

पत्राक-न्याय-पुनरीक्षण / 2020-21 /

प्रेषक,

कमिश्नर, वाणिज्य कर,

उत्तर प्रदेश।

सेवा में,

समस्त कर निर्धारण अधिकारी /

अपीलीय अधिकारी, वाणिज्य कर

उत्तर प्रदेश।

(वाद अनुभाग)

लखनऊ: दिनांक: 04 दिसम्बर, 2020

महोदय,

कृपया इस पत्र के साथ संलग्न मा0 उच्च न्यायालय इलाहाबाद के सेल्स टैक्स / ट्रेड टैक्स रिवीजन संख्या 94 / 2020 सर्वश्री बी0एस0 इण्टरप्राइजेज बनाम कमिश्नर वाणिज्य कर उत्तर प्रदेश के मामले में दिये गये निर्णय दिनांक 02.12.2020 का सन्दर्भ लें जिसके द्वारा कर निर्धारण वर्ष 2013-14 से सम्बन्धित विवेकानुसार कर निर्धारण के मामले में निर्णय दिया गया है।

प्रश्नगत प्रकरण में दिये गये निर्णय की प्रति पत्र के साथ विभागीय वेबसाइट पर उपलब्ध है। अतः उक्त निर्णय का भलीभाँति अध्ययन करना सुनिश्चित किया जाए।

संलग्नक-उपरोक्तानुसार।

भवदीय

(सुनील कुमार राय)

एडीशनल कमिश्नर(विधि)वाणिज्य कर  
उत्तर प्रदेश, लखनऊ।

पृ0प0सं0 व दिनांक उक्त।

प्रतिलिपि-एडीशनल कमिश्नर ग्रेड-2(आई0टी0)वाणिज्य कर मुख्यालय को इस अनुरोध के साथ प्रेषित कि उपरोक्त निर्णय को विभागीय वेबसाइट पर अपलोड करना सुनिश्चित करें।

संलग्नक-उपरोक्तानुसार।

(राम सजीवन मिश्रा)

ज्वाइन्ट कमिश्नर(वाद)वाणिज्य कर  
मुख्यालय, लखनऊ।

vaad

**A.F.R.****Court No. - 38****Case :- SALES/TRADE TAX REVISION No. - 94 of 2020****Revisionist :- M/S B.S. Enterprises****Opposite Party :- The Commissioner Of Commercial Tax U.P.  
Lucknow****Counsel for Revisionist :- Vishwjit****Counsel for Opposite Party :- C.S.C.****Hon'ble Pankaj Bhatia, J.**

Heard Sri Vishwjit, learned counsel for the revisionist and Sri Rishu Kumar, Standing Counsel appearing on behalf of State-opposite party.

In view of the statement made by the Standing Counsel that he does not want to file any objections, I proceed to hear and decide the matter finally.

The present assessment proceedings arise from the Assessment Year 2013-14 wherein the revisionist has disclosed the turn over of purchases and sales as under:

(1) Total purchases from the registered dealers:	16,65,367.00
(2) Sales within U.P.	
(a) Taxable	Rs. 65,400.00
(b) Non-taxable	Rs. 20,000.00
Total sales within U.P.	85,400.00
(3) Central Sales	Rs. 25,29,563.00
Gross Turn over of sales:	Rs. 26,14,963-00

It is stated that the revisionist has also filed his detailed Statements of Accounts. It is stated that while the assessment proceedings were going on two tax invoices collected by Mobile Squad were considered by

the Assessing Authority and with regard to one of the said two tax invoices, the Assessing Authority came to the conclusion that the same was issued by the revisionist, the said findings were recorded on the basis of personal inspection of the invoices (comparing them with the actual invoices by the revisionist) and also the fact that the revisionist did not lodge any FIR when it came to his knowledge that any parallel invoice is being issued. On the basis of the said invoice, the Assessment Authority rejected the Books of Accounts and proceeded to assess taking recourse to Section 28(2)(ii) of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as the 'Act') for 'best judgement assessment'. The said 'best judgement assessment' was done on 31.3.2017 by an ex-parte order, the revisionist filed an application under section 32 of the Act for recall of the ex-parte order. The Assessment Authority proceeded to decide the matter on merits and passed an order dated 04.12.2017 determining evaded purchase of 65,00,000.00 and evaded sales of Rs. 80,00,000/- (Rs. 60,00,000 Provincial & Rs. 20 lacs Central Sales) and thus the tax payable by the assessee was assessed at Rs. 17,50,000/- in Provincial case and Rs. 2,80,000/- in Central Sales.

The order dated 04.12.2017 was rectified in respect of the Central Sales vide order dated 18.12.2017.

Aggrieved against the order dated 04.12.2017, the revisionist preferred an appeal before the Appellate Authority and submitted that the manner of best judgement assessment was wholly arbitrary and illegal inasmuch as only one bill recovered or produced by the

Mobile Squad was found to be non-genuine and it was argued before the Appellate Authority that the assessment taking into account the entire sales, the State as well as the Central was an arbitrary exercise of power.

The Appellate Authority, vide order dated 18.2.2018, was of the opinion that the determination of the turnover on the basis of 'best judgement assessment' was based upon maintenance of parallel bill book hence the evaded sales was assessed as equal to the disclosed sales of the assessee i.e. 26,15,000/-. As regards, the Central Sales, the Appellate Authority was of the opinion that as no evidence was on record with regard to evasion of Central Sales hence the demand for evaded Central Sales was set aside.

Aggrieved against the said order, an appeal was preferred before the Tribunal. The Tribunal after considering the arguments raised by appellant upheld the order of the First Appellate Authority placing reliance upon the judgement of this Court in **M/S Kapil Kumar & Brothers, Gautam Budh Nagar vs. Commissioner of Trade Tax (Vol. 34 NTN 2007, Page 171)**.

Aggrieved against the said judgement dated 11.2.2020 the present revision has been filed on the following substantial questions of law:

*"1. Whether on the facts and circumstances of the present case, it was legally justified to enhance the taxable turnover of sale by Rs. 26,15,000.00 under the U.P. VAT Act merely on the basis of single invoice of Rs. 11970-00?"*

2. *Whether Tribunal was legally justified to confirm the enhancement of taxable turnover arbitrarily against the principle of law laid down by this Hon'ble court that determination of turn over should be commensurate to the material and evidence available on the record?*

3. *Whether, Tribunal was legally justified in confirming the enhancement of taxable turn over of sale in U.P. by Rs. 26,15,000-00 equal to gross sale of Rs. 26,14,963/- disclosed by the applicant for the entire assessment year which includes the Inter State Sales (Central Sales) of Rs. 25,19,563.00 accepted by the appellate authorities?*

4. *Whether in view of provision of the Act and settled law of this Hon'ble Court, it was legally justified to impose the tax both on determined taxable turnover of purchase and sales without giving the benefit of input tax credit to the applicant?"*

The counsel for the revisionist argued that while taking recourse to the powers conferred upon the authority under section 28(2)(ii) of the Act, the Assessing Authority does not get absolute powers for making the assessment. The said power has to be exercised with caution and any exercise of power which is prima facie arbitrary has to be held contrary to the powers conferred under section 28(2)(ii) of the Act.

The counsel for the revisionist has placed reliance upon the judgement of this Court in the case of **Ayyub Traders vs. Commissioner, Commercial Tax U.P. Lucknow, [2019 U.P.T.C. (Vol. 102)-1363]** wherein

this Court recorded as under:

*"Insofar as estimation of turnover is concerned, normally, this Court does not interfere if such an estimation is found arising from material and evidence on record, however, in the present case, other than the two undisclosed bills recording transactions worth Rs. 5,520/- (in all), there is absolutely no material considered by the assessing officer or the appellate authority for the purposes of making an estimation. It is a settled position in law that the estimation made must arise from and be proportionate to the evidence of undisclosed turnover. In the instant case, as against the undisclosed turnover Rs. 5,520/- discovered, that too, on one date, i.e. 01.01.2006, the estimation as has been sustained, bears no proportion being Rs. 5,25,000/-. The same cannot be sustained.*

*Normally, this Court would have remanded the matter to the fact finding authority to record a proper finding of its own, however, the Court cannot lose sight of the fact that the assessment year in question is 2005-06 and almost 14 years have passed since then. If the matter were to be remitted today, largely, it would be a waste of time, inasmuch as the assessment had arisen under the U.P. Trade Tax Act, 1948 that came to be repealed by the U.P.V.A.T. Act which, in turn, has come to be repealed by the G.S.T. Act, 2017.*

*Thus, to bring a closure to an old dispute wherein the assessee appears to have a genuine grievance and not to set a rule as to the estimation to be made, the estimation of undisclosed turnover be pegged at Rs. 50,000/-. The assessment may stand concluded accordingly. Question of law no.*

*(ii) is answered accordingly."*

He further placed reliance upon the judgement of this Court dated 04.12.2017 in Sales/Trade Tax Revision No. 317 of 2007 (**M/s Vivek Agency Thru' Prop. Gyan Prakash Kesarwani vs. The Commissioner of Trade Tax, U.P. Lucknow**) wherein this Court has recorded as under:

*"Both the Assessing Authority as well as the Tribunal have proceeded in the matter without being educated by the principles which must necessarily govern a best judgment assessment. While it is true that in the course of estimation of turnover a certain degree of guess work must necessarily be recognized as vesting and inhering in the hands of the Assessing Authority, the same cannot possibly be construed as conferring a power to estimate turnover in a wholly whimsical manner as has been done in the facts of the present case. The estimation of turnover of Rs.10,00,000/- is based solely on surmises and conjectures. The mere fact that the bill in question bore the number 114, cannot automatically lead one to conclude or hold that it was preceded by 113 prior transactions and that too of identical value. Such a process of determination and assessment in the case of a taxing statute cannot be accorded approval by this Court."*

He has further placed reliance on the judgement of this Court passed in Sales/Trade Tax Revision No. 499 of 2015 (**M/S Raj Pan Products Private Limited vs. Commissioner of Commercial Tax U.P. Lucknow**) dated 20.1.2017 wherein this Court has held as under:

*"The authorities have not recorded any finding as to how assessment has been enhanced by almost 28 times. There has to be some reasonable basis or nexus between the escaped transaction noticed and the consequential enhancement made by the authorities. This Court had earlier indicated that unless there exists other material to come to a different conclusion, the authorities could enhance the assessment by twice the amount i.e. Rs.1,40,000/-. The observations made by this Court in the order dated 22.7.2015 does not appear to have been taken note of in correct perspective and without any independent material or finding, it has reiterated the view taken earlier by it. There is no finding that assessee had persistently committed such default or that it was done with deliberate intent.*

*In the facts and circumstances of the present case, enhancement ought not to have been made more than twice the escaped transaction. The question of law raised in this revision is accordingly answered by holding that tribunal was not justified in enhancing the turnover above twice the escaped transaction in the facts and circumstances of the present case, and the enhancement to the tune of 28 times is not justified."*

In view of the judgements referred above, counsel for the revisionist argues that the assessment made against the assessee, the appellate orders herein are wholly arbitrary and illegal and deserves to be set aside.

The Standing Counsel, on the other hand, argues that there was no error committed by Assessing Authority in rejecting the Books of Accounts on the basis



of one bill, which on examination was found to be issued by the assessee himself. In support of the said contention, he has placed reliance on the judgement of this Court in case of **M/S Kapil Kumar & Brothers, Gautam Budh Nagar vs. The Commissioner of Trade Tax (Vol. 34 NTN 2007, Page 171)** wherein this Court had accepted the application of stay in respect of fake bills. Surprisingly, in the said judgement itself, while deciding the issue on the quantum of assessment, this Court recorded as under:

*"The inference of the Tribunal that every month suppressed sales had been made against 100 bills is also not without any basis. Taking the value of the each bill at Rs. 1.29,000/-, total suppressed sale for the entire year comes to Rs. 15.48 crores. Tribunal has taken a very lenient view and has estimated the suppressed sales only at Rs. 1,54,46,975/-, which cannot be said to be arbitrary or excessive."*

Thus, in sum and substance, this Court with regard to quantum accepted 10% of the escape sales not to be arbitrary and excessive.

The jurisdiction of the Assessing Authority while taking recourse to the 'best judgement assessment' is well settled. The Supreme Court in the case of **State of Kerala vs. C. Velukutty, (1966) 60 ITR 239, The Commissioner of Income Tax, Calcutta vs. Padamchand Ramgopal, 1970 (3) SCC 866, M/s Joharmal Murlidhar and Co. vs. Agricultural Income Tax Officer, Assam and others, 1970 (3) SCC 331 and Shri S.M. Hasan, S.T.O. Jhansi and another vs.**

**M/s New Gramophone House, Jhansi, (1976) 4 SCC 854** has categorically held that while assessing, on the basis of 'best judgement', the Assessing Authority has to make the assessment honestly and on the basis of an intelligent well-grounded estimate rather than upon pure surmises. The assessment so made while taking recourse to the 'best judgement assessment' should not be speculative or fanciful but on reasonable guess based upon the material available before the Assessing Authority.

In the present case, admittedly, the one tax invoice, which was found to be fake, was of Rs. 11,970/- and solely on the basis of the said invoice, the evaded sales has been assessed at Rs. 26,15,000/- i.e. 100% of the disclosed sales.

Considering the judgements placed by both the counsels, it is clear that the Assessing Authority is bound to act in a rational manner while resorting to best judgement assessment in view of the facts on record it is clear that only one bill of Rs. 11,570/- was available as material to assess the evaded sales. There was nothing more before the Assessing Authority to form an opinion that sales equal to the declared sales should be determined as evaded sales.

In view of the facts and circumstances and following the judgements cited by Standing Counsel in case of **M/S Kapil Kumar & Brothers** (supra), I hold that the evaded sales should be quantified as Rs. 2,61,500/- that is the 10% of the total disclosed sales for the purposes of determining in the tax liability.

The liability of payment of tax shall be calculated for the year 2014-15 treating evaded sales at Rs. 2,61,500/-.

Question of law no. 1, 2 and 3 are answered accordingly.

The revision is partly allowed.

**Order Date :-** 2.12.2020  
Puspendra