form has not been produced by the respondents. However, it is clear from clause (C) that the respondents had reserved the power to extend the offer by a fortnight. This period had expired on 10th July, 1999. Any further extension of time has to be strictly construed so that the rights of the citizen to recover the money are not jeopardised. Despite opportunity, the respondents have not produced the original record to show that the telegram had been actually despatched on 12th July, 1999. Still further, it is the admitted position that the tenders were opened on 12th May, 1999. So far as the petitioner is concerned, it is the respondent's own case in para 7 of the written statement that "12th July, 1999 was the date on which..... the tender of the petitioner was opened for acceptance". In the circumstances of the case, we are satisfied that it would be inequitable and unjust to deny the petitioner the refund of the amount deposited by him.

(25) No other point has been raised.

(26) In view of the above, the question as posed above is answered in favour of the petitioner. The writ petition is allowed. It is directed that the amount of Rs. 2,60,000 shall be paid to the petitioner within one month of the receipt of a copy of this order. In case of failure to pay the amount within the aforesaid time, the petitioner shall be entitled to the amount alongwith interest @ 10% from 1st August, 1999 to the date of actual payment. In the circumstances, the parties are left to bear their own costs.

R.N.R.

Before G.S. Singhvi & Nirmal Singh, JJ

HARYANA AGRO INDUSTRIES CORPORATION LTD,—*Petitioner*

versus

STATE OF HARYANA & OTHERS—*Respondents*

C.W.P. No. 12124 of 2000

18th May, 2001

Haryana General Sales Tax Act, 1973—Ss. 31 & 40—Revisional Authority initiating proceedings under Section 40 for revision of the assessment orders in a case of 'escaped assessment'—Section 40(1)

empowers the Revisional Authority to suo motu *call for the record of pending proceedings or decided cases to satisfy itself as to the legality or to propriety of any proceedings or of any order—Revisional Authority taking action without indicating any illegality or impropriety in the orders of the Assessing Authority—Case of 'escaped assessment' fall within the exclusive jurisdiction of the Assessing Authority—Orders of the Revisional Authority revising the assessment orders* ultra vires *Section 40 and liable to be quashed.*

Held, that under Section 31 of the 1973 Act, the Assessing Authority can undertake the exercise for reassessment if it discovers that the turnover of the business of a dealer has been under assessed or escaped assessment. The power under section 40 vested in the Commissioner to *suo motu* call for the record of pending proceedings or decided cases to satisfy himself as to the legality and/or propriety of the pending proceedings or final order cannot be used for dealing with a case of 'escaped assessment' which is the exclusive preserve of the Assessing Authority. Thus, the notices issued by the Revisional Authority under Section 40 of the Act were *ultra vires* of its powers and on that ground alone the impugned orders are liable to be quashed.

(Para 9)

Further held, that the expression 'legality or propriety' used in Section 40(1) of the Act would take within its folds all types of illegalities and improprieties which may have crept in the proceedings pending before the Assessing Authority or which may have affected the final adjudication, but it cannot take within its sweep, the cases of escaped assessment because in such cases there is no assessment/adjudication by the Assessing Authority or Appellate Authority.

(Para 15)

R.P. Sawhney, Senior Advocate with Kishan Singh, Advocate for the petitioner.

Jaswant Singh, Deputy Advocate General for the respondents.

JUDGMENT

G.S. SINGHVI, J.

(1) This is a petition for issuance of a writ in the nature of certiorari for quashing orders Annexures P3, P3/A and P3/B, passed by Deputy Excise and Taxation Commissioner (1)-cum-Authority,

Karnal (respondent No. 2) and order annexure P4, dated 6th August, 1999 passed by Sales Tax Tribunal 1, Haryana (for short, the Tribunal).

(2) The petitioner is a Haryana Government undertaking. It is registered as a dealer under the Haryana General Sales Tax Act, 1973 (for short, the Act) as well as the Central Sales Tax Act, 1956. It filed returns for the years 1985-86, 1986-87 and 1987-88 on due dates. The Assessing Authority, Panipat finanlised the assessment,—*vide* orders Annexures P1 dated 14th March, 1990, P1/A dated 31st October, 1991 and P1/B dated 23rd March, 1992. After almost four years from the finalisation of assessment for the year 1985-86, three years from the date of finalisation of assessment for the year 1986-87 and almost two years from the finalisation of assessment for the year 1987-88, respondent No 2 issued notices dated 18th February, 1994 under Section 40 of the Act proposing *suo motu* revision of the assessment orders on the ground that the amount received by the petitioner in the form of hiring and services charges had escaped levy of tax at the hands of Assessing Authority. The petitioner challenged the jurisdiction of respondent No. 2 to initiate action under Section 40 of the Act by contending that assessment orders did not suffer from any impropriety or illegality. On merits, it contested the notices by asserting that the so-called hiring and services cannot be treated as covered by the definition of 'sale' because there was no transfer of property in goods either for cash or deferred payment. The petitioner also asserted that tractors etc. were made available to the farmers with its own drivers/labour and mechanical staff for harvesting their crops etc. without allowing them even to touch the machines. After considering the reply filed by the petitioner, respondent No. 2 passed orders Annexures P3, P3/A and P3/B and revised the assessment orders for all the three years. Appeals filed by the petitioner under Section 39(1)(c) of the Act were dismissed by the Tribunal by a common order dated 6th August, 1999 (Annexure P4). Review petitions filed by it under Section 41 of the Act were also dismissed by the Tribunal by a common order dated 24th April, 2000 (Annexure P.5).

(3) The petitioner has challenged the orders Annexures P3, P3/A, P3/B and P4 on the following grounds :—

1. The proceedings initiated by respondent No. 2 for revising the assessment orders were *ultra vires* to Section 40 of the

Act because the notices issued under that Section did not speak of any illegality or impropriety in the orders passed by Assessing Authority and the case of escaped assessment do not fall within the jurisdiction of revisional authority.

2. The notice issued by respondent No. 2 was time barred *qua* assessment year 1985-86.

3. The orders passed by respondent No. 2 and appellate order passed by the Tribunal are vitiated by error of law apparent on the face of the record because neither of them considered the petitioner's plea in a correct perspective.

4. While holding the petitioner liable to tax in lieu of hiring and services charges collected from the farmers, respondent No. 2 and the Tribunal did not take into consideration the peculiar nature of the operation undertaken by it.

(4) The respondents have defended the impugned orders by contending that the Assessing Authority had, while passing the orders of assessment, over-looked the evidence available on record regarding hiring and services charges. According to them, the absence of the words 'illegality' or 'impropriety' in the notices issued by respondent No. 2 cannot be made basis for quashing the revisional orders. They have also averred that the activities of the petitioner fall within the definition of 'sale' as amended by Haryana Act No. 11 of 1984.

(5) Shri R.P. Sawhney, Senior Counsel for the petitioner argued that the impugned orders should be declared illegal and quashed because respondent No. 2 did not have the jurisdiction to initiate proceedings under Section 40 of the Act on the premise that amount received by the petitioner from hiring and services charges had escaped levy of tax at the hands of Assessing Authority. He further argued that power under Section 40 of the Act can be exercised by the competent authority only for the purpose of satisfying itself as to the legality or propriety of any proceedings or of any order made therein and not for dealing with the cases of escaped assessment. Learned counsel pointed out that the cases of escaped assessment are covered by Section 31 of the Act under which power can be exercised only by the Assessing Authority within three years from the date of final assessment order.

He then referred to the contents of notices issued by respondent No. 2 to show that the only ground on which the said respondent had proposed revision of assessment orders was that the amount received by the petitioner from hiring and services charges had escaped levy of tax at the hand of Assessing Authority and not on the ground that those orders were vitiated by any illegality or impropriety. In supports of his argument, Shri Sawhney relied on the following decisions :—

1. *State of Kerala* V. *K.M. Cheria Abdulla and Company (1)*
2. *Hari Chand Rattan Chand & Co.* V. *The Deputy Excise and Taxation Commissioner(2)*
3. *Deputy Commissioner of Agricultural Income-Tax and Sales Tax, Quilion, and another* V. *Dhanalakshmi Vilas Cashew Co. (3)*
4. *Bidar Sahakar Sakkare Karkhane Ltd.* Vs. *The State of Karnataka (4)*

(6) Shri Jaswant Singh, Deputy Advocate General, Haryana controverted the arguments of Shri Sawhney and submitted that the revisional orders cannot be quashed on the ground of so-called defect in the notices issued under Section 40 of the Act. He submitted that the cases of 'escaped assessment' are also covered by the terms legality or propriety used in that Section and, therefore, initiation of proceedings for revision of the assessment orders cannot be invalidated on the ground that the expression referred to Section 3 was used in the notices. He further argued that the petitioner's case was not the one of the escaped assessment but was a case of omission on the part of the Assessing Authority to properly appreciate the nature of the works executed by it and, therefore, respondent No. 2 had the jurisdiction to take action under Section 40 of the Act.

(7) We have given serious thought to the respective arguments. Sections 31 and 40 of the Act, which have bearing on the decision of

(1) (1965) 16 STC 875
(2) (1969)24 STC 258
(3) (1969) 24 STC 491
(4) (1985) 58 STC 65

the issue relating to legality of the proceedings initiated by respondent No. 2 and the impugned orders read as under :

SECTION 31

Reassessment of Tax

"If in consequence of definite information which has come into his possession, the assessing authority discovers that the turnover of the business of a dealer has been under assessed, or has escaped assessment in any year, the assessing authority may (at any time within three years from the date of final assessment order) and after giving the dealer a reasonable opportunity, in the prescribed manner, or being heard, proceed to reassess the tax payable on the turnover which has been under-assessed or has escaped assessment."

SECTION 40

Revision

"(1) The Commissioner may on his own motion call for the record of any case pending before, or disposed of by, any officer appointed under sub-section (1) of section 3 of the Act to assist him or any assessing authority or appellate authority, other than the Tribunal, for the purposes of satisfying himself as to the legality or to propriety of any proceedings or of any order made thereir and may pass such order in relation thereto as he may think fit :

Provided that no order, shall be so revised after the expiry of a period of five years from the date of the order :

Provided further that the aforesaid limitation of period shall not apply where the order in a similar case is revised as a result of the decision of the Tribunal or any Court of law :

Provided further that the assessee or any other person shall have no right to invoke the revisional powers under this sub-section.

(2) The State Government may by notification, confer or any officer the powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect of such areas as may be specified in the notification.

(3) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard. (*see* rule 60)."

(8) A conjoint reading of the provisions quoted above shows that while Section 31 speaks of reassessment of tax, Section 40 provides for revision. Under Section 31, the Assessing Authority can reassess the tax payable on the turnover which has been under-assessed or has escaped assessment. This power can be exercised within three years from the date of finalisation of assessment and subject to the giving of notice and reasonable opportunity of hearing to the dealer. Section 40(1) empowers the Commissioner to *suo motu* call for the record of the case pending before, or disposed of by, any officer appointed under section 3(1) to assist him or any essessing authority or appellate authority for the purposes of satisfying himself as to the legality or to propriety of any proceedings or of any order made therein and pass such order in relation to said proceedings or order as he may think fit. The period of limitation prescribed for exercise of power under this sub-section is five years from the date of the order. Sub-section 2 of section 40 empowers the State Government to issue notification conferring on any officer the powers of the Commissioner under sub-section (1). Sub-section 3 of 40 represents embodiment of the rule of hearing. It provides that no order under Section 40 can be passed adversely affecting any person unless such person is given a reasonable opportunity of being heard.

(9) The above analysis of Sections 31 and 40 shows that the Legislature has conferred powers upon the Assessing Authority and the Commissioner to deal with different types of cases and has prescribed different periods of limitation for exercise of powers under the two sections. While the Assessing Authority can undertake the exercise for reassessment if it discovers that the turnover of the business of a dealer has been under assessed or escaped assessment, the Commissioner has

been vested with the power to call for the record of pending as well as decided cases to satisfy himself as to the legality and/or propriety of any proceedings or of any order and then pass appropriate order. In our opinion, the use of different phraseology in the two sections is clearly indicative of the Legislature's intention to confer powers upon different authorities to deal with different situation and, therefore, the power exerciseable by one authority cannot be exercised by another authority. In other words, the power vested in the Commissioner to *suo motu* call for the record of pending proceedings or decided cases to satisfy himself as to the legality and/or propriety of the pending proceedings or final order cannot be used for dealing with a case of escaped assessment which is the exclusive preserve of the Assessing Authority. In view of this, we are inclined to agree with Shri Sawhney that the notices issued by respondent No. 2 under Section 40 of the Act were ultra vires of the powers of the said respondent and on that ground alone the impugned orders are liable to be quashed.

(10) In *K.M. cheria Abdulla's* case (supra) their Lordships of the Supreme Court considered the scope of Sections 12(2) and 19 of Madras General Sales Tax Act, 1939 and Rule 14-A of Madras General Sales Tax Rules, 1939 and held as under :

> "The words of Section 12(2) of the Madras General Sales Tax Act, 1939, that the Deputy Commissioner "may pass such order with respect thereto as he thinks fit" means such order as may in the circumstances of the case for rectifying the defect be regarded by him as just. Power to pass such order as the revising authority thinks fit may in some cases include power to make or direct such further enquiry as the Deputy Commissioner may find necessary for rectifying the illegality or impropriety of the order, or irregularity in the proceedings. It is therefore not right baldly to propound that in passing an order in the exercise of his revisional jurisdiction the Deputy Commissioner must in all cases be restricted to the record maintained by the officer subordinate to him, and can never make enquiry outside that record. Therefore conferment of power under rule 14-A of the Madras General Sales Tax Rules, 1939, to make further enquiry in cases where after being satisfied about the illegality or impropriety of the order or irregularity in the

proceeding, the revising authority thinks it just for rectifying the defect to do so does not amount to enlarging the jurisdiction conferred by section 12(2). The power to make such inquiry as the appellate or the revising authority considers necessary can manifestly be invested by clauses (k) and (1) of Section 19, sub-section (2), and if such power is invested the rule authorising the making of enquiry is not *ultra vires*. But the power conferred by rule 14-A by the use of the expression "making such enquiry as such appellate or revising authority considers necessary" must be read subject to the scheme of the Act. *It would not invest the revising authority with power to launch upon enquiries at large so as either to trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities or to ingnore the limitations inherent in the exercise of those powers. Neither Section 12 nor rule 14-A authorises the revising authority to enter generally upon enquires which may properly be made by the assessing authorities and to reopen assessments."*

(11) In *Hari Chand Rattan Chand & Co.* v. *The Deputy Excise and Taxation Commissioner* (supra), a Full Bench of this Court considered the scope of section 11-A and section 21(1) of Punjab General Sales Tax Act, 1948. The Full Bench, relied upon the proposition in *K.M. Cheria Abdulla and Company's* case (supra) and held as under :

"Section 11-A empowers the assessing authority to reassess a dealer in respect of any turnover which had escaped assessment or which had been under-assessed in consequence of any definite information which comes into his possession after the original order of assessment was made. This power cannot be exercised either by the appellate authority or the revisional authority. The revisional authority is entitled to call for the record of any case decided by the assessing authority or any appellate authority in order to see whether the order passed is proper or legal. Similarly he can call for the record of any proceedings pending before any assessing authority or appellate authority in order to determine the legality or propriety of the proceedings. But, before he decides to exercise this power,

he must come to the conclusion that the order or the proceedings suffer from the vice of impropriety or illegality and for this conclusion he has to confine himself to the record which is called for by him and which was before the lower authority, as the lower authority can be presumed to have applied his mind only to that record. He cannot take into consideration any fresh material in order to come to this conclusion. After having come to that conclusion, he will be entitled to scrutinise the proceedings and the order passed in order to determine the correct turnover which should have been assessed to tax on the basis of that record. He cannot, however, bring to tax, in the purported exercise of revisional powers, any turnover which had not been disclosed to the assessing authority by the dealer or which was not discovered by him during the course of assessment and which has come to the notice of the revising authority after the expiry of three years following the close of the year to which the turnover proposed to be taxed relates. That is the function of the assessing authority under section 11-A and cannot be exercised by the revising authority."

(12) *In Deputy Commissioner of Agricultural Income-Tax and Sales Tax, Quilion, and another* vs. *Dhanalakshmi Vilas Cashew Co.* (supra), a three Judges Bench of the Supreme Court interpreted Section15(1)(i) of Kerala General Sales Tax Act and Rule 33 of Kerala General Sales Tax Rules, 1950 and held that the revisional jurisdiction under section 15(1)(i) cannot be exercised to deal with the case of escaped turnover. Some of the observations made in that decision are extracted below :

"*The revisional jurisdiction under section 15(1)(i) is quite distinct and separate from the one created under rule 33 to tax escaped turnover.* The Deputy Commissioner while exercising revisional jurisdiction under section 15(1)(i) would be restricted to the examination of the record for determining whether the order of assessment was according to law. Rule 33, which confers power to assess escaped turnover, is normally to be exercised in matters *de hors* the record of assessment proceedings."

(13) In *Bidar Sahakar Sakkare Karkhane Ltd.* v. *The State of Karnataka* (supra), a Division Bench of Karnataka High Court interpreted Sections 12-A and 21(2) of Karnataka Sales Tax Act, 1957 and held as under :

> *"The revisional power cannot be exercised in respect of a matter which falls within the power to reassess escaped turnover. The revising authority, in other words, should not trench upon the powers which are expressly reserved to the assessing authority under section 12-A of the Karnataka Sales Tax Act, 1957.* The Deputy Commissioner, in exercise of his revisional jurisdiction, should not ignore that limitation. It is clear from the provisions of section 12-A of the Act that the reason for the turnover escaping assessment is immaterial. It might be by oversight, mistake or by design. *If the record reveals no application of mind by the assessing authority in respect of a part of the turnover, then it must be deemed to have escaped assessment. It would therefore be a clear case falling within the exclusive jurisdiction of the assessing authority for reassessment, no matter whether that part of the turnover was in or outside the record of assessment.* If, on the other hand the assessing authority has applied his mind and erroneously excluded any part of the turnover, then certainly it would be a case for the revisional authority to revise the assessment.

Where the assessee, a co-operative institution having a sugarcane factory, included harvesting charges incurred in the purchase of sugarcane to the factory, the assessing authority without applying his mind omitted to include those expenses in the taxable turnover, and the Deputy Commissioner in exercise of his powers under section 21(2) of the Karnataka Sales Tax Act set aside the assessment and directed the assessing authority to redo the assessment by including in the purchase turnover, the harvesting charges incurred by the assessee.

Held, that since the assessing authority did not apply his mind to the disputed turnover, the revising authority could not have invoked the powers under section 21(2) of the Act."

(14) The argument of Shri Jaswant Singh that the expression legality or propriety used in Section 40(1) of the Act should be liberally construed so as to include a case of escaped assessment sounds attractive but having regard to the scheme of the Act, we are unable to accept the same. If the Legislature intended to invest the revisional authority with the jurisdiction and power to deal with all types of cases, then it would have incorporated a non-obstante clause in Section 40. In the absence of such clause, we are unable to interpret Section 40(1) as empowering the Commissioner or other designated officer to exercise power conferred upon the Assessing Authority under section 31.

(15) We are further of the view that the expression legality or propriety would take within its folds all types of illegalities and improprieties which may have crept in the proceedings pending before the Assessing Authority or which may have affected the final adjudication, but it cannot take within its sweep, the cases of escaped assessment because in such cases there is no assessment/adjudication by the Assessing Authority or Appellate Authority.

(16) The matter deserves to be considered from another angle. A perusal of the notices dated 18th February, 1994 shows that respondent No. 2 had filled the blanks in the printed proforma and called upon the petitioner to show cause against the proposed *suo motu* revision of the assessment order. The printed portion of the notice and the blanks filled by hand writing are re-produced below :

"From

Y.C. Aggarwal
The Dy. Excise and Taxation Commissioner Ins. **Printed**
Cum-Revisional Authority, Karnal.

To

M/s Haryana Agro Industries, **Hand written**
Panipat,
Re No. 715.

Subject : Notice u/s 40 of the H.G.S.T. Act, 1973 for the Assessment Year 1985-86. **Printed**

NOTICE **Printed**

I, Y.C. Aggarwal, Dy. Excise and Taxation Commissioner (Inspector) Karnal, vested with the powers of Revisional Authority under section 40 of the H.G.S.T. Act, 1973, in *suo-motu* examined your sales tax assessment record for the purpose of satisfying myself as to the legality and propriety of the order passed by assessing authority for the assessment year 85-86 on_____. After examining the said record, I have **Printed** found the following discrepancies in the assessment order passed by the assessing authority.

Amount received by the Co. from hiring & Services has escaped levy of tax at the hands of the Assessing Authority which need revision. **Hand written**

I, therefore, propose to take *suo-motto* action in the said **Printed** case for revision of the assessment order. Before I pass an order in revision, you are hereby provided an opportunity of being heard on 28th February, 1994 in my office at 10.30 a.m. and to produce account books/stock inventory/sufficient evidence in support of your claim, if any.

Dy. Excise & Taxation Commissioner (I)-cum-Revisional **Printed** Authority, Karnal 18th February, 1994"

(17) A bare reading of the notice extracted above shows that while initiating action under section 40 respondent No. 2 did not even advert to the relevant provisions, else he would have indicated that proposed action was being taken on account of particular illegality or

impropriety in the orders passed by the Assessing Authority. In our opinion, this is sufficient to draw a conclusion that respondent No. 2 had mechanically issued the impugned notices. In *Barium Chemicals Ltd. and another* V. *Company Law Board and others(5)* a Constitution Bench interpreted the expression if in the opinion of Central Government appearing in Section 237(b) of Companies Act, 1956 and held that for exercise of power under that Section, there must exist circumstances referable to the relevant statutory provisions. Their Lordships also held that an order passed in the printed proforma do not satisfy the requirement of formation of an objective opinion with reference to the relevant statutery provision.

(18) For the reasons mentioned above, we hold that orders annexures p3, p3/A and p3/B passed by respondent No. 2 are ultra vires to section 40 of the Act and liable to be quashed as such. Order Annexure p4 passed by the Tribunal is also liable to be quashed on that ground.

(19) In view of the above conclusion, we do not consider it necessary to deal with other grounds of challange raised by the petitioner.

(20) In the result, the writ petition is allowed. The impugned orders are declared illegal and quashed. The respondents are directed to refund the amount, if any, deposited by the petitioner in compliance of orders Annexures p3, p3/A and p3/B.

R.N.R.

Before G.S. Singhvi & Nirmal Singh, JJ

THE MAUR MANDI CO-OPERATIVE MARKETING-CUM-PROCESSING SOCIETY LTD.—*Petitioner*

versus

STATE OF PUNJAB & ANOTHER,—*Respondents*

C.W.P. No. 7311 of 2000

(5) AIR 1967 SC 295