**(1979) 02 AHC CK 0019**

**Allahabad High Court**

**Case No:** Sales Tax Reference No. 249 of 1972

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| Ram Dayal Harbilas | APPELLANT |
| Vs | |
| The Commissioner of Sales Tax | RESPONDENT |

**Date of Decision:** Feb. 22, 1979

**Acts Referred:**

- Uttar Pradesh Sales Tax Act, 1948 - Section 10, 21, 21(2), 7, 9

**Citation:** AIR 1979 All 267 : (1979) 44 STC 84

**Hon'ble Judges:** R.M. Sahai, J; H.N. Seth, J; C.S.P. Singh, J

**Bench:** Full Bench

**Advocate:** S.P. Gupta, for the Appellant; V.D. Singh, for the Respondent

**Final Decision:** Disposed Of

**Judgement**

H.N. Seth, J.

The dealer Sri Harbilas carried on business in the name and style M/s. Ram Dayal Harbilas and dealt in vegetable ghee and some other commodities. For the assessment year 1957-58 he filed quarterly returns showing his gross and net turnover as Rupees 19,17,223 and Rs. 7,16,936 respectively. However, the books filed by the dealer disclosed a gross turnover of Rs. 19,08,223 which included the two amounts of Rs. 3,80,848 and Rs. 6,52,656 representing the turnover of vegetable oil purchased in Uttar Pradesh and that imported by the dealer from outside the State respectively. A scrutiny of the account books of the dealer further showed that he had, during the year, purchased vegetable oil worth Rupees 4,53,011 in Uttar Pradesh and had imported vegetable oil worth Rs. 6,39,978 from outside the State (bulk purchases being from Rohtak Industries Limited, Dalmianagar, Bihar). The dealer further filed a list of four traders namely Babu Mian Ibrahim, M/s. Bharat Trading Company, M/s. Yogesh Kumar & Sons and M/s. Beni Ram, Harcharan Lal from whom he claimed to have purchased vegetable oil in Uttar Pradesh amounting to Rs. 3,83,206.

2. The Sales Tax Officer, Allahabad, who was the assessing authority, made enquiries from respective Sales Tax Offices within whose jurisdiction the four parties from whom the dealer claimed to have made purchases of vegetable oil inside the State were said to be trading. Sales Tax Officer, Moradabad reported that the firm M/s. Bharat Trading Company was a bogus firm which had not been assessed to tax in respect of the transactions disclosed by the dealer. Sales Tax Officer, Kanpur reported that the proprietors of firm M/s. Yogesh Kumar & Sons were not traceable. The firm M/s. Babu Mian Ibrahim made a representation to the Assistant Commissioner (Judicial) Sales Tax, Allahabad Range, through its Advocate, alleging that the dealer had presented fictitious bills from a number of vegetable ghee dealers in the State with a view to show that he had himself not imported corresponding quantity of vegetable ghee from outside the State, Amongst others, he disclosed the names of M/s. Bharat Trading Company and M/s. Yogesh Kumar and Sons, as the persons in whose names some of the fictitious bills had been obtained by the dealer.

3. Eventually, the assessing authority, vide its order dated 13th September, 1958 did not find the returns submitted by the dealer, in so far as the turnover of vegetable oil was concerned, to be correct. He estimated the dealer''s turnover of imported vegetable oil as Rupees Fourteen lacs and that of vegetable oil purchased within Uttar Pradesh as Rs. 50,000. In the process, he enhanced the gross turnover of the dealer to Rs. 23,24,780 and assessed him to sales tax amounting to Rs. 92,187.

4. Being aggrieved the dealer went up in appeal before the Judge (Appeals) Sales Tax, Allahabad. The Judge (Appeals) found that before holding that the particulars supplied by the dealer with regard to the purchases of vegetable oil claimed to have been made by him from the four firms in Uttar Pradesh were not correct and that he had imported much larger quantity of vegetable oil from, outside the State, the Sales Tax Officer did not afford proper opportunity to the dealer to substantiate his case. He also made certain general observations regarding the manner in which the Sales Tax Officer should have proceeded to appreciate the real nature of the transactions alleged to have been entered into by the dealer. Accordingly, vide his order dated 25th November, 1958, the Judge (Appeals) allowed the appeal filed by the dealer, he set aside the assessment order dated 13th September, 1958 and remanded the case for re-assessment after fresh enquiries and in the light of observations made by him.

5. While the assessment proceedings, us a result of the remand order dated 25th November, 1958, were pending, certain material came to the notice of the assessing authority which according to it indicated that huge quantity of vegetable oil had been supplied by M/s. Rohtas Industries Limited, Bihar to Uttar Pradesh parties, including the dealer in question, and payment of sales tax on such transaction had been avoided as the same had not been shown by the respective dealers in their account books. Eventually, the assessing authority vide its order dated 16th August,

1962, acting on the basis of the material collected prior to the remand order as also that procured subsequent to it, enhanced the taxable turnover of the dealer to Rs. 52,95,608 and assessed him to tax amounting to Rs. 3,13,918.70 p.

6. The dealer questioned the assessment order dated 16th August, 1962 by filing an appeal before the Judge (Appeals) Sales Tax, Allahabad. He contended that while making fresh assessments in pursuance of the remand order dated 25th November, 1958 it was not open to the assessing authority to take any fresh material into consideration. According to him the assessing authority had to confine itself to the directions given in the remand order. The appellate authority rejected the submission and held that on remand the entire case became wide open and the Sales Tax Officer was fully within its jurisdiction in taking into account fresh material as well which came to his notice subsequent to the order of remand. However, as in its opinion, the assessing authority did not afford proper opportunity to the dealer for being heard on the question of import of vegetable oil from outside the State, he set aside the assessment order and remanded the case for making a fresh assessment.

7. The dealer, not being satisfied with the opinion of the appellate authority, viz. that while making fresh assessment in pursuance of the remand order dated 25th November, 1958, it was open to the Sales Tax Officer to take fresh material into consideration, went up in revision before the Revising Authority. The Revising Authority, relying upon a decision of a Division Bench of this Court in the case of D.S. Bhist v. Commissioner, Sales Tax, Sales Tax Reference No. 134 of 1964 decided on 7-10-1968 (All) held that while making an assessment in pursuance of the order of remand dated 25th November, 1958, it was open to the assessing authority to take into consideration new material which came to its notice subsequent to the remand order, as well. The Revising Authority also rejected the dealer''s request to state the case on the points raised before him for the opinion of the High Court. The dealer then approached this Court and on 13th October, 1971 obtained an order requiring the Revising Authority to state the case and refer the following question for its opinion:--

"Whether having regard to the language of the remand order made by the Appellate Authority, the assessing authority was competent to examine the case afresh and to assess tax on enhanced turnover in the re-assessment proceedings after remand?" The Revising Authority then stated the case (present reference) and referred the aforesaid question of law for opinion of this Court.

8. When the aforesaid reference, came up for hearing before a Bench of this Court, its attention was invited to a decision of another Division Bench decision of this Court in the case of Chittarmal Narain Dass Vs. Commissioner, Sales Tax, wherein it had been laid down that in view of language used in the remand order made in that case, the jurisdiction of the assessing authority was confined only to making of fresh order after re-checking and calculation and examination of what amount of tax had

actually been obtained and realised u/s 8A(4) of the Act and that in the circumstances it was not open to the assessing authority to proceed to redetermine the entire turnover of the assessee. The Bench observed that the learned Judges deciding Chittarmal''s case had distinguished the decision of the earlier Division Bench decision in the case of D.S. Bhist on unsubstantial grounds. It felt that before answering the question referred to it by the Revising Authority it was necessary to obtain the opinion of a Full Bench on the following question of law:

"Where the order of assessment is set aside by the Appellate or Revising Authority which remands the case to the assessing authority with certain directions for making a fresh assessment, has the assessing authority subject to carrying out such directions the same power as it had originally in making the assessment u/s 7 of the U. P. Sales Tax Act."

9. In order to answer the question referred to us it will be convenient to state in brief the scheme for assessing tax as provided in the U. P. Sales Tax Act. Section 7 of the Act requires every dealer liable to pay tax under the Act, to submit periodical returns of his turnover. Sub-section (2) thereof enables the assessing authority to scrutinise the return and to make such enquiries as it considers necessary and thereafter if it finds the return to be correct and complete, to assess to tax on its basis. If, however the dealer does not submit the returns or the returns filed by him are found to be incorrect or incomplete, the assessing authority is enjoined by Sub-section (3) to determine the turnover of the dealer to the best of his judgment and to assess him to tax accordingly.

10. Section 9 of the Act as it stood at the relevant time enabled the dealer objecting to assessment made u/s 7 of the Sales Tax Act, to file an appeal before the Appellate Authority. Sub-section (3) laid down the types of orders which could ultimately be made by the Appellate Authority, while disposing of the appeal filed by the dealer. Relevant portion of the sub-section ran thus:--

"Section 9 (3)-- The appellate authority may after giving the appellant reasonable opportunity of being heard--

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the assessing authority to pass a fresh assessment order after such further enquiry as may be directed....."

11. Section 10 of the Act contemplates appointment of Revising Authority which can on the application of the Commissioner of Sales Tax or the person aggrieved call for a case for the purposes of satisfying itself that an order passed under the Act by any appellate or assessing authority is according to law and thereafter pass such order with respect of the same as it thinks fit. Section 11 then deals with questions of law being referred to the High Court for recording its opinion and for disposal of assessment proceeding in accordance with the same,

12. Sub-section (1) of Section 21 of the Act lays down that if the assessing authority has reasons to believe that whole or any part of the turnover of a dealer has, for any reasons, escaped assessment to tax for any year, the assessing authority may after issuing notice to the dealer and making such an enquiry as may be necessary, assess or re-assess him to tax. Sub-section (2) of Section 21 then provides for the period of limitation for making an assessment either under Sub-section (1) or under any other provision of the Ad in following words:--

"No order of assessment under Sub-section (1) or under any other provision of this Act shall be made for any assessment year after the expiry of four years from the end of such year,

Provided that nothing contained in the section limiting the time within which any assessment or any re-assessment could be made shall apply to an assessment or re-assessment made in consequence of or to give effect to any finding or directions contained in an order under Sections 9, 10 or 11."

13. A perusal of the aforementioned provisions shows that while dealing with an appeal u/s 9 of the Act, the appellate authority has been empowered either to confirm, reduce, enhance or annul the assessment or to set it aside and direct the assessing authority to pass a fresh assessment order after such further enquiry as it may direct. Where, while disposing of the appeal, the appellate authority is not in a position to make a final order either confirming, reducing, enhancing) or annulling the assessment, and it finds the assessment proceedings to be defective in any material particular, the only order which it can make is to set aside the assessment and to direct the assessing authority to pass a fresh assessment order after making such further enquiry as it may direct. As soon as the assessment order is set aside and the assessing authority is directed to pass a fresh assessment order, the proceeding in which the assessment order was made, is revived and it has to be concluded afresh in accordance with the provisions applicable to it after holding such enquiry as may be directed by the appellate authority. The direction which an appellate authority can, while setting aside an assessment and sending the case back to the assessing authority for making fresh assessment order u/s 9 (3) of the Act make is with regard to the holding of further enquiry before completing the assessment in accordance with the provisions applicable thereto. The section does not contemplate any direction being given by the appellate authority with regard to the extent to which an assessment is to be made on remand or to limit in such cases, the powers of the assessing authority to make the assessment in accordance with law and in the manner in which it would have made it had the original assessment order not been made. As we read the section, the appellate authority acting u/s 9 (3) (b) of the Act, has merely to set aside the assessment, leaving it to the assessing authority to bring into a fresh assessment order made in accordance with law after removing the defects pointed out by it. Of course, when the case goes back to the assessing authority, the assessing authority would while making

assessment, be bound by the findings, if any, recorded by the appellate authority on the basis of material already on the record and he will have to make the final assessment treating such finding as binding on him. But as while completing the assessment proceedings it is open to the assessing authority to make such enquiry as it likes and to take notice of fresh material which comes to his knowledge before making the assessment order, the assessing authority will be able to reconsider the findings, if any, recorded by the appellate authority on the basis of the additional material coming to its knowledge.

14. It, therefore, follows that where an assessment made u/s 7 of the Act is set aside by the appellate authority, and the case is remanded to the assessing authority, the assessing authority has, subject to carrying out the directions made by the appellate authority with regard to making of enquiries, the same power as it originally had for making the assessment under that section.

15. At this stage, it would be pertinent to notice that somewhat similar provisions are contained in Section 251 of the I-T Act 1961 which runs thus :--

" (1) In disposing of an appeal, the Appellate Assistant Commissioner shall have the following powers--

(a) In an appeal against an order of assessment he may confirm, reduce, enhance or annul the assessment, or he may set aside the assessment and refer the case back to the Income Tax Officer for making fresh assessment in accordance with the directions given by the Appellate Assistant Commissioner and after making such further enquiry as may be necessary and the Income Tax Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment."

16. It may be noticed that whereas u/s 9, Sub-section (3) (b) of the U. P. Sales Tax Act, the only order that the Appellate Authority can, while setting aside an assessment, make is to direct the assessing authority to make a fresh assessment order after making such further enquiry as may be directed by it, Section 251(1) of the Income Tax Act gives slightly wider powers to the Appellate Assistant Commissioner in similar situation. This section empowers the Appellate Assistant Commissioner to, while setting aside an assessment, to give directions to the Income Tax Officer not only with regard to making of enquiries before making fresh assessment order, but also with regard to the making of the assessment itself. Consequently, whereas the Appellate Assistant Commissioner has been while remanding the case to the Income Tax Officer authorised to limit the very scope of the assessment proceedings to be taken by him, the Appellate Authority under the Sales Act Act has not been given any such authority. It is because of the wordings used in Section 251 of the Income Tax Act that it has been held in various cases that where the Appellate Assistant Commissioner sets aside an assessment and refers the case back to the Income Tax Officer for making fresh assessment without any direction with regard to the

making of the assessment, the entire assessment proceedings get reopened and the Income Tax Officer would have such jurisdiction to assess the assessee as he originally had. See J. K. COTTON SPINNING and WEAVING MILLS CO. LTD. Vs. COMMISSIONER OF INCOME TAX U. P., and Abhai Ram Gopi Nath Vs. Commissioner of Income Tax, , but then it is open to the Appellate Assistant Commissioner to, while setting aside the assessment, direct the Income Tax Officer to consider only certain matters when making the assessment and in that event the Income Tax Officer cannot go behind the direction and enquire into other matters. See Pulipati Subbarao and Co. Vs. Appellate Asstt. Commissioner of Income Tax, Vijayawada and Another, . However, the Appellate Authority under" the Sales Tax Act has not, while setting aside an assessment and remanding the case for making fresh assessment, been given any power to limit the scope and ambit of re-assessment proceedings and the power of the assessing authority for making assessment u/s 7 of the Act cannot be inhibited in any manner.

17. The position of a remand made by a Revisional Court u/s 10 of the U. P. Sales Tax Act, may, however, stand on a slightly different footing. According to that section after the Revising Authority has suo motu or on being moved by the Commissioner of Sales Tax or on the application of any person aggrieved, called for and examined the record or any order made or proceedings recorded by any Appellate or Assessing Authority under the Act for the purposes of satisfying itself about the legality or propriety of such order or as to the regularity of such proceedings, he can pass such order as he thinks fit This section gives very wide power to the revising authority, much wider than that is available to the appellate authority. In exercise of that power the revising authority can remand a case to the assessing authority for making assessment or fresh assessment in accordance with the directions given by it. Here the revising authority, like the Appellate Assistant Commissioner under the Income Tax Act has been given ample power to inhibit the scope and ambit of the assessment proceedings to be carried on by the assessing authority, In appropriate cases, the Revising Authority can direct the reopening of the assessment proceedings on certain specified questions only and not in respect of other questions. Accordingly, in each case of remand made by the Revising Authority it will depend upon the order passed by it as to whether the assessing authority will have the jurisdiction to make the assessment u/s 7 of the Act or that his jurisdiction will stand inhibited in any manner.

18. Sri S.P. Gupta, learned counsel appearing for the dealer urged that Sub-section (2) of Section 21 of the Sales Tax Act lays down that no order of assessment under Sub-section (1) or under any other provision of the Act can be made for any assessment year after the expiry of four years from the end of such year. The second proviso to Sub-section (2) lays down an exception to the general rule of limitation for making the assessment mentioned above. According to that proviso the general rule of limitation is not to apply to any assessment or re-assessment made in consequence of or to give effect to, any finding or direction contained in an

order under Sections 9, 10 or 11. It means that the general rule of limitation has been done away with only for implementing the findings or directions contained in an order of remand. Accordingly, in a case where on remand made by the appellate authority, the assessing authority, assesses a dealer on the basis of material which was not available to the appellate authority, he does not do so for the purposes of implementing any finding or direction contained in the order of remand. He does it in the exercise of his original power of assessment u/s 7. The second proviso to Section 21 (2), therefore, does not come into play and the limitation prescribed by Sub-section (2) of Section 21 whereafter no assessment can be made continues to apply. He, therefore, contends that in this case as the limitation for making the assessment as prescribed by Sub-section (2) of Section 21, on the basis of the new material brought to the notice of the Sales Tax Officer, had already expired, the Sales Tax Officer could not avail the same for making the assessment with a view to implement the findings and directions contained in the order of remand for which there was no period of limitation. We are unable to accept this submission for the simple reason that as pointed out by us, the appellate court while making an order of remand u/s 9 of the Act is not competent to make any direction regarding the scope of the assessment proceedings, which have to be taken exactly in the same manner as if the assessment order which has been set aside, had not been passed. In such cases, for all practical purposes, the assessment proceedings are reopened in consequence of the order of remand made by the appellate authority. The second proviso does not say that the period of limitation prescribed u/s 21, Sub-section (2) is done away with in cases where the assessment is made by the Sales Tax Officer for the purposes of implementing the finding or direction contained in the order of remand, instead it lays down that the period of limitation shall not be applicable for the purposes of assessment or re-assessment made in consequence of or to give effect to any finding or directions contained in an order under Sections 9, 10 or 11 of the Act. Where the Appellate Authority sets aside an assessment and directs a fresh assessment to be made, the fresh assessment is to be made in consequence of a direction contained in an order made u/s 9 of the Act. Such assessment proceedings will have to be taken in accordance with Section 7 of the Act i.e. in accordance with the powers which the assessing authority originally had and for such proceedings the period of limitation as prescribed in Sub-section (2) of Section 21 would not be available.

19. Sri S.P. Gupta, next argued that jurisdiction of the appellate authority, while deciding an appeal u/s 9 of the Act, is confined to the subject-matter of the appeal preferred by the assessee and it cannot go outside it. The phrase confirm, reduce, enhance or annul the assessment of the appellant in Sub-section (3) of the Section 9 of the Act does not include that part of the assessment order which is not the subject-matter of appeal. The appellate authority may decide the points raised in appeal on the grounds set forth in the memorandum of appeal or on any other ground as contemplated by Rule 66 (3) of the Rules framed under the Sales Tax Act.

The Appellate Authority cannot, while hearing the appeal of an assessee assess the appellant in respect of the turnover which had not been assessed by the assessing authority. Vide Madan Studio, Varanasi v. Asst. Commr. (Judicial) Sales Tax 1975 UPTC 58. According to him there is yet another limitation on the power of the appellate authority viz. that while exercising its jurisdiction u/s 9 (3) of the Act, it cannot take into consideration new circumstances and new materials, and it has to confine itself to the material already on the record, see Engineering Traders v. State of U. P. 1976 UPTC 21 ; Commissioner of Income Tax, Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria, ; The Additional Commissioner of Income Tax, Gujarat Vs. Gurjargravures Private Ltd., . He, therefore, urged that while remanding the case, the appellate authority could not invest the assessing authority with a jurisdiction greater than what that authority itself had. As in this case, the appellate authority itself was not competent to, while dealing with the appeal, take any new material into consideration, it could also not enable the assessing authority to make use of such material in making assessment in consequence of the order of remand made by it.

20. In this case, it is not necessary for us to comment upon, the precise nature of the authority possessed by the appellate authority in dealing with an appeal filed by the dealer and we refrain from doing it. Even assuming that the appellate authority u/s 9 has to act within the limits as stated by the learned counsel, the scope and ambit of the power of the assessing authority to deal with the case on remand depends upon the powers conferred upon him by the statute. If the statute itself empowers the assessing authority to do on remand something which the appellate authority itself could not do, the power so conferred upon the assessing authority would not be bad. As already explained, the consequence of the order of the appellate authority setting aside the assessment made by the assessing authority and sending the case back to him for making fresh assessment, is that the original assessment proceedings are reviewed and the assessing authority has to make the assessment afresh within the ambit and scope of Section 7 of the Act. That section specifically enables the assessing authority to make enquiries and to take all such materials into consideration which come to its notice before making the assessment order. Accordingly, the jurisdiction of the assessing authority to take fresh material into consideration cannot be inhibited by the theoretical consideration that generally speaking the appellate authority cannot remand the case to the assessing authority which results in the assessing authority doing something which the appellate authority itself could not do.

21. Sri S.P. Gupta next argued that the original assessment proceedings u/s 7 of the Act are something different from the assessment proceedings in consequence of an order of remand. Accordingly once the original assessment is finalised, the only method provided by the Act to further assess the dealer is by way of a notice provided u/s 21 of the Act. Except under that section a dealer cannot be assessed for the escaped turnover. The turnover which had escaped assessment at the time of

original assessment will continue to be escaped turnover, and it will not cease to be escaped turnover merely because the order of assessment has been set aside in appeal. Consequently, the order of remand cannot remove the bar created by Section 21 (1) of the Act and the escaped turnover of the dealer, if any, can be assessed only with the help of Section 21 (1) of the Act. It cannot be so assessed on the basis of the jurisdiction assumed by the assessing authority in consequence of the order of remand.

22. It appears to us that Sri Gupta has developed the entire argument on the assumption that original assessment proceedings u/s 7 of the Sales Tax Act are different from assessment proceedings in consequence of the order of remand. We are unable to accept this as correct position in law. When the assessment is set aside in appeal and the case is sent back to the assessing authority for making a fresh assessment, the original proceedings u/s 7 are revived. As a consequence of the remand order, the assessing authority passes a fresh assessment order in original proceedings u/s 7 of the Act. The earlier assessment does not survive and so long as the fresh assessment is not made and the proceedings for the assessment are continuing, no question of any turnover escaping assessment as contemplated by Section 21 of the Act can possibly arise. It is different that the limitation for making the assessment is done away with because it is now being made in consequence of the order of remand made by the Appellate Authority. Once the foundation for the argument disappears the rest does not follow.

23. In view of the aforesaid discussion, we answer the question referred to us by the Division Bench in the following manner:--

"Where an order of assessment is set aside by the Appellate Authority which remands the case to the assessing authority with certain directions for making a fresh assessment, the assessing authority has subject to carrying out such directions, the same power as it originally had in making the assessment u/s 7 of the U. P. Sales Tax Act. But where the order of assessment is set aside by a revisional authority u/s 10 of the Sales Tax Act, the jurisdiction of the Sales Tax Officer to make the assessment can be circumscribed by the specific directions given by the Revisional Authority in that regard. If under the remand order made by the Revising Authority the jurisdiction of the Sales Tax Officer to make the assessment has been limited, the Sales Tax Officer will have the jurisdiction to make the assessment only to the extent to which he has been permitted to do so under the orders of the Revising Authority."