Cases 119
35 At para 24 p 141

These provisions in the Haryana VAT Act must be clearly distinguished from those which obtain in the State of Uttar Pradesh. In Uttar Pradesh when the UP VAT Act was enacted, a specific provision was contained in Section 81(6) to the effect that the mention of particular matters in the section shall not be held to prejudice or affect the general application of Section 6 of the Uttar Pradesh General Clauses Act 1904 with regard to the effect of repeals. Hence, not merely is there no expression of a "different intention" by the legislature to exclude the application of the Uttar Pradesh General Clauses Act but, on the contrary, a specific provision has been made in Section 81(6) to protect the application of the U P General Clauses Act, 1904.

A decision which has an important bearing on the subject matter of the present case is that rendered by three Hon'ble Judges of the Supreme Court in **Swastik Oil Mills Ltd Vs H B Munshi, Deputy Commissioner of Sales Tax, Bombay**[36]. The appellant was registered as a dealer under various Sales Tax Acts which were in force in Bombay and was assessed to sales tax on its turnover. The appellant claimed an exemption from tax in respect of its turnover representing the despatches or transfers of goods from its head office to various depots or branches in other States and in respect of sales allegedly in the course of inter-state trade after 26 January 1950. Both the claims were rejected by the Assessing Officer but were partially allowed by the first appellate authority. Revisions filed by the appellant against the rejection of its claim in respect of inter-state sales were pending when a notice was issued by the Deputy Commissioner intimating the appellant that

36 AIR 1968 SC 843

he proposed to revise suo motu the appellate order of the Assistant Commissioner, Sales Tax insofar as he had allowed a deduction in respect of goods despatched to branches in other States outside Maharashtra. The appellant filed a writ petition challenging the notice. On behalf of the appellant, it was urged before the Supreme Court that the notice was issued when the earlier Act of 1953 had been repealed by a subsequent legislation of 1959 and the revisional jurisdiction could have only been exercised by the Deputy Commissioner on the basis of the new Act within a stipulated period of limitation. A repeal and savings provision was contained in Section 77(1)(a) of the repealing enactment of 1959. The Supreme Court held that notwithstanding the repeal of the earlier legislation, the power of the Deputy Commissioner to institute proceedings for revision suo motu was saved:

> "Very clearly, the repeal of the Act of 1953 by the Act of 1959 did not affect the rights and liabilities of the assessee to tax under the Act of 1953 or the Act of 1946 in respect of the turnover which became liable to sales-tax under the Act of 1946. The effect of clause (e) of Section 7 of the Bombay General Clauses Act further is that any legal proceeding in respect of levy, imposition or recovery of that tax is to continue and any fresh investigation, legal proceeding or remedy could be instituted as if there had been no repeal by the Act of 1959. Consequently, the repeal of the Act of 1953 did not in any way affect the power of the Deputy Commissioner to institute proceedings for revision suo motu against the appellate order of the Assistant Collector which had been passed in exercise of his powers under the Act of 1946."

That leads us to the construction of the provisions of Section 6 of the Uttar Pradesh General Clauses Act 1904. Section 6(c), inter alia, provides that the repeal of an enactment by state legislation shall not, unless a different intention appears, affect any right, privilege, obligation or liability which is acquired, accrued or incurred under any enactment so repealed. Under Section 6(e), the repeal is not to affect, inter alia, any remedy in respect of any such right, privilege, obligation or liability as aforesaid and any such remedy may be enforced as if the repealing Act has not been passed. Now, undoubtedly, Section 6(e) refers to "such right, privilege, obligation, liability . . as aforesaid". In other words, the remedy which is referred to in clause (e) is in respect of a right, privilege, obligation or liability of the nature which is referred to in clause (c). Clause (c) refers to a right, privilege, obligation or liability which is acquired, accrued or incurred. We must proceed on the basis that the remedy of a revision is in the nature of an enabling provision and is not in the nature of a substantive right, as has been held in the judgments of the Supreme Court in **Hari Shankar (supra)** and **Shiv Shakti Co-op Housing Society (supra)**. That, however, is not conclusive of the matter because the remedy which is saved by Section 6(e) is also in respect of a privilege, obligation or liability which is acquired, accrued or incurred. Under the provisions of the UP Trade Tax Act, Section 3(1) imposes upon every dealer for each assessment year the liability to pay tax at the rates provided by or under Sections 3-A, 3-D or Section 3-H on the turnover of sales or purchases or both, as the case may be. Under Section 7(1), every dealer, who is liable to pay tax under the Act, was required to

submit returns of his turnover at such intervals, within such period, in such form and verified in such manner as may be prescribed. Under sub-section (2) of Section 7, the Assessing Authority is empowered to assess the tax on the basis of returns submitted if, after such enquiry as it considers necessary, it is satisfied that the returns submitted are correct and complete. If no return is submitted or if the authority believes it to be incorrect or incomplete, a best judgment assessment can be made under sub-section (3). Section 7-D provides for composition of tax liability. Section 9 provides for the remedy of an appeal to a dealer or other person aggrieved by an order made by the Assessing Authority. Section 10-B provides for a revision by the Commissioner. Section 10(2) provides for an appeal to the Tribunal. The remedy of a revision is undoubtedly an enabling provision under Section 10-B. But undoubtedly, this is a **remedy** within the meaning of Section 6(e) of the General Clauses Act. A dealer who is governed by the provisions of the Act is subject to the provisions contained in the taxing legislation in regard to the framing of an assessment and the remedies which are available both to him and to the State, as the case may be, against an assessment which has been made. Against an assessment made, the dealer would be entitled to pursue remedies which have been provided and these remedies would not be affected by the repeal of the Act by the UP VAT Act. Similarly, the remedy which is available to the revenue under Section 10–B is not abrogated upon the repeal of the UP Trade Tax Act by the UP VAT Act. In fact, the provisions of Section 56 of the repealing Act would clearly evince an intention on the part of the legislature not to abrogate the remedy of a

revision which was available under Section 10–B of the repealed Act. Hence, where an order of assessment has been made under the provisions of the repealed Act, the remedy which is available to the revenue under Section 10–B of the UP Trade Tax Act would survive the repeal. There are no express words in the repealing enactment indicative of an intention to abrogate that remedy. On the contrary, there are sufficient provisions in the repealing enactment to indicate that the remedy of a revision in respect of an assessment made under the UP Trade Tax Act is saved notwithstanding the repeal.

In **Universal Imports Agency Vs Chief Controller of Imports and Exports**[37], a Constitution Bench of the Supreme Court, while considering the ambit of repealing and saving legislation, has held that:

> "...This case illustrates the point that it is not necessary that an impugned thing in itself should have been done before the Act was repealed, but it would be enough if it was integrally connected with and was a legal consequence of a thing done before the said repeal..."

The nature of the power of revision in such cases involving fiscal legislation has fallen for consideration before the Supreme Court in **Raymond Ltd Vs State of Chhattisgarh**[38] in the context of Section 56 of the Stamp Act 1899 as amended, in relation to the State of Madhya Pradesh. Under sub-section (2) of Section 56, if any Collector acting under stipulated provisions has a doubt as to the amount of duty with which any instrument is chargeable, he can draw up a statement of the case and refer it with his own

37 AIR 1961 SC 41
38 (2007) 3 SCC 79

opinion for the decision of the Chief Controlling Revenue Authority. Under sub-section (4), which was introduced by a state amendment, the Chief Controlling Revenue Authority is, on its own motion or on the application of any party, empowered to call for and examine the record of any case disposed of by the Collector and to pass such order in reference thereto as it thinks fit for the purpose of satisfying itself as to the amount with which the instrument is chargeable with duty. The Supreme Court has held, while construing the provision, that:

> "...The intention of the legislature in inserting the said provision is clear and explicit as by reason thereof a power of revision has been conferred upon the highest authority of Revenue in the State, viz. Board of Revenue. .. The revisional power is to be exercised by the Board so as to enable it to satisfy itself in regard to the amount with which the instrument is chargeable with duty. The revisional proceeding has a direct nexus with determination of an instrument being charged with duty and not the endorsement made thereupon at a subsequent stage."[39]

The principle which has been laid down is that a revisional proceeding of this nature in the context of revenue legislation has a direct nexus with the determination of the instrument being charged with duty. The power of revision is, therefore, construed in the context of revenue or fiscal legislation not as one in the nature of a stand alone provision but as a provision which is intended to enable the revisional authority to ensure that the assessment has

39 At para 16 p 85 & 86

been carried out in accordance with law. An error on the part of the assessing authority is amenable to correction in revision. The power that is vested in the revisional authority is one which has a direct nexus with the order of assessment and is in the nature of a final determination over the order of the Assessing Officer. The object and purpose is to ensure that the assessment has been made in accordance with law. In the present case, it must be emphasised, even the assessment that took place was after 1 January 2008, on 9 November 2009. The power of the revisional authority to call for and examine the records for the purpose of satisfying himself as to the legality or propriety of the order of assessment and to pass such order with respect thereto as he thinks fit is, hence, unaffected by the repeal. This power is intrinsically connected with the right of the authority to ensure that the assessment has been carried out in accordance with law. This imposes a corresponding obligation and liability on the assessee where it is found that the assessment was otherwise than in accordance with law. One cannot be disassociated from the other.

Undoubtedly, there is a difference in the language of Section 6 of the General Clauses Act 1897 and Section 6 of the U P General Clauses Act 1904. However, we are of the view that this distinction in the language will have no practical meaning or consequence to the construction which has been placed by us on the provisions of the repealed and the repealing legislation.

For these reasons, we come to the conclusion that the judgments of the two Division Benches of this Court in **Dharma Rice Mill (supra)** and

Kumar Rice Mills (supra), insofar as they hold that the remedy of a revision against an order of assessment under the UP Trade Tax Act provided to the Commissioner under Section 10–B survives the repeal lay down the correct principle of law. The remedy is saved by virtue of the provisions of Section 81 of the Uttar Pradesh Value Added Tax Act 2008 read with Section 6 of the Uttar Pradesh General Clauses Act 1904.

The questions of law are accordingly answered. The reference shall stand disposed of. The revision shall be placed before the regular Bench for disposal in light of the questions so answered.

December 2, 2015
RK/AHA

(Dr D Y Chandrachud, CJ)

(S P Kesarwani, J)

(Yashwant Varma, J)