* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **STR No.14-17 of 1989**

With

STR No. 18 of 1989 and STR No. 7 of 1991

% Decision Delivered On: 14th July, 2010.

1. STR Nos. 14 – 17 of 1989

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. H.L. Taneja, Advocate

VERSUS

M/s PRATAP STEEL ROLLING MILLS . . .Respondent

through: Nemo

2. STR No.18 of 1989

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. H.L. Taneja, Advocate

VERSUS

M/s PRATAP STEEL ROLLING MILLS . . .Respondent

through: Nemo

3. **STR No. 7 of 1991**

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. H.L. Taneja, Advocate

VERSUS

M/s SARDAR OIL . . .Respondent

through: Nemo

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. *(ORAL)*

1. In all these cases, questions of law, which are referred for opinion of this Court, at the instance the Commissioner of Sales Tax on applications filed under Section 45 of the Delhi Sales Tax Act, 1975, are common which are reproduced below:

   (i) Whether learned Appellate Tribunal was empowered and had jurisdiction to go into the vires of the provisions of Rule 23 (a) of the Delhi Sales Tax Rules, 1975?

   (ii) Whether the learned Tribunal was justified in holding that Rule 23A was repugnant to the relevant provisions of the Act and the penalty was not imposable?

2. For the sake of convenience, we may take note of the facts from STR No.14-17 of 1989 in which the assessees M/s. Pratap Steel Rolling Mills is a private limited company and is engaged in the business of manufacture and sale of iron and steel. On the basis of its sales tax registration certificates, the appellant purchased

iron scrap from the registered dealers by giving them declaratio in ST-1 forms and sent it to its Ballabhgarh factory in Haryana for fabrication and after fabrication, received back the fabricated goods for sale in Delhi. But it did not show purchase price of unutilized raw materials in each quarterly return filed but showed the same in the turnover for each year and got itself assessed accordingly. The Assessing Officer (AO) was of the view that under Rule 23A of the Delhi Sales Tax Rules, 1975 (hereinafter referred to as 'the Rules'), it ought to have shown the purchase price of unutilized raw materials in every quarterly return and paid the tax on that amount within the prescribed period, i.e., 45 days from the end of the quarter to which the return related to. Consequently, the AO had not only imposed tax on the price of the unutilized raw materials for each quarter but also imposed interest on the tax so calculated.

3. Aggrieved by the order of the AO, the respondent-dealer filed appeal before the Deputy Commissioner and the Deputy Commissioner rejected the appeals of the respondent-dealer.

4. Feeling aggrieved, the respondent filed appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') and the Tribunal accepted that appeal. It held that the price of the raw materials purchased on the basis of registration certificates and not utilized in the manufacture of the goods will be added to the taxable turnover (yearly) of the dealer and not in

the quarterly returns. The liability to pay interest will arise on after the assessment is made and the amount of tax is not deposited within a month from the service of demand notice. It also held on the basis of an authority of the Tribunal in the case of ***Hamdard Dawakhana*** Vs. ***C.S.T.*** in Appeal No.276/STT/80 that Rule 23A is repugnant to the provisions of Section 2(9) of the Act which defines 'turnover' and so the liability to pay interest arises after the amount of tax has been assessed under Section 23 or 24 of the Act and the dealer will be liable to pay interest after the expiry of 30 days from the service of Notice demanding the payment of tax. Therefore, it directed the Sales Tax Officer that the interest would be calculated at the permissible rate with effect from the date next following the date of expiry of one month from the service of demand notice.

5. Thus, the view taken by the Tribunal, the dealers who violated the declaration in From ST-1 inasmuch as they purchased raw materials free of tax, on the strength of the said declaration for use in the manufacture of goods in Delhi but transferred the raw materials to a place out of Delhi for manufacture of goods. Viewed thus, according to Rule 23A the dealers were liable to pay tax along with interest with the return for the quarter following the quarter during which such violation took place. But, the view taken by the Tribunal was that interest was payable only when assessment for the return period was made and the dealer did not pay the tax within 30 days as envisaged by Section 27 of the Act.

6. Before we consider to answer these questions, we deem appropriate to point out that such questions had been referred in other cases including in the case of ***Hamdard Dawakhana (supra)*** itself, as well. Feeling aggrieved by the aforesaid order of the Tribunal, Commissioner filed application for reference and the Tribunal vide its order dated 13.10.1989 referred the aforesaid questions of law for the opinion of this Court. Under almost similar circumstances and relying upon the judgment of the Tribunal in the case of ***Hamdard Dawakhana (supra)***, the same questions are referred in other cases as well. Both these questions need to be answered addressing one aspect, viz., whether it is within the powers of jurisdiction of the Tribunal to go into the vires of the provisions of statutory rules.

7. The first reference registered as S.T. Reference No.12 of 1987 in the case of ***Hamdard Dawakhana (supra)*** came up before a Division Bench of this Court on 28.309.2005. This Reference was returned unanswered on account of the fact that paper books had not been filed for over 17 years. However, the Court granted liberty to the Revenue to seek recall of the said order dated 28.09.2005 in case the requisite paper books were filed within six months from that date. But unfortunately, the counsel who appeared on 28.09.2005 neither informed the Department about the order passed nor did he himself file the paper books within six months. Subsequently, in the year 2008, when the Department on a letter addressed to the Registrar of this Court came to know

about the order dated 28.09.2005, the Department filed application for restitution along with an application for condonation of delay, relying on a judgment of the Supreme Court in the case of ***Rafiq and Anr.*** Vs. ***Munshilal and Anr.*** [AIR 1981 SC 1400] that no one should suffer for the lapse on the part of the counsel, but this application was rejected considering that there was inordinate delay of three years.

8. In another case also, viz., S.T. Reference No. 5 of 1989 entitled ***Commissioner of Sales Tax*** Vs. ***Lloyds Sales Corporation,*** these questions were referred. However, vide orders dated 09.01.2009, this Court returned the said Reference unanswered for the reasons stated therein. Main reason was that the judgment of the Tribunal in that case was not founded on Rule 23A being repugnant to Section 2(o) of the Act.

9. Therefore, it is clear that none of these questions have been answered so far, on merits.

10. With the aforesaid introductory remarks, we revert back to the merits of this case.

11. Law on this aspect is well-settled, viz., an authority created under a statute cannot question the vires of the statute or any other provision thereof, as it functions within the four corners of the Act and not outside it. Likewise, it is also a trite law that the Rules

made under the statute must, for all purposes of construction a obligation be construed as if they were in the Act and are to be of the same effect as contained in the Act, or that there is a presumption of constitutionality in respect of law made by the legislature.

12. Following are the judgments which laid down the aforesaid proposition of law:

In the case of **K.S. Venkataraman & Co.** Vs. ***State of Madras*** [60 ITR 112], the Supreme Court explained that a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, by necessary implication, bar the maintainability of a civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of a civil court in that regard. But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside it. If it acts on the basis of a provision of the statute which is *ultra vires,* to that extent it would be acting outside the Act. In that event, a suit to question the validity of such an order made outside the Act would certainly lie in a civil court.

This position was reiterated by the Apex Court in the case of ***Collector of Central Excise*** Vs. ***Doaba Co-Operative Sugar***

Mills Ltd. [1988 (37) E.L.T. 478] holding that the Authoriti functioning under the Act are bound by the provisions of the Act.

A Division Bench of this Court in the case of ***M/s. Radhey Shiam Sharma*** Vs. ***Sales Tax Officer & Others***, following the aforesaid dicta, reiterated the legal position in the following manner:

> "10. It is fairly well-settled in law that a forum, which is creature of a statue, cannot adjudicate upon the constitutional validity of a provision or the vires of that statute. By a catena of decisions, for example, K.S. Venkataraman & Co. (P) Ltd. v. State of Madras, (1966) 2 SCR 229; Commissioner of Income Tax v. Straw Products Ltd., (1966) 60 ITR 156; C.T. Senthilnathan Chettial v. State of Madras, (1968) 67 ITR 102; Alpha Chem v. State of U.P. (1993) 89 STC 304 and C.W.T. v. Hashmatunnisa Begum (1989) 176 ITR 98 (SC), the position has been clarified. Therefore, a forum, which is created under a statute, cannot adjudicate upon the vires of provisions of that statute. In Hashmatunnisa Begum's case (supra), while dealing with reference under Wealth-tax Act, 1957, the Apex Court inter alia, observed as follows:-
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> xxx xxx xxx
>
> We, however, should not be understood to have pronounced on the question of constitutionality. That is the task of the Court in a judicial review by the rule of preference of a particular construction amongst alternatives, in order to avoid unconstitutionality is unavoidable here.
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> In alpha Chms's case (supra), the Apex Court observed, inter alia, as follows:-
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> "As the Tribunal is a creature of the statute, it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of Act. The question of ultra vires is foreign to the scope of its jurisdiction."
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> By application of the same logic, an authority's power is circumscribed by the provision giving such power. If an authority does something, which is not provided for in the provision conferring the power he would be transgressing the jurisdiction of power conferred. Such action is indefensible in law."

13. We, thus, answer the questions referred in favour of the Revenu holding that the Tribunal had no power or jurisdiction to declare the provision of Rule repugnant to the provisions of the Act.

(A.K. SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

JULY 14, 2010.
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