IN THE COURT OF HIMACHAL PRADESH TAX TRIBUNAL, DHARAMSHALA, CAMP AT SHIMLA

Revision Application No. 01/2020

Date of institution: 08-12-2020

Date of Order: 02-07-2021

In the matter of:

M/s Budget Signs,
Plot No.76, Thana,
Revenue District BBN Area,
District Solan (HP) ..... **Applicant (Revisionist)**

Versus

1. The Excise & Taxation Commissioner (Commissioner ST & E)-cum-Revisional Authority, HP, Shimla.

2. Assistant Commissioner, (ST & E),
Baddi Circle IV. Revenue District BBN Area,
District Solan ..... **Respondents.**

Parties represented by:-

1. S/Shri S.K. Avasthi, Goverdhan Sharma and Pradeep Sarpal, Advocates, for the Applicant.

2. Shri R.N. Sharma, Advocate with Shri Rakesh Rana, Deputy Director (Law) for the Respondents.

ORDER

The Applicant has filed the application dated 7th December, 2020 for revision under section 46(3) of the Himachal Pradesh Value Added Tax Act, 2005 against the order dated 26.10.2020, of the Ld. Excise & Taxation Commissioner-cum-Revisional Authority, Himachal Pradesh, for the years 2005-06 to 2008-09, passed in consequence of and for giving effect to the order of this Tribunal dated 29.8.2013.

2. The facts of this case are that in the same matter the Applicant had filed original Application before this Tribunal under section 46(3) of the HP VAT Act, 2005 read with section 9(2) of the Central Sales Tax Act, 1956 against the order dated 15.3.2011 of the Ld. Excise and Taxation Commissioner, Himachal Pradesh, passed, on his own motion, under section 46(1) of the HP VAT Act, 2005 and section 9(2) of the Central Sales Tax Act, 1956 and for the years 2005-06 to 2008-09. The said Application was registered as Revision No. 1/2011 and instituted on 04.06.2011. After detailed hearing of the parties, this Tribunal had decided the issues involved in the above-said original application vide Order dated 29.8.2013. Subsequent to remand of the cases by the Ld. Appellate Authority on 27.2.2010, the Ld. Assessing Authority had passed the composite assessment order dated 18.3.2010 for the above-said years on non-germane ground that "it is true that the dealer has in the returns filed by him has applied wrong rate of tax. Therefore, the returns are rejected and the sales are being determined on the basis of Balance Sheet, Trading and Profit and Loss Account." Resultantly, these assessment orders being contrary to law were taken up in revision under section 46(1) of the HP VAT Act, 2005 etc. by the Ld. Excise and Taxation Commissioner-cum-Revisional Authority, who passed the revisional order dated 15.3.2011 and held that "the impugned order is *prima facie* not tenable in the eyes of law and it suffers from serious illegalities and improprieties...and as such the impugned order ddated 18-03-2010 including the consequ4ntial order of allowing ITC claim is hereby quashed and set aside being illegal & prejudicial to the interest of revenue.." The matter was remanded to the Ld. Assessing Authority for re-assessment. However, the above-said order dated 15.3.2011 of the Ld. Excise & Taxation Commissioner-cum-Revisional Authority was assailed by means of application for revision under section 46(3) of the HP VAT Act, 2005 etc. before this Tribunal. After detailed hearing and consideration this **Tribunal passed the order dated 29.8.2013 and held that it was not satisfied with the act of the Ld.**

Assessing Authority that in the instant case the sales tax assessment should be done on the basis of balance sheet, profit and loss account, rather than on returns, meaning thereby that returns should have formed the basis of the assessments. This Tribunal in Para 18 (a) to (f) of the above Order dated 29.8.2013, recorded the following findings and also decided the issues brought before it and held that:-

"In view of the above said position, the following facts emerge:-

(a) The appellant being a dealer registered under the HP VAT Acct, 2005, is authorized to undertake sales which includes works contract. Such sales can be inter-State sales;

(b) In view of Article 286 of the Constitution of India and the specific agreement between the appellant and the customers bases outside the State, State of HP cannot levy tax on works contract executed outside the State and material/labour procured and hired outside State of HP;

(c) All expenditure of labour, installation, inspection, freight, staff etc. deployed in the execution of works contract outside the State etc. are perforce to be deducted from taxable turnover;

(d) Works contract executed within H.P. will be taxed as such;

(e) Being a registered dealer appellant is authorized to use 'C' Form and 'F' Form etc. Benefit of Notification No. EXN-F (5) 2/2005 dt. 30-6-2005 has been correctly disallowed.

(f) manufactured or semi finished goods transported outside H.P. are to be assessed to tax either at the rate applicable to inter-State sales, by way of furnishing 'C' Forms or if no 'C' Form furnished, the

local rate of 4% or 12.5% would be applicable depending upon goods."

The Tribunal also held that "it would be appropriate to remand the case back to the Ld. Excise and Taxation Commissioner, Himachal Pradesh, Shimla." While so remanding the case, it was also directed that a committee should be constituted to go into the larger ramifications of the aspect of work contract. Pursuant to this, a Committee of three officers was constituted which submitted its report to the Excise and Taxation Commissioner on 4.9.2015. However, the Committee only concluded that "there is no standard formula by which one can distinguish contract for sale from a works-contract. Distinction between sale and works-contract is often hazy, This issue has vexed the jurists all over the world." Pursuant to the order dated 29.8.2013 of this Tribunal, the Ld. Excise and Taxation Commissioner issued the notice dated 30.12.2015 for hearing on 23.01.2016 and for passing 'consequential orders', and for this purpose he asked the applicant "to prefer any objections, which you (applicant) may wish to prefer in this behalf why the appropriate order under section 46 of the aforesaid Act should not be passed on the issued mentioned above", in the notice. The applicant preferred his objections. The Ld. Excise and Taxation Commissioner-cum-Revisional Authority heard the applicant and passed the consequential order dated 26.10.2020 observing that "I have gone through record at hand and personally heard the parties on 3rd October, 2020. Arguments put forward by both the parties are the same as put forward to the Revisional Authority, Hon'ble Tax Tribunal and my predecessors at different stage of the long history of this case" and passed the consequential order giving effect to this Tribunal's order dated 29.8.2013. It is against this order dated 26.10.2020 of the Ld. Excise and Taxation Commissioner against which the present application has been filed under section 46(3) of the HP VAT Act, 2005.

3. S/Shri Goverdhan Lal Sharma, S.K. Avasthi and Pradeep Kumar Sarpal Advocates, appeared for the Applicant Shri Avasthi has argued that the instant Application preferred under section 46(3) of the HP VAT Act, 2005 should be allowed because the Ld. Respondent No.1 has passed the impugned order 26.10.2020 under section 46(1) , and this order requires revision by this Tribunal under section 46(3) of the above mentioned Act and because this order has been passed without consideration and decisiɒn of the preliminary objections preferred by the applicant before the Ld. Commissioner and thus the same is bad in law and against principles of natural justice. The preliminary objections raised were that (i) no proceedings were pending or disposed by the subordinate authority, (ii) the revision of the assessment order dated 18.3.2010 was time barred, (iii) raising of the issues decided in revision dated 15.3.2011 was not proper, (iv) remand is confined to the directions of the Ld. Tribunal and not to open issues of C forms in which Revisional Authority did not find any faults, and the order dated 26.10.2020 travelled beyond directions of remand. The objections need to be decided by the Tribunal. Further certain major issues, namely work contract and sale, treatment of labour deduction and tax rate to be applied. Notice did not disclose the issues on which the decision was required to be made, and, therefore, the impugned order deserves to be st aside. It was also pleaded that the second suo moto revision initiated by the Ld. Excise and Taxation Commissioner smacks of *malafide* intentions as the orders have been passed after a lapse of more than seven years and further the Ld. Revisional Authority has directed the Assessing Authority to decide and assess the case of applicant within a period of one month from the date of the order and thus by-passing the statutory period of 60 days for filing revision against the order of the Ld. Commissioner. As regards works contract, the applicant had entered into valid inter-State transactions of composite works contracts of fabrication, supply, transportation and installation of the RVI elements like canopy fascia, building fascia, monoliths and other

Sign Boards at the business sites demarcated and specified by the customers and thus the transactions deserve to treated as such, and in such case only deemed sales were there and the property passed by accretion etc., and the applicant is liable to pay tax on the goods involved in the execution of works contract under the CST Act, 1956, He referred to the judgment in *Gannon and Dunkerley in 73 STC 373 and also in 88 STC 204* and also the amendments by Finance Act, 2000 regarding "sale", "works contract" and the term "sales price" as introduced in the CST Act, 1956. He also He emphasized that the balance sheets and books of accounts have been totally ignored. He also pleaded that the labour and service charges of 22.50%, 23%, 22.50% and 22% respectively for the 2005-06, 2006-07, 2007-08 and 2008-09 as per the assessment order dated 28.3.2010 should be accepted. Regarding rate of tax Shri Avasthi argued that the RVI elements are processed, fabricated and strictly in accordance with the directions of the IOC, HPCL etc. and has no market value. For deduction of labour charges from the gross turnover, the Ld. Advocate referred to Rule 17(4) of the HP VAT Rules, to have been framed in view of the judgments of the Hon'ble Apex Court in *Builder Association's case and Gannon Dunkerley,* and for application of these rules for purposes of CST he quoted the judgment in Mahim Patram Pvt. Ltd. v. Union of India (2007) 29 PHT 324 (SC). He cited the case of rolling shutters to be a works contract, and relied upon the judgment in *Sentinel Rolling Shutters v. CST (1978) 42 STC 409 (SC),* and argued for deduction of labour charges. In this behalf, he also cited the judgments in *M/s Thomson Press (India) Ltd. and ors. V. State of Haryana 100 STC 417, M/s Gannon Dunkerley & Co. v. State of Rajasthan 88 STC 204 SC, M/s Bharat Heavy Electricals Ltd. v. Union of India, State of Andhra Pradesh v. Usha Breco Ltd. Calcutta 212 STC 373, M/s Dewasdia Castings Pvt. Ltd. v. Dy. Commissioner of Sales Tax, Ujjai Division and others 123 STC 417, East India Cotton Mft. Co. Ltd. v. State of Harya and anothers 90 STC 221, M/s English Electric Co. of India v. Dy. CTO and others 38 STC 475, State of Maharashtra v.*

Embee Corporation 107 STC 196 and Builder Association of India v. Union of India 73 STC 370. With regard to charging of interest, the Ld. Advocate argued that no interest can be levied retrospectively from the date of filing the return, as held in *J.K. Synthetics Ltd. v. State of Rajasthan, 94 STC 422 SC, Frick India Ltd. and ors. V. State of Haryana 95 STC 188, Maruti Wire Industries Pvt. Ltd. v. STO 122 STC 410 and Commissioner of Sales Tax v. Hindustan Aluminium Corporation 127 STC 258.* In the matter of penalty it was argued that there was reasonable cause and bonafide belief in claiming the transaction to be inter-State transaction, and hence no penalty should be imposed as held in *Hindustan Steel Ltd. v. State of Orissa 25 STC 211 and M/s Cement Marketing Ltd. v. Assistant Commissioner 45 STC 197 and M/s Vijay Hosiery v. State of Rajasthan 45 STC 345.* It was also argued that re-assessment orders dated 18.3.2010 was restored by the Ld. Tax Tribunal vide its order dated 29.8.2013 has attained finality, and the suo moto revision order dated 26.11.2020 passed in Revision NO.45 of 2014-15 and the consequential ex-parte order dated 19.11.2020 are illegal, void *ab initio,* influenced by *malafide* intentions and are hopelessly time barred. Shri Avasthi referred to certain documents from the revisional file of the order of the Ld. Commissioner dated 26.10.2020 and asserted that the record of the assessment cases which were under revision was never before the Ld. Commissioner, and hence the impugned order is vitiated. In view of these submissions it was impressed upon that the impugned order and the consequential assessment order dated 19.11.2020 should be quashed and set aside.

4. Shri R.N. Sharma, Advocate appearing alongwith Shri Rakesh Rana, Deputy Director (Legal) for the Respondents repelled all the contentions advanced for the Applicant and asserted that the instant application is not maintainable under section 9(2) of the CST Act, 1956 read with section 46(3) of the HP VAT Act, 2005 and should be dismissed. It was argued that this Tribunal in para 10 of its order

dated 29.8.2013 had also observed that for judging the nature of the transaction, the court has to find out "intention of the parties", "main object of the parties", and it was directed that a committee or two or three members of TRU and Assessing Authority be constituted to examine it. However, the Committee merely concluded on 4.9.2015 that "there is no standard formula by which one can distinguish a contract for ssale from a works contract. Distinction between sale and works-contract is oftern hazy. This issue has vexed the jurists all over the world. " On the contrary, within less than one month after this Tribunal's order dated 29.8.2013, the Hon'ble Supreme Court in *Larsen and Toubro Ltd. v. State of Karnataka (2014) 1 SCC 708 (3JJ)* on 26.9.2013 had already declared the law by holding that :

> *"Whether the contract involved a dominant intention to transfer the property in goods, in our view, it is not at all material. It is is not necessary to ascertain what is the dominant intention of the contract", and that "the* dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen to have lost their significance where the transactions of the nature contemplated in Article 366(29A)".

On 6.5.2015, the Constitution Bench of the Hon'ble Supreme Court in Kone Elevator (P) Ltd. v. State of Tamil Nadu (2014) 7 SCC 1 (5JJ) has held that:

> *"Considered on the touchstone of the aforesaid two Constitution Bench decisions in Builders' Assn[(1989) 2 SCC 645] and Gannon Dunkerley (2) [(1993) 1 SCC 364],* we are of the convinced opinion that the principles stated in Larsen and Toubro ...., do correctly enunciate the legal position. *Therefore, the "dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable."*

In *Chairman-cum-Managing Director, Coal India Ltd. v. Ananta Saha (2011) 5 SCC 142 (2JJ)* Hon'ble Apex Court has also clearly held that:

> *"18. This Court in State of T.N. v.Hind Store ([(1981) 2 SCC 205], Karnal Durai v. District Collector [(1999) 1 SCC 475] , Union of India v. Indian Charge Chrome [(1999) 7 SCC 214] and Howrah Municipal Corpn. V. Gages Rope Co. Ltd. [(2004) 1 SCC 663] has clearly held that the law to applied in a case is the law on the date of decision making."*

Further in it has been held that:

> *"It is well settled that the judgments of this Court are binding on all the authorities under Article 142 of the Constitution of India and it is not open to any authority to ignore a binding judgment of this Court..."*

As such, the said decisions are binding on the Ld. Commissioner and the Ld. Assessing Authority who have passed the consequential orders dated 26.10.2020 and 19.11.2020 respectively, solely to implement and to give effect to the order of this Tribunal dated 29.8.2013. Even otherwise, as per record, the Applicant has himself returned and split-up his turnover clearly into "sale" and "labour", freight" and other charges separately for each of the years, namely 2005-06, 2006-07, 2007-08 and 2008-09, which were demonstrated by the Ld. Advocate from the original record of assessment dated 18,3,2010 and in view of the irrepudiable documentary evidence voluntarily disclosed by the applicant himself in the normal course, the plea cutting across the entire texture of such documentary information is impermissible and the applicant cannot, after efflux of statutory time in section 16(5) of the HP VAT Act, 2005, cannot repudiate these voluntarily disclosed and admitted declarations and set up a case contrary to his claims made in the ordinary course. The assessment order dated 18.3.2010, for the years 2005-06 to 2008-09 passed by the Assessing Authority cannot legally discard the returns filed in the normal course on the ground that "it is true that the Dealer has in the returns filed by him has applied wrong rate of tax.

Therefore, the returns are rejected and the sales are being determined on the basis of Balance Sheet, Trading and Profit and Loss Account." This Tribunal has clearly held that *"in the instant case, I am not absolutely satisfied that the sales tax assessment should be done on the basis of balance sheet, profit and loss account, rather than on returns."—thereby disapproved the act of the Ld. Assessing Authority.*

5. Shri Shrma also submitted that it is legally incorrect to call the said implemental order dated 26.10.2020 passed by the Ld. Excise and Taxation Commissioner, to be a ***"second suo moto revision",*** because it is neither *"suo moto"* revision nor a *"second suo moto revision"* but factually and incontestably an order passed ***"in consequence"*** and ***"to give effect"*** to the Hon'ble Tribunal's Order dated 29.8.201 and exclusively and indisputably only to "implement" the said order under Rule 82 of the HP VAT Rules, 2005, which mandates that:

> *"82. Execution of the order of appellate or revisional authority.—(1) Unless the order passed in appeal under section 45 is subject matter of further proceedings, the order passed in appeal under section 45, which has the effect of barring or modifying any order of Assessing Authority, appellate authority or any other officer such authority or officer shall take action to implement the order, and the Assessing Authority or other officer shall realize the deficit or refund or adjust the amount paid in excess, as the case may be. The excess amount shall be refunded in the manner laid down in rule 74.*
>
> *(2) The provisions of sub-rule (1) shall, mutatis mutandis, apply to a revisional order passed under section 46."*

As such, the Ld. Commissioner was obliged "to take action to implement the order" dated 29.8.2013 of this Hon'ble Tribunal. He cited the decision of the Hon'ble Madras High Court in *Shree Rajendra*

Mills Ltd. v. Joint Commercial Tax Officer, Salem (1971) 28 STC 483 (MAD.) (DB) to the following effect:

> *"We consider that in the hierarchy of authorities set up under the Act, the Tribunal is superior to the Appellate Assistant Commissioner, who is bound by the orders of the Tribunal. The orders of the Tribunal will be as effective as the orders of this Court so far as their binding character on the Appellate Assistant Commissioner is concerned. Merely because a tax case has been filed by the department, it does not mean it acts a kind of stay of operation of the orders of the Tribunal. So long as the order of the Tribunal is not set aside, the Appellate Assistant Commissioner is bound to give effect to it and if he fails to do it and by-passes it on the ground on the ground that the department has filed an appeal, it will be really a contempt of the Tribunal's order. In the circumstances, therefore, we should think that the Appellate Assistant Commissioner will, as he is bound to, follow the Tribunal's view."*

Accordingly, the Ld Commissioner has passed the impugned Order dated 26.10.2020, clearly and indisputably to implement the order of this Hon'ble Tribunal dated 29.8.2013 and consequential order thus passed in compliance of and for giving effect to the Order dated 29.8.2013 of the Hon'ble Tribunal, is an implemental or execution order of the Tribunal's said order rather than an order passed 'on the motion' of the Commissioner, and cannot be termed to a second *suo moto* revision by the Ld. Commissioner under in terms of section 46(1) of the HP VAT Act, 2005.. The very text of the order dated 26.10.2020 repells and conclusively repudiate any attempt at such allegations.

Further, tt is manifest that the Applicant remained throughout satisfied with the Hon'ble Tribunal's Order dated 29.8.2013 and was never aggrieved with that order, because he has neither assailed, that order, by way of revision, before the Hon'ble High Court, under

Section 48 of the HP VAT Act, 2005 read with section 9(2) of the Central Sales Tax Act, 1956, nor has he sought any rectification of that order under section 47 of the Act of 2005 read with section 9(2) of the Central Act of 1956. Resultantly, the Order of this Hon'ble Tribunal attained finality after efflux of period of limitation specified in sections, *ibid*, by operation of law enacted in section 45(3) of the HP VAT Act, 2005, which explicitly provides:

> *"(3) Every order of the Tribunal, the Commissioner or any officer exercising the powers of the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters or the order of the Deputy Excise and Taxation Commissioner or of the Assessing Authority or an officer-in-charge of check-post or barrier or any officer not below the rank of Excise and Taxation Officer, if not challenged in appeal or revision, shall be final."*

Consequently, the present application under section 46(3) of the HP VAT Act, 2005 etc. is entirely misconceived and clearly a repeat attempt to seek re-opening or review of the final and binding decision of the Hon'ble Tribunal dated 29.8.2013 by re-agitating the same issues which stood decided by this Hon'ble Tribunal, and hence the doctrine of *res judicata* applies and the Applicant cannot file and maintain the present application once again under section 46(3) of the Act of 2005. The applicant-dealer is in reality and substance seeking to achieve the object indirectly which the law does not allow to be done directly In *Jagir Singh v. Ranbir Singh AIR 1979 SC 381,* the Hon'ble Apex Court has observed that an authority cannot be permitted to evade a law by *"shift or contrivance"*. The Hon'ble Apex Court in *M.C. Mehta v. Kamal Nath and other AIR 2000 SC 1997,* has held that *"even the Supreme Court cannot achieve something indirectly which cannot be achieved directly by resorting to the provisions of Article 142 of the Constitution, which empowers the Court to pass any order in a case in order to do "complete justice".* Since the present Application for revision under section 46(3) etc.

actually and effectually aims at achieving a review or reconsideration of the issues, which stood decided in the order of this Hon'ble Tribunal, in the guise of application for 'revision' for which there exists no enabling provision of law, the instant application is not legally maintainable and is liable to dismissed. The Applicant is, therefore, not legally entitled now to turn around and seek review of any of the findings and decisions of the Hon'ble Tribunal dated 29.8.2013 which have been implemented through the consequential order dated 26.10.2020 passed by the Ld. Commissioner. In order to elaborate, it was submitted that the instant application is not maintainable under section 46(3) of the HP VAT Act, 2005 read with section 9(2) of the CST Act, 1956, because section 46 of the Act of 2005 clearly enacts as under:-

"46. Revision.-- (1) The Commissioner may, of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and, on finding the proceedings or the orders prejudicial to the interest of revenue, may pass such order in relation thereto as he may think fit:

Provided that the powers under this sub-section shall be exercisable only within a period of five years from the date on which such order was communicated.

(2) The State Government may, by notification, confer on any officer 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 and such officer shall be deemed to be the Commissioner for the purposes of sub-section (1).

(3) The tribunal, on application made to it against an order of the Commissioner under this section within sixty days from the date of the communication of the order, for the purpose of satisfying itself as to the legality or propriety of such order, may call for and examine the record of any such case and may pass such orders thereon as it thinks just and proper.

(4) 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."

Section 9(2) of the Central Sales Tax Acct, 1956 adopts and applies the said provisions for its purposes. A bare reading of the said provision shows that in order to attract application of section 46(1) of the HP VAT Act, 2005, the conditions precedent are

(i) there must exist *"any proceedings which are pending before, or have been disposed of by, any Authority subordinate' to the Commissioner"*;

(ii) the Commissioner must have called for the record of the proceedings at (i) above solely and exclusively *"on his own motion"*, 'suo moto' i.e. on his own ;

(iii) such *record must be called by the Commissioner 'for satisfying himself as to the legality or propriety of such proceedings or order made therein"*;

(iv) a finding must be there that the proceedings or the orders are prejudicial to the interest of revenue; and

If all these requisites are present, an order can be said to have been passed under section 46 (1), ibid, and it is only such order against which application lies to the Hon'ble Tribunal under section 46(3) of the Act of 2005 and section 9(2) of the CST Act, 1956, and none else. Since the order dated 29.8.2013 passed by the Tribunal under section 46 (3) emanates from

the Hon'ble Tribunal which is evidently an authority higher than the Commissioner , it can neither be termed to be a proceeding or order passed by an authority subordinate to the Commissioner nor does the power of calling for the record of the order passed by the Hon'ble Tribunal for "satisfying himself as to the legality and propriety" vest in the Commissioner, because the Commissioner is himself legally subordinate to and is bound to pass the consequential order only as per directions of the Tribunal. Resultantly, the consequential or implemental order dated 26.10.2020 passed by the Commissioner pursuant to the remand directions of the Hon'ble Tribunal under section 46(3) cannot be legally said to be founded ***"on his own motion"*** of the Ld. Commissioner, and consequently, it is an order passed pursuant to the direction under and in furtherance of section 46(3) of the HP VAT Act, 2005 and is un-assailable under section 46(3) before the Hon'ble Tribunal itself. There is no statutory provision which permits filing of revision application to the Hon'ble Tribunal against its own orders, or the orders implementing its orders. The provisions of section 46(1) require to read strictly as the Hon'ble Supreme Court in *Polestasr Electronic's (Pvt.) Ltd v. Additional Commissioner Sales Tax and another [(1978)* _41 STC 409 (at pps. 426)) has clearly laid down that:

> "If the language of statute is clear and explicit effect must be give to it for in such a case the words best declare the intention of the law-giver ....It is only from the language of *the statute that the intention of the legislature must be gathered, for the legislature means no more and no less than what it says. It is not permissible to the court to speculate as to what the legislature must have intended and then to twist or bend the language of the statute to make it accord with presumed intention of the legislature....it is a well-settled*

rule of interpretation that in construing a taxing statute "one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law".

Further *in Assessing Authority-cum-Excise and Taxation Officer, Gurgaon v. East India Cotton Mfg. Co. Ltd.[(1981) 48 STC 239 (at pp. 246-47the Hon'ble Apex Court quoted with approval the law in Thompson v. Goold and Company (1910) A.C., 409"*

"It is strong thing to read into an Act of Parliament words which are not there and in the absence of clear necessity it a wrong thing to do"

On entitlement to invoke jurisdiction of this Hon'ble Tribunal under section 46(3) of the HP VAT Act, read with section 9(2) of the CST Act, 1956, the law is that since appeals and revisions are creatures of statute, these must be exercised strictly in accordance with provisions made therefor. The consequential order dated 26.10.2020 having been passed in furtherance of the Hon'ble Tribunal's order dated 29.8.2013 made under section 46(3) of the HP VAT Act, 2005 read with section 9(2) of the CST Act, 1956 *cannot be re-assailed under section 46(3) and 9(2), ibid.* because the statute does not provide for any appeal or revision against such an order. In this behalf. The principle of law declared by the Hon'ble Apex Court in State of Haryana v. Maruti Udyog Ltd. (2001) 124 STC 284 (SC) is that:

"There cannot be any dispute that right of appeal is creature of statute and has to be exercised within the limits and according to the procedure provided by law. It is filed for invoking the powers of a superior court to redress the errors of court below, if any. No right of appeal can be conferred except by express words. An

appeal for its maintainability, must have a clear authority of law."

It was thus emphatically argued the consequential order dated 26.10.2020 having been passed in furtherance of the Hon'ble Tribunal's order dated 29.8.2013 under section 46(3) of the HP VAT Act, 2005 read with section 9(2) of the CST Act, 1956 cannot be re-assailed under section 46(3) and 9(2), ibid. because there is no provision of law which confers the right of second revision in respect of the same case to the Applicant. In *Commissioner Of Income Tax, ... vs Anjum M.H.Ghaswala & Ors (2002) 1 SCC 633 (5 JJ) it has been held that:*

> *"27. .... It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself."*

In Ramchandra Keshav Adke & Ors vs Govind Joti Chavare And Ors. (1975) 1 SCC 559 (3 JJ) it has been held that

> *"24. Next point to be considered is, what is the consequence of noncompliance with this mandatory procedure ?*
>
> *25. A century ago, in Taylor v. Taylor(1), Jassel M. R. adopted the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. This rule has stood the test of time. It was applied by the Privy Council, in Nazir Ahmed v. Emperor(2) and later by this Court in several cases(3), to a Magistrate making a record under ss. 164 and 364 of the Code of Criminal Procedure, 1898. This rule squarely applies "where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other.(4)" ... Failure to comply with these mandatory provisions, therefore, had vitiated the*

surrender and rendered it non-est for the purpose of s. 5 (3) (b)."

The power of revision exhausts on its use once, as held In *Kanepalli Venkatda Narayana & Ors. V. The State of Andhra Pradesh & Ors. (1959) 10 STC 524 (AP) (DB),* wherein the Hon'ble Andhra Pradesh High Court considered section 20 (1) of the APGST Act, 1957, which was similar to section 46(1) held that held that *"There is no power in the authorities concerned to exercise this revisional jurisdiction more than once."* In *Ashwin Industries v, Deputy Commissioner of Sales Tax.(1982) 50 STC 322 (Guj.) (DB)* it was held : "The revisional powers cannot in this manner be exercised twice over in respect of the same subject matter..." Consequently, the legal principal is that the power of revision is exhausted when it is once exercise in respect of the same matter and the same is not available to be exercised twice over again. Consequently, in the present case, the remedy of revision before this Hon'ble Tribunal stands already availed and exhausted by the Applicant. Consequently, the Applicant-dealer is not legally entitled to approach this Hon'ble Tribunal for the decided by this Hon'ble Tribunal. The instant application is incontestably a repeat effort clearly designed to obtain a review of the decisions of this Hon'ble Tribunal dated 29.8.2013 and the application is clearly without authority of law and, therefore, legally impermissible and is liable to dismissed. Not only the final order of the Hon'ble Tribunal is not open to review but subsequent proceedings concluded by the Ld. Commissioner in obedience of that order which is *res judicata* so far the Applicant is concerned *In Commissioner of Sales Tax Madhya Pradesh v. Banshidhar Sanwalram (1996) 103 STC 539 (at page 542)* has clearly held that:-

"5. We may in this connection refer to two other decisions. One is that of the Kerala High Court in Commissioner of Income Tax v. Swaraj Motors (P) Ltd. (1987 167 ITR 83. T. Kochu Thommen J. (as he then was) speaking for the Division

Bench held that the order of remand in regard to a disputed aspect had remained unchallenged, subsequent proceedings of Income Tax Officer could only be in obedience of that order which is res judicata so far as the assessee is concerned in regard to the aspect decided. Another decision is that of the Punjab and Haryana High Court in S.P. Gramophone Company v. Income Tax Appellate Tribunal (1986) 160 ITR 417, wherein it was held that if the correctness of the remand order is not challenged through proper proceedings it should not be open to review when the matter comes again before that authority in appeal or revision against the order passed by the authorities below in accordance with the remand order." It follows that if the correctness of the remand order is not challenged through proper proceedings it would not be open to review when the matter comes again before the authority in appeal or revision against the order passed by the authorities below in accordance with the remand order."

6.....With respect we agree with the view taken by the High Courts of Kerala and Punjab and Haryana.

7. In its earlier order, the Tribunal decided the controversy as to the exigibility to tax holding that bamboo was subject to manufacturing process and became a different commercial commodity and this finding was not sought to be challenged in any way by the assessee by seeking reference to the High Court. The finding became concluded. The concluded finding does not become unsettled on account of the view taken by the High Court in another case subsequently. The matter could not have been re-opened either by the assessing authority or by the appellate authority or the tribunal."

As such, the present Application under section 46(3) is effectually only to obtain review and reconsideration of the decision dated 29.8.2013 by an indirect, circuitous and legally misconceived method

of *ex facie* re-agitating the consequential order implementing the order decision dated 29.8.2013. The the law being that what cannot be achieved *per directum* cannot be achieved *per obliquum.*, it prohibits all attempts to achieve anything indirectly which cannot be achieved directly. The Order dated 29.8.2913 of this Hon'ble Tribunal having become final has become un-assailable under the said Acts .

It is also well-settled by a catena of the Hon'ble Apex court decisions that the court becomes ***functus officio*** once an order is passed, and this principle has also been considered by the Hon'ble Supreme Court in its judgment in *Deputy Director Land Acquisition vs Malla Atchinadu and others (AIR 2007 SC 740),* wherein the Hon'ble Court held as under:

> *"45. The general rule is clear that once an order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the order is functus officio and cannot set aside or alter the order however wrong it may appear to be. That can only be done on appeal....."*

Earlier, the Hon'ble Supreme Court in *UP SRTC vs Imtiaz Hussain [(2006) 1 SCC 380]* also laid down a similar proposition of law, as under:

> *"The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues or remedies provided in respect of the same and the very court or the tribunal, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein".*

Further in *Sunita Jain v. Pawn Kumar (2008) 2 SCC 705(2JJ)*, the Honble Apex Court has held that:

> *21. .... that as a general rule, as soon as the judgment is pronounced or order is made by a Court, it becomes functus officio (ceases to have control over the case) and has no power to review, override, alter or interfere with it."*

The Supreme Court in a judgement reported as State Bank of India v. S.N. Goyal, (2008) 8 SCC 92 observed as under:

> *"26. It is true that once an authority exercising quasi-judicial power takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review. But the question is as to at what stage an authority becomes functus officio in regard to an order made by him. ..... . A quasi-judicial authority will become functus officio only when its order is pronounced, or published/notified or communicated (put in the course of transmission) to the party concerned. ... But once the order is pronounced or published or notified or communicated, the authority will become functus officio ".*

In *M/S Maruti Udyog v. State of Haryana*, the Hon'ble High Court of Punjab In VAT Appeal No.139 of 2012 held that:

> "The Tribunal had become *functus officio* after signing of the order. Such order could not be interfered with by any other authority expect in appeal filed in accordance with law."

The Order dated 29.8.2013 having been communicated to the parties, this Hon'ble Tribunal has become *functus officio* in the case, and there being no provision for review in such a case, this Hon'ble Tribunal has now no control over the case and has no power to review, override, alter that order. Consequently, it was asserted that the Applicant is not entitled to re-invoke the jurisdiction of this Hon'ble Tribunal under section 46(3) of the Act of 2005 in the same case and for the second time. Secondly, the remedy of revision is a one-time remedy, and the same stands exhausted on its having been availed of and having culminated into the Hon'ble Tribunal's order dated 29.8.2013 is re-emphasized here also. The statutory jurisdiction of revision under section 46(3) stands exhausted and cannot be re-invoked, for re-hearing the same matter over again, especially when the judgment and order dated 29.8.2013 has become absolute and statutorily final under section 45(3) of the Act. The instant application is legally impermissible. The Hon,ble Apex Court in *Dr. Buddhi Kota Subbarao v. K. Parasaran & Ors., AIR 1996 SC 2687* observed as under:

> *"No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived or frivolous petitions."*

Hence, it was emphatically submitted that even on this count, the instant application may be dismissed as not entertainable under section 46(3) of the HP VAT Act, 2005 read with section 9(2) of the CST Act, 1956., in view of the law laid down by the Hon'ble Courts. Further, the Order dated 26.10.2020 passed by the Ld. Commissioner is neither appealable nor revisable under any

provision of the HP VAT Act, 2005 or the CST Act, 1956 and hence attains finality on its passing. The Hon'ble Supreme Court in *Ashok Leyland v. State of Tamil Nadu (2004) 134 STC 473 (3JJ) (at page 519)* after holding that there is no provision for appeal against the orders passed under section 6A of the CST Act, 1956 has clearly held that:-

> *"98. The law in this regard is well-settled that there is no law that only because no appeal is provided the order would not attain finality."*

On this principle of law, the Order dated 26.10.2020 attains finality and does not become liable to review i.e reconsideration because it is only in pursuance of this Hon'ble Tribunal's Order dated 29.8.2013, which has itself attained finality. Similarly, the revised Order dated 29.11.2020 of the Ld. Assessing Authority also attains finality. The application filed by the Applicant requires to be dismissed.

Since the consequential order passed by the Commissioner pursuant to the remand directions under section 46(3) falls squarely outside the statutory ambit of section 46(1), ibid, the provisions of limitation of five years enacted in proviso to section 46(1) have no application to the consequential to implemental order dated 26.10.2020 passed by Ld. Commissioner. The plea of the Applicant-dealer regarding limitation is absolutely misconceived and contrary to law. Further, since the Order dated 26.10.2020 essentially gives effect to the Hon'ble Tribunal's Order dated 29.8.2013 passed under section 46(3), ibid, and since section 46(3) does not prescribe any period of limitation for implementing orders of the Hon'ble Tribunal, it is legally incorrect to make a plea of limitation for passing the consequential order. Statute does not stipulate any period of limitation for passing the consequential order dated 26.10.2020. The Hon'ble Supreme Court in *Bombay Metropolitan Region ... vs Gokak Patel Volkart Ltd. & Ors 1995 SCC (1) 642 (2JJ)* has held that:

> *"19. It is well settled that when the Statute lays down the period of limitation for passing an order that requirement*

is fulfilled as soon as an order is passed within that period. If the order is set aside on appeal and the Appellate order directs a fresh order to be passed then there is no requirement of law that the consequential order to give effect to the Appellate order must also be passed within the statutory period of limitation. This proposition of law is well settled.

20. In the case of Director of Inspection of Income-Tax (investigation) New Delhi, and Anr. v. Pooran Mall and Sans and Anr. 96 ITR 390. this Court repelled the contention that the Income Tax Officer had no jurisdiction to pass an order under section 132(5) of the Income Tax Act when the order initially passed by him within the period of limitation had been set aside by the Appellate Authority. It was held in that case that the period of time fixed for passing an order under section 132 (5) applied only to the initial order and not to any subsequent order that may have to be passed under the direction given by a Statutory Authority or by a Court in a writ proceeding. It was observed :-

"Even if the period of time fixed under section 132(5) is held to be mandatory that was satisfied when the first order was made. Thereafter, if any direction is given under section 132(12) or by a court in writ proceedings, as in this case, we do not think an order made in pursuance of such a direction would be subject to the limitations prescribed under section 132(5). Once the order has been made within ninety days the aggrieved person has got the right to approach the notified authority under section 132(11) within thirty days and that authority can direct the Income- tax Officer to pass a fresh order. We cannot accept the contention on behalf of the respondents that even such a fresh order should be passed within ninety days. It would make the sub-sections

(11) and (12) of section 132 ridiculous and useless. It cannot be said that what the notified authority could direct under section 132 could not be done by a court which exercises its powers under article 226 of the Constitution. To hold otherwise would make the powers of courts under article 226 wholly ineffective. The court in exercising its powers under article 226 has to mould the remedy to suit the facts of a case."

Section 24 of the HP VAT Act, 2005 provides as under:-

"24. Period of limitation for completion of assessment or re-assessment not to apply in certain cases.— (1) Notwithstanding the provisions relating to period of limitation contained in section 21 or section 23 or in any other provision of this Act, assessment or re-assessment may be made at any time in consequence of or to give effect to any order made by any court or other Authority under this Act.

(2) Where the assessment proceedings relating to any dealer remained stayed under the orders of any court or other Authority for any period, such period shall be excluded in computing the period of limitation for assessment or re-assessment contained in section 21 or 23 or any other provision of this Act."

Consequently, the "assessment" order dated 19.11.2020 passed by the Assessing Authority Baddi, *"in consequence of "* and *"to give effect to"* the *"order made by"* by the Ld. Commissioner on 26.10..2020 and this Hon'ble Tribunal and 29.8.2013 can be passed *"at any time"*— this Hon'ble Tribunal and the Ld. Commissioner *"being other Authority under this Act"*.

In Shankar Iron Store v. S.R. Goel, Appellate Tribunal, Sasles TAxx, Tis Hazari, Delhi and others (1989) 75 STC 4 (at pages 8,9 and 10), the Hon'ble Delhi High Court held that:

"The word "assessment" has various connotations and would include within its ambit the whole procedure of the charge, levy, determination and realization of tax. As held by the Supreme Court in Kalawati Devi Harlalka v. Commissioner of Income Tax (1967) 66 ITR 680 "It is quite clear from the authorities cited above that the word 'assessment' can bear a very comprehensive meaning; it can comprehend the whole procedure for ascertaining and imposing liability upon the tax payer." In that case the Supreme Court was concerned with expression "procedure for the assessment", and the Supreme Court held that this expression included, inter alia appeals and revisions as well."

Accordingly, the plea of limitation advanced on behalf of the Applicant-dealer has no legal basis in view of the law declared by the Hon'ble Supreme Court. Hence this plea deserves to be dismissed.

Shri Sharma also argued that even though the instant application does not lie under section 46(3) of the Act of 2005, yet to reply other arguments for the Applicant, he submitted that while passing of the original revisional order dated 15.3.2011 by the Ld. Excise and Taxation Commissioner (Revisional Authority), it was clearly held that *"the impugned order dated 18.3.2010 including the consequential order allowing ITC is hereby quashed and set aside"*. The argument for the Applicant that original revisional order dated 15.3.2011 was quashed by the Hon'ble Tribunal is factually incorrect because the order dated 29.8.2013 of the Hon'ble Tribunal nowhere "set aside" the Order dated 15.3.2011, but it has explicitly held and approved in Para 18(e) of its order dated 29.8.2013, that: *"Benefit of Notification No. EXN-F (5) 2/2005 dt. 30-6-2005 has been correctly disallowed"*. Thereby the Ld. Tribunal had clearly upheld the revisional finding of levying tax @ 12.5% on sales (*quantified at Rs.9,47,17,057 for 2005-06 to 2008-09 in the detection order dated 7.3.2009*) to Banks, Financial Institutions etc.. Further, the decision of

the Revisional Authority on the point of disallowing the 12 C forms had also not been upset and has remained intact and operative. The Hon'ble Tribunal, in Para 14 of the order has also held clearly that *"in the instant case, I am not absolutely satisfied that the sales tax assessment should be done on the basis of balance sheet, profit and loss account, rather than on returns."—thereby disapproved the act of the Ld. Assessing Authority,* who in his order dated 18.3.2010 had held that: *"It is true that the dealer in the returns filed by him has applied wrong rate of tax. Therefore, the returns are rejected and sales is being determined on the basis of Balance Sheet, Trading and Profit and Loss Account".* Further, In Para 19(f) the Hon'ble Tribunal itself determined the rates of tax to be levied: *"manufactured or semi finished goods transported outside H.P. are to be assessed to tax either at the rate applicable to inter-State sales, by way of furnishing 'C' Forms or if no 'C' Form furnished, the local rate of 4% or 12.5% would be applicable depending upon goods".* It was submitted that the order of the Ld. Assessing Authority dated 18,3,2010 had merged into the Original Revisional Order dated 15.3.2011 and the order dated 15.3.2011 had, in turn, merged into the Order dated 29.8.2013 of this Hon'ble Tribunal as held by the Hon'ble Apex Court in *Kunhayammed v. State of Kerala and another (2000) 119 STC 505 (3JJ)* after having *"catalogued and dealt with all the available decisions of this Court"* laid down the law that:

> *" Where an appeal or revision is provided against an order passed by a court, Tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and capable of enforcement by law."*

Legally, therefore, it is the Order dated 29.8.2013 of the Hon'ble Tribunal which subsists and is operative, and it is this order alone which the Ld. Commissioner is enforcing by passing the consequential

order dated 26.10.2020. The argument of attaching finality to the assessment order dated 18.3.2010 is consequently devoid of any legal basis and requires to be rejected.

It was further submitted that The plea relating to the Ld. Commissioner's notice dated 30.12.2015 was equally untenable because the Hon'ble Tribunal's order dated 29.8.2013 was made at the instance of the Applicant, and he cannot feign ignorance of the findings and directions therein. The order remanding the case to the Ld. Commissioner constitutes a standing notice to the Applicant. Even otherwise, unlike section 21(2),(4), and (8) and section 34(7) of the HP VAT Act, 2005 (applicable vide section 9(2) of the CST Act, 1956) legally, the provisions of section 46(4), only require affording of *"opportunity of being heard"* and does not stipulate any statutory requirement of issuance of notice. Therefore, power of revision under 46 is not contingent on the giving of a notice to show cause. What is expressly contemplated by section 46 is is an opportunity of hearing to be afforded to the dealer. The Hon'ble Supreme Court, in order *"to undersand the arguments and to understand the contours of suo moto revisional power vested in the learned CIT"* in *Commissioner of Income Tax, Mumbai v. Amitabh Bachhan (2016) 11 SCC 748* considered the following provisions of section 263 of the Income Tax Act, 1961:

> *"Revision of orders prejudicial to revenue.—(1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the assessing officer is erroneous insofar as it is prejudicial to the interests of revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or*

modifying the assessment, or cancelling the assessment and directing a fresh assessment."

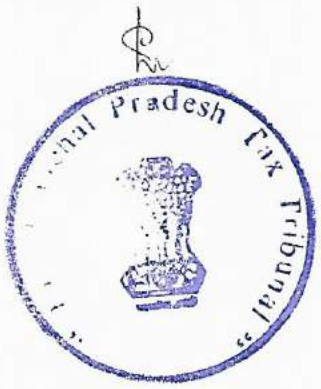
These provisions are *in pari materia* with those of section 46(4), in so far as the statutory requirement of affording *"opportunity of being is heard"*. The Hon'ble Apex Court observed in Para 3 that the against the Tribunal's order dated 28.8.2017, the Appeal of the Revenue was summarily dismissed by the High Court of Bombay on 7.8.2008, holding that :

"as CIT had gone beyond the scope of the show cause notice dated 7,11,2005 and had dealt with the issues not covered/mentioned in the said notice, the revisional order dated 20.3.2006 was in violation of the principles of natural justice."

On Special leave to appeal under Article 136 of the Constitution,, the Hon'ble Apex Court held that:

"10. Reverting to the specific provisions of Section 263 of the Act what has to be seen is that a satisfaction that an order passed by the Authority under the Act is erroneous and prejudicial to the interest of the Revenue is the basic pre-condition for exercise of jurisdiction under Section 263 of the Act. Both are twin conditions that have to be conjointly present. Once such satisfaction is reached, jurisdiction to exercise the power would be available subject to observance of the principles of natural justice which is implicit in the requirement cast by the Section to give the assessee an opportunity of being heard. It is in the context of the above position that this Court has repeatedly held that unlike the power of reopening an assessment under Section 147 of the Act, the power of revision under Section 263 is not contingent on the giving of a notice to show cause. In fact, Section 263 has been understood not to require any specific show cause notice to be served on the assessee. Rather, what is required under the said provision is an opportunity of hearing to the assessee. The two requirements

are different; the first would comprehend a prior notice detailing the specific grounds on which revision of the assessment order is tentatively being proposed. Such a notice is not required. What is contemplated by Section 263, is an opportunity of hearing to be afforded to the assessee. Failure to give such an opportunity would render the revisional order legally fragile not on the ground of lack of jurisdiction but on the ground of violation of principles of natural justice. Reference in this regard may be illustratively made to the decisions of this Court in Gita Devi Aggarwal vs. Commissioner of Income Tax, West Bengal and others[1] and in The C.I.T., West Bengal, II, Calcutta vs. M/s Electro House[2]. Paragraph 4 of the decision in The C.I.T., West Bengal, II, Calcutta vs. M/s Electro House (supra) being illumination of the issue indicated above may be usefully reproduced hereunder:



"This section unlike Section 34 does not prescribe any notice to be given. It only requires the Commissioner to give an opportunity to the assessee of being heard. The section does not speak of any notice. It is unfortunate that the High Court failed to notice the difference in language between Sections 33-B and 34. For the assumption of jurisdiction to proceed under Section 34, the notice as prescribed in that section is a condition precedent. But no such notice is contemplated by Section 33-B: The jurisdiction of the Commissioner to proceed under Section 33-B is not dependent on the fulfilment of any condition precedent. All that he is required to do before reaching his decision and not before commencing the enquiry, he must give the assessee an opportunity of being heard and make or cause to make such enquiry as he deems necessary. Those requirements have nothing to do with the jurisdiction of the Commissioner. They pertain to the region of natural justice. Breach of the principles of natural justice may affect the legality of the order made but that does not affect the jurisdiction of the

Commissioner. At present we are not called upon to consider whether the order made by the Commissioner is vitiated because of the contravention of any of the principles of natural justice. The scope of these appeals is very narrow. All that we have to see is whether before assuming jurisdiction the Commissioner was required to issue a notice and if he was so required what that notice should have contained? Our answer to that question has already been made clear. In our judgment no notice was required to be issued by the Commissioner before assuming jurisdiction to proceed under Section 33-B. Therefore the question what that notice should contain does not arise for consideration. It is not necessary nor proper for us in this case to consider as to the nature of the enquiry to be held under Section 33-B. Therefore, we refrain from spelling out what principles of natural justice should be observed in an enquiry under Section 33-B. This Court in Gita Devi Aggarwal v. CIT, West Bengal ruled that Section 33-B does not in express terms require a notice to be served on the assessee as in the case of Section 34. Section 33-B merely requires that an opportunity of being heard should be given to the assessee and the stringent requirement of service of notice under Section 34 cannot, therefore, be applied to a proceeding under Section 33-B." (Page 827-828).

[Note: Section 33-B and Section 34 of the Income Tax Act, 1922 corresponds to Section 263 and Section 147 of the Income Tax Act, 1961]

11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the assessee indicating therein, broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (Section 263) to raise the said notice to

the status of a mandatory show cause notice affecting the initiation of the exercise in the absence thereof or to require the C.I.T. to confine himself to the terms of the notice and foreclosing consideration of any other issue or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the C.I.T. is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as may be considered relevant by the assessee, must be afforded to him by the C.I.T. prior to the finalization of the decision.

12. In the present case, there is no dispute that in the order dated 20th March, 2006 passed by the learned C.I.T. under Section 263 of the Act findings have been recorded on issues that are not specifically mentioned in the show cause notice dated 7th November, 2005 though there are three (03) issues mentioned in the show cause notice dated 7th November, 2005 which had specifically been dealt with in the order dated 20th March, 2006. The learned Tribunal in its order dated 28th August, 2007 put the aforesaid two features of the case into two different compartments. Insofar as the first question i.e. findings contained in the order of the learned C.I.T. dated 20th March, 2006 beyond the issues mentioned in the show cause notice is concerned the learned Tribunal taking note of the aforesaid admitted position held as follows: "In the case on hand, the CIT has assumed jurisdiction by issuing show cause notice u/s 263 but while passing the final order he relied on various other grounds for coming to the final conclusion. This itself makes the revision order bad in law and also violative of principles of natural justice and thus not maintainable. If, during the course of revision proceedings the CIT was of the opinion that the order of the AO was erroneous on some other grounds also or on any additional grounds not mentioned in the show cause notice, he ought to have given another show cause notice to the assessee on those grounds and given him a reasonable

opportunity of hearing before coming to the conclusion and passing the final revision order. In the case on hand, the CIT has not done so. Thus, the order u/s 263 is violative of principles of natural justice as far as the reasons, which formed the basis for the revision but were not part of the show cause notice issued u/s 263 are concerned. The order of the CIT passed u/s 263 is therefore liable to be quashed in so far as those grounds are concerned."

13. The above ground which had led the learned Tribunal to interfere with the order of the learned C.I.T. seems to be contrary to the settled position in law, as indicated above and the two decisions of this Court in Gita Devi Aggarwal (supra) and M/s Electro House (supra). The *learned Tribunal in its order dated 28th August, 2007 had not recorded any finding that in course of the suo motu revisional proceedings, hearing of which was spread over many days and attended to by the authorized representative of the assessee, opportunity of hearing was not afforded to the assessee and that the assessee was denied an opportunity to contest the facts on the basis of which the learned C.I.T. had come to his conclusions as recorded in the order dated 20th March, 2006. Despite the absence of any such finding in the order of the learned Tribunal, before holding the same to be legally unsustainable the Court will have to be satisfied that in the course of the revisional proceeding the assessee, actually and really, did not have the opportunity to contest the facts on the basis of which the learned C.I.T. had concluded that the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. The above is the question to which the Court, therefore, will have to turn to.*

14. .....If the revisional authority had come to its conclusions in the matter on the basis of the record of the assessment proceedings which was open for scrutiny by the assessee and available to his authorized representative at all

times it is difficult to see as to how the requirement of giving of a reasonable opportunity of being heard as contemplated by Section 263 of the Act had been breached in the present case."

Resultantly, it was emphasized that not only the notice at Annexure A-15 gave all the requisite details but the record was also considered and the Applicant-dealer was given opportunity of being heard in the matter. As regards the notice, there is nothing in section 46 that notice is mandatory. The revisional orders can be passed on the basis of record, which is always open for scrutiny by the dealer himself or through his legal representative. Accordingly, the Applicant-dealer's contention about the show cause notice are contrary to section 46 and he having been afforded full opportunity of hearing cannot complain any breach of natural justice., and therefore, his contention deserves to be rejected and plea dismissed.

It was thus submitted that the consequential order dated 26.10.2020 passed by the Ld. Commissioner has been passed not only after a detailed notice but also after affording opportunity of being heard to the Applicant, but the arguments were no different from arguments at the previous and original hearing. The assessment order dated 19.11.2020 has also been passed after giving notices dated 29.10.2020, 2.11.2020. 6.11.2020 and 13.11.2020, but the Applicant either replied that he should be given time to challenge the order dated 26.10.2020, " being very old record it is difficult for us to produce this record in short time notice" and "faulty notice need not be complied as per established legal precedents", and thus he never bothered to appear before the Assessing Authority and evinced non-cooperative attitude, even despite reasonable opportunities afforded to him. The Hon'ble Apex Court in Titagarh Paper Mills Co v. State of Orissa (1963) 53 STC 315 (SC) (43JJ) has clearly laid down the law that:

"The impugned order clearly shows that the petitioners were afforded sufficient opportunity to place their case. Merely because the learned Sales Tax Officer refused to grant any further adjournment and decided to proceed to best judgment, it cannot be said that he acted in violation of the rules of natural justice."

According to the said dictum of law the dealer cannot complain of any violation of natural justice and the order passed remains perfectly valid in the eyes of law.

As regards the levy of interest, it was submitted that interest is a statutory liability and can be levied under section 9(2B) of the CST Act, 1956 and section 19 of the HP VAT Act, 2005. The judgments in **Sunthetic's case (94 STC 422) , Frick India case (95 STC 188), Maruti Wire Industries' case (122 STC 410) and Hindustan Aluminium Corporation (127 STC 258)** are no longer applicable because of these having been rendered ineffective by the Finance Act, 2000. Hence, interest is payable under the law. Besides, penalties are imposed for tax delinquency and according to the statutory provisions, which cast no bar in that behalf. The Hon'ble Apex Court in *Director of Enforcement v. MCTM Corpn. (P) Ltd.: (SCC pp. 478 & 480-81,* held that:

"8. It is thus the breach of a `civil obligation' which attracts `penalty' under Section 23(1)(a), FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 that would immediately attract the levy of `penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with

any `guilty intention' or not. "

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12. In Corpus Juris Secundum, Vol. 85, at p. 580, para 1023, it is stated thus:

> *`A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws.'*

13. We are in agreement with the aforesaid view and in our opinion, what applies to `tax delinquency' equally holds good for the `blameworthy' conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens rea (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23(1)(a) as soon as contravention of the statutory obligation contemplated.

Consequently the contentions of applicant are contrary to law and require to be rejected.

Further, in hearing the revision application, the plea of the Appellant for re-appreciation of certain evidence is legally untenable, in the absence of statutory provision and was contrary to the law laid down by the Hon'ble Apex Court in *Lachhman Dass vs Santokh Singh on 12 May, 1995 SCC (4) 201*, the Hon'ble Apex Court has held as under:

> *"7....The Legislature has, however, made a provision for discretionary remedy of revision which is indicative of the fact that the Legislature has created two jurisdictions different from each other in scope and content in the form of an appeal and revision. That being so the two jurisdictions - one under an*

appeal and the other under revision cannot be said to be one and the same but distinct and different in the ambit and scope. Precisely stated, an appeal is a continuation of a suit or proceedings wherein the entire proceedings are again left open for consideration by the appellate authorities which has the power to review the entire evidence subject, of course, to the prescribed statutory limitations. But in the case of revision whatever powers the revisional authority may have, it has no power to reassess and reappreciate the evidence unless the statute expressly confers on it that power. That limitation is implicit in the concept of revision. In this view of the matter we are supported by a decision of this Court in State of Kerala vs. K.M. Charia Abdullah and Co. [1965 (1) SCR 601 at 604].

In view of the law laid down by the Hon'ble Su;preme Court, the law is clear and indisputable that re-appreciation of evidence is not permissible. Hence the plea for seeking re-appreciation of the documents is legally impermissible. Besides, the application for revision cannot be equated with appeal and cannot be heard by re-opening all the issues. The nature of revision itself repels any such attempt.

The plea of the applicant that the Ld. Commissioner could not direct passing consequential order of quantification of tax etc. liability prior to 60 days appellate time was no statutory provision, it was submitted that perusal of statutory provisions of sections 21(8), 21(9), 34(8), 25 and Rule 70 provide for time-limits of (i) not more than thirty days, (ii) 30 days, (iii) 20 days, (iv) 30 days, and (v) not more than thirty days respectively while the appeal, while section 45(4) provides for a period of 60 days for filing the appeals, which are perfectly legal and valid, and thus the plea for applicant may be dismissed as contrary to law as there is no provision in the Act which requires withholding of passing of consequential orders prior to expiry of the appellate time.

Regarding argument for the Ld. Applicant that the Ld. Commissioner did not have the record of the case before passing the impugned order, it was submitted that the entire record was available

in the Headquarter's office of the Ld. Commissioner and duly considered, and the record is already before the Hon'ble Tribunal, from which all the returns filed by the dealer and the C Forms, alleged to have been sent for verification, were physically shown to be on the original assessment record of these four years, and hence the plea is without any factual and true basis, and must be rejected. Other ancillary arguments being without any basis may also be rejected.

In view of the above, the instant application under section 9(2) of the Central Sales Tax Act, 1956 read with section 46(3) of the HP VAT Act, 2005, being in sum and substance an attempt to obtain re-consideration and review of the order dated 29.8.2013 of this Hon'ble Tribunal, which is not legally permissible and resultantly the instant application filed by the Application being contrary to law is not maintainable cannot be entertained. Consequently, the application requires to be dismissed as un-maintainable.

6. I have heard the arguments, perused the entire relevant record and the consequential orders dated 26.10.2020 passed by the Ld. Commissioner and the Order dated 19.11.2020 and the statutory provisions. I am of the considered view that by filing the instant application against the consequential orders implementing and giving effect to the Order of this Tribunal dated 29.8.2013, the Applicant is actually seeking review and re-consideration of the said order dated 29.8.2013, for which the HP VAT Act, 2005 and the CST Act, 1956 do not provide any power. The Applicant cannot re-agitate the same issues which stand decided by this Tribunal in order dated 29.8.2013, which has attained finality under section 9(2) of the CST Act, 1956 read with section45(3) of the HP VAT Act, 2005. Consequently, the application filed by the Applicant cannot be entertained and the same is hereby dismissed.

7. It is also ordered that the interim orders dated 14.12.2020 passed in OMA o1 in Revision Application No.01 of 2020 shall also stand vacated.

8. The orders reserved in this case on 1st July, 2021 are hereby released and announced in the presence of the parties.

9. Parties be informed accordingly, and the file, after completion, be consigned to record room.

Announced:
2nd July, 2021

(Dr. S.S. Guleria)
Chairman,
H.P. Tax Tribunal
Camp at Shimla.

Endst No.HPTT/CS/2020- 138-142 Dated: 02-07-2021

Copy to:

1. The Commissioner of State Taxes and Excise-cum-Revisional Authority, Himachal Pradesh, Block No.30, SDA Complex, Shimla.
2. M/s Budget Signs, Plot No76, Thana, Revenue District BBN Area Baddi, District Solan, H.P.
3. The ACST&E-cum Proper Officer, Baddi Circle-IV.
4. Shri R.N. Sharma, Advocate, House No. A-157, Sector-III, New Shimla..
5. Shri Rakesh Rana, Deputy Director (Law), Office of the Commissioner , ST&E, Block No.30, SDAComplex, Shimla.

Sulajan Sharma
Reader to the
Chairman,
H.P. Tax Tribunal
Camp at Shimla