

* **HIGH COURT OF DELHI : NEW DELHI**

+ **Writ Petition (Civil) No.5828 of 2007**

Judgment reserved on: March 10th, 2008

% Judgment delivered on: March 14th, 2008

M/s International Metro Civil Contractors
167, Amrit Puri-B, 3rd Floor
East of Kailash
New Delhi – 110 065

...Petitioner

Through Mr. Neeraj Kishan Kaul, Sr. Adv.
with Mr. Dhruv Mehta, Mr. Yashraj
Singh & Mr. K.D. Tiwari, Advs.

Versus

1. Commissioner of Sales Tax/VAT, Delhi
Vyapar Bhawan, New Delhi

2. Deputy Commissioner Sales Tax/VAT
Special Zone, Vyapar Bhawan
New Delhi

...Respondents

Through Mr. A.S. Chandhiok, Sr. Adv. with
Mr. M.K. Arora & Mr. Ritesh Kumar,
Advs.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment?

Yes

- | | |
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| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MADAN B. LOKUR, J.

This case exposes us to another unfortunate aspect of the underbelly of litigation in India – one where both litigating parties go hammer and tongs at each other with neither side willing to give any quarter. This may be understandable where the litigating parties are individuals or corporations seeking a slice of the cake. But where one of the parties is the State, it is a little difficult to appreciate why a litigation should be fought tooth and nail, particularly when a Constitutional Court has repeatedly taken a view that is not only unfavourable to it, but has resulted in observations suggesting that the State is trying to overreach the process of the Court. There is also a severe indictment of a functionary of the State, by this Court, of interpolations and manipulations in an official order. This is perhaps what makes the stage show enacted by the State in this litigation a little distasteful and unpalatable if not sordid and tragic.

2. To make matter worse, if we were to include the initiation of contempt proceedings, this is the fifth time that the Petitioner has had to

approach this Court for relief that was due to it as far back as in April, 2003 – such is the irony of this litigation, which has twice reached the Supreme Court already.

3. Add to this the fact that when we requested learned counsel for the parties to let us know the expenses incurred by their clients so that meaningful costs could be awarded to the successful party, as laid down by the Supreme Court, we were shocked to learn that this litigation alone (not to mention the earlier forays in this Court or the Supreme Court) has cost the parties almost half a crore of rupees – so much for access to inexpensive and affordable justice!

4. With this preface, it is necessary to consider the challenge mounted by the Petitioner which is to:

(a) An order dated 19th April, 2007 issued by the Commissioner, Value Added Tax. By this order, the jurisdiction in respect of the Petitioner for the assessment year 2000-2001 onwards under the Delhi Sales Tax on Works Contract Act, 1999 (the Works Contract Act) and the Central Sales Tax Act, 1956 was transferred to the Deputy Commissioner (Special Zone).

(b) Another order dated 19th April, 2007 issued by the Commissioner, Value Added Tax. Essentially, this order delegates revisionary powers under Section 46 of the Delhi Sales Tax Act, 1975 (the DST Act) to the Deputy

Commissioner (Special Zone). It may be noted that the DST Act was repealed on 31st March, 2005.

(c) A notice dated 18th July, 2007 issued by the Deputy Commissioner (Special Zone) of the Government of NCT of Delhi, Department of Trade and Taxes. By this notice, the Deputy Commissioner (Special Zone) seeks to exercise his (delegated) revisionary jurisdiction to call for and examine the record/proceedings pertaining to the assessment of the Petitioner under the Works Contract Act and the DST Act.

The initial facts:

5. On 31st March, 2003, an assessment order was passed by the Tax Assessment Officer in respect of the Petitioner for the assessment year 2001-2002. By virtue of this order, the Assessing Officer granted a refund of Rs.6,30,79,487/- to the Petitioner which was then to be made over to the Petitioner on an application filed by it. The assessment order was accepted by the Revenue and was not sought to be immediately revised or otherwise set aside. It may be mentioned, *en passant*, that the assessment order was rectified on 9th June, 2003 but that is admittedly of no real significance or import.

6. Consequent upon the assessment order, the Petitioner preferred an application on 2nd May, 2003 for refund of the amount due to it under Section 30(1) of the DST Act. Unfortunately, the Assessing

Officer, instead of granting the refund, went on to consider the merits of the assessment order as if he were sitting in appeal over the assessment made.

7. Eventually, the Assessing Officer passed an order dated 14th August, 2003 whereby he rejected the refund application. But what is worse, he made interpolations and manipulations in the order dated 14th August, 2003. The Assessing Officer also did not communicate the order dated 14th August, 2003 to the Petitioner. Instead, on 4th September, 2003 a notice was issued to the Petitioner seeking to reopen the assessment in respect of the assessment year 2001-2002. The reassessment proceedings continued and culminated in an order of reassessment dated 15th January, 2004.

The first writ petition:

8. Feeling aggrieved by the rejection of its refund application preferred under Section 30(1) of the DST Act (by the order dated 14th August, 2003) as well as the order of reassessment dated 15th January, 2004, the Petitioner filed in this Court WP (C) No.869 of 2004 (the first writ petition). In that writ petition, which was decided on 28th July, 2004 the following conclusions were arrived at by the Division Bench:

(1) The order dated 14th August, 2003 passed by the Assessing Officer was the following:-

“Dealer is asked to file the present addresses of sub-contractor and sales tax wards, tax deposited figures of each. But he refused to sign and left office. Application is not kept in abeyance and is rejected.”

(2) The underlined words, that is, ‘not’ and ‘and is rejected’ were interpolated by the Assessing Officer and so the order rejecting the refund application deserved to be quashed.

(3) A refund could be withheld only under the conditions mentioned in Section 30(6) of the DST Act. These conditions are: (a) the assessment order is the subject matter of an appeal or further proceedings or where any other proceeding is pending under the DST Act, and (b) the Commissioner is of the opinion that the grant of refund is likely to adversely affect the Revenue.

(4) In the present case, no such proceedings were pending and so the refund could not be withheld. **“Therefore it goes without saying that it is very clear that an application for refund ought to have been allowed under Section 30.”** (Emphasis given)

(5) The order rejecting the refund was quashed and the reassessment order was also quashed.

(6) The Commissioner was directed to pass appropriate orders on the refund application keeping in view the mandate of Section 30 of the DST Act within a period of 15 days.

9. Instead of complying with the mandamus issued by this Court, the Commissioner passed an order on 12th August, 2004 (on the

extended date) on the application for refund and came to the prima facie conclusion that the assessment order dated 31st March, 2003 was erroneous and prejudicial to the interest of the Revenue. Therefore, he concluded that before granting the refund, the assessment order dated 31st March, 2003 is required to be revised under Section 16 of the Works Contract Act read with Section 46 of the DST Act. Consequently, the Commissioner directed the concerned Assistant Commissioner [who was delegated powers of the Commissioner under Section 46 of the DST Act by an order dated 12th September, 1994] to revise the assessment order. It was further directed that only thereafter should the Zonal Assistant Commissioner take up the question of refund due to the Petitioner.

10. Section 46 of the DST Act is of some importance and this reads as follows:

“46. Revision of orders prejudicial to revenue: The Commissioner may call for and examine the record of any proceeding under this Act and if he considers that any order passed therein by any person appointed under sub-section (2) of section 9 to assist him, is erroneous in so far as it is prejudicial to the interests of revenue, he may, after giving the dealer an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment

and penalty (if any) imposed or cancelling the assessment and penalty (if any) imposed and directing a fresh assessment.

Provided that a final order under this section shall be made before the expiry of five years from the date of the order sought to be revised.”

11. Feeling aggrieved by the failure of the Commissioner to comply with the mandamus issued by this Court in the matter of refund, and instead, attempting to revise the assessment order dated 31st March, 2003 the Petitioner filed a miscellaneous application in the first writ petition seeking appropriate orders from this Court.

12. On 20th September, 2004 an order came to be passed on the miscellaneous application directing the Revenue to deposit the entire refundable amount with interest, in the Registry of this Court, within one week. The order dated 12th August, 2004 passed by the Commissioner was also stayed by this Court and this interim stay continued until the miscellaneous application was decided on 18th November, 2005 when it was held that it would be appropriate for the Petitioner to initiate separate substantive proceedings challenging the order dated 12th August, 2004 instead of through a miscellaneous

application.

13. In the meanwhile, on 31st March, 2005 both the Works Contract Act as well as the DST Act were repealed and on 1st April, 2005 the Delhi Value Added Tax Act, 2004 (the DVAT Act) was brought into force.

14. There are two significant aspects of the DVAT Act that we are concerned with. Firstly, the provision for repeal and savings, which is Section 106 of the DVAT Act and this reads as follows:

“106. Repeal and savings

(1) The Delhi Sales Tax Act, 1975 (43 of 1975), the Delhi Tax on Entry of Motor Vehicles into Local Areas Act, 1994 (4 of 1995), the Delhi Sales Tax on Works Contract Act, 1999 (9 of 1999), and the Delhi Sales Tax on Right to Use Goods Act, 2002 (13 of 2002) as in force in Delhi (referred to in this section as the “said Acts”), are hereby repealed.

(2) Notwithstanding sub-section (1) of this section, such repeal shall not affect the previous operation of the said Acts or any right, title, entitlement, obligation or liability already acquired, accrued or incurred thereunder.

(3) For the purposes of sub-section (2) of this section, anything done or any action taken including any appointment, notification, notice, order, rule, form or certificate in the exercise of any powers conferred by or under the said Acts shall be deemed to have been done or taken in the exercise of the powers conferred by or under

this Act, as if this Act were in force on the date on which such thing was done or action was taken, and all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act.”

15. Secondly (and this is important in so far as the Petitioner is concerned) no power of revision was conferred upon the Commissioner of Value Added Tax under the DVAT Act. The revisionary power, which earlier existed under the DST Act, was not saved under the DVAT Act. It came into existence under the DVAT Act only by an amendment brought into force with effect from 16th November, 2005 by the inclusion of Section 74A in the DVAT Act. In other words, the power of revision conferred upon the Commissioner under the DST Act was omitted under the DVAT Act and conferred on the Commissioner only on 16th November, 2005.

16. Given this factual background, it is necessary at this stage to pause and take stock of the facts as they existed on 1st April, 2005 when the DVAT Act came into force. The important facts are:

1. The Works Contract Act and the DST Act were repealed by the DVAT Act. Section 106 of the DVAT Act dealt with repeal and savings.
2. Under the DVAT Act, on 1st April, 2005 the

Commissioner of Value Added Tax did not have the power to revise an assessment order which was erroneous or prejudicial to the interest of the Revenue. [Such a power was conferred on him much later only on 16th November, 2005].

3. The power of revision earlier available with the Commissioner under the DST Act was omitted under the DVAT Act.
4. An order dated 12th September, 1994 issued by the Commissioner was in existence delegating powers of revision under Section 46 of the DST Act to the Assistant Commissioner.
5. The order dated 12th August, 2004 passed by the Commissioner was in existence. By this order, the Assistant Commissioner was asked to revise the assessment order dated 31st March, 2003 and thereafter take up the application filed by the Petitioner for refund.
6. No proceeding was initiated or pending in respect of the Petitioner on 1st April, 2005 pursuant to the order dated 12th August, 2004.
7. The Petitioner had filed a miscellaneous application in the first writ petition (decided on 28th July, 2004) in which an order was passed by this Court on 20th September, 2004 staying the operation of the order dated 12th August, 2004.

The contempt petition:

17. It appears that in view of the recalcitrant attitude (but despite the pendency of the miscellaneous application in the first writ petition) the Petitioner filed a civil contempt petition in this Court on 11th May,

2005 against the Commissioner of Value Added Tax (earlier the Commissioner of Sales Tax) being CCP No.381 of 2005. The grievance of the Petitioner was that not only was the refund denied to it in spite of a mandamus of this Court but the order dated 12th August, 2004 was an attempt to overreach the orders passed by this Court in the first writ petition decided on 20th July, 2004.

18. The civil contempt petition came to be heard by a Division Bench of this Court and by an order dated 18th November, 2005 the learned Judges expressed different opinions. One of the learned Judges (T.S. Thakur, J) was of the view that the contempt petition merited dismissal and that the amount deposited by the Revenue pursuant to the orders of this Court passed on 20th September, 2004 shall stand refunded to the Revenue. The other learned Judge (Badar Durrez Ahmed, J) was of the opinion that the Commissioner had committed contempt of Court by showing complete and thorough disrespect to the orders passed by this Court and had deliberately and intentionally and by a device thwarted the opinion of this Court dated 20th July, 2004. However, the learned Judge was of the view that since contempt proceedings involve penal consequences and T.S. Thakur, J did not find the Commissioner in

contempt, it would be appropriate to give him the benefit of doubt and not haul him up for contempt of Court. Accordingly, the contempt petition was dismissed.

The second and third writ petitions:

19. On 16th January, 2006, an office order was issued by which the Commissioner transferred the jurisdiction concerning the assessment of the Petitioner to the Special Zone in respect of all proceedings, whether commenced, pending or to be initiated.

20. Pursuant thereto, the Joint Commissioner, Special Zone issued a notice dated 21st February, 2006 to the Petitioner in exercise of powers delegated to him under Section 46 of the DST Act. It was stated in the notice that the assessment order dated 31st March, 2003 was erroneous and prejudicial to the interest of the Revenue and therefore the Petitioner may show cause why the assessment order be not revised. Although no reference was made to the order dated 12th August, 2004 it is quite clear that the notice was pursuant to that order passed by the Commissioner of Sales Tax.

21. A few days earlier, on or about 17th February, 2006, the Petitioner had filed WP (C) No.2355 of 2006 (the second writ petition) in this Court in which it was prayed that the order dated 12th August, 2004 passed by the Commissioner of Sales Tax be quashed. The writ petition was heard for admission by a Division Bench of this Court on 20th February, 2006 and judgment reserved. Judgment was eventually delivered by the Division Bench on 15th September, 2006 when again there was a difference of opinion between the learned Judges constituting the Division Bench (T.S. Thakur and B.N. Chaturvedi, JJ) – but more on that a little later.

22. The Petitioner filed a reply to the show cause notice dated 21st February, 2006 and soon thereafter in April, 2006 filed WP (C) 5272 of 2006 (the third writ petition) in this Court challenging that show cause notice. It was contended in the third writ petition, inter alia, that the show cause notice is without jurisdiction since it was issued in exercise of powers conferred by the Works Contract Act and the DST Act both of which statutes had been repealed, the revisionary power vested in the Commissioner under the DST Act was not saved or preserved and that no revisionary power was conferred on the

Commissioner under the DVAT Act until 16th November, 2005 when Section 74A was inserted in that statute.

23. The third writ petition challenging the show cause notice dated 21st February, 2006 was heard for admission on 3rd April, 2006 when orders were reserved. However, it was directed on that date that the revision proceedings may go on before the appropriate authority but no final order shall be passed thereon and that the Petitioner should cooperate with the proceedings.

24. As mentioned above, the second writ petition which was argued for admission on 20th February, 2006, was decided by a Division Bench of this Court on 15th September, 2006. T.S. Thakur, J upheld the validity of the notice dated 12th August, 2004 whereby the refund application of the Petitioner was rejected by the Commissioner and a direction was given to the Zonal Assistant Commissioner to revise the assessment order dated 31st March, 2003 and thereafter decide the refund application of the Petitioner. On the other hand, B.N. Chaturvedi, J concluded that the order dated 12th August, 2004 deserved to be quashed, which he did. It was directed by the learned Judge that the

Revenue should pass appropriate orders on the refund application filed by the Petitioner in conformity with the orders dated 20th July, 2004 passed by this Court in the first writ petition. Liberty was granted to the Revenue to pass appropriate orders in regard to revision of the assessment order, in accordance with law, but not before disposing of the refund claim.

25. In view of the difference of opinion between the learned Judges in the second writ petition, the matter was referred to a third learned Judge (Mukul Mudgal, J) who passed an order on 18th October, 2006 concurring with the view taken by B.N. Chaturvedi, J quashing the order dated 12th August, 2004. It was held that the Revenue should first comply with the mandamus dated 20th July, 2004 directing refund to the Petitioner.

26. After the third learned Judge rendered his opinion, the second writ petition was placed before the Division Bench on 3rd November, 2006 for passing consequential orders. On that date, the Division Bench allowed the writ petition and quashed the order dated 12th August, 2004. The Commissioner was directed to pass appropriate

orders on the refund application in conformity with the orders of this Court dated 20th July, 2004 in the first writ petition. The Revenue was also given liberty to pass appropriate orders, in accordance with law, in regard to the assessment order but only after disposing of the refund application.

27. The Revenue preferred Special Leave Petition (C) No.20786 of 2006 against the final order dated 3rd November, 2006 in the second writ petition, but the SLP was dismissed by an order dated 4th January, 2007 with the Supreme Court observing that:

“On the facts of the case, we are not inclined to interfere keeping the question of law open. The special leave petition is dismissed.”

28. Therefore, the factual position as it stood on 4th January, 2007 when the Supreme Court dismissed the SLP of the Revenue was as follows:

1. The Petitioner was entitled to a refund on the basis of the assessment order dated 31st March, 2003. This was conclusively held by two Division Benches of this Court, both in the first writ petition (decided on 20th July, 2004) as well as in the second writ petition (decided on 3rd November, 2006).
2. An SLP against the decision rendered by this Court in the

second writ petition was dismissed on 4th January, 2007.

3. The order passed on 12th August, 2004 to initiate reassessment proceedings against the Petitioner stood quashed in the second writ petition.
4. While the order dated 12th August, 2004 was quashed in the second writ petition, liberty was given to the Respondents to pass appropriate orders in respect of the assessment order dated 31st March, 2003 in accordance with law.
5. The Works Contract Act and the DST Act were repealed with effect from 31st March, 2005 and the DVAT Act was brought into force on 1st April, 2005.
6. The DVAT Act did not confer any power of revision on the Commissioner of DVAT till 16th November, 2005 when Section 74A was inserted in the DVAT Act.
7. The third writ petition challenging the show cause notice dated 21st February, 2006 issued by the Joint Commissioner, Special Zone on the ground of lack of jurisdiction was heard for admission on 3rd April, 2006 and judgment reserved. The Joint Commissioner was permitted to go ahead with the proceedings but was restrained from passing a final order thereon.

The fourth writ petition:

29. After finality was given to all the pending proceedings (other than the third writ petition in which judgment was still awaited), the refund due to the Petitioner was granted to it by an order dated 8th January, 2007 passed by the Commissioner (T&T). However, in the

order dated 8th January, 2007 the Commissioner stated in paragraph 10 thereof as follows:

“This order would, however be without prejudice to the rights and powers of the competent authority for suo-moto revision under Section 46 of the Delhi Sales Tax Act, 1975 read with section 16 of Delhi Sales Tax on Works Contract Act, 1999 which have already been initiated by the competent authority keeping in view the serious discrepancies observed in the assessment order dated 31.3.2003, passed by the assessing authority.”

30. Pursuant to the order dated 8th January, 2007 two events occurred. Firstly, the Commissioner issued two orders on 19th April, 2007 both of which are impugned in the writ petition that we are presently concerned with. The first Order No. 29 reads as follows:

“OFFICE OF THE COMMISSIONER,
VALUE ADDED TAX
DEPTT. OF TRADE & TAXES (POLICY BRANCH)
VYAPAR BHAWAN, I.P. ESTATE, NEW DELHI

No.VATO/Policy-III/2005-06/29

Dated: 19-04-2007

ORDER

In partial modification of order No.F.8(28)/93-PPR/13368-384 dated 12th September 1994 regarding delegation of powers under section 46 of the DST Act, 1975, I, Archana Arora, Commissioner, Value Added Tax, Department of Trade & Taxes, in exercise of the powers conferred by section 10 of the Delhi Sales Tax Act, 1975 read with section

106 of DVAT Act, 2004, do hereby delegate powers vested in Commissioner Sales Tax under section 46 of the DST Act, 1975 to revise all orders prejudicial to the interest of revenue passed by an Assessing Authority below the rank of Assistant Commissioner to Deputy Commissioner, Special Zone in respect of M/s International Metro Civil Contractors, 8, Jantar Mantar Marg, Near Connaught Place, Delhi-110001.

This order shall come into force with immediate effect.

sd/-
(ARCHNA ARORA)
Commissioner, Value Added Tax”

The other Order No. 34 reads as follows:

“OFFICE OF THE COMMISSIONER,
VALUE ADDED TAX
DEPTT. OF TRADE & TAXES (POLICY BRANCH)
VYAPAR BHAWAN, I.P. ESTATE, NEW DELHI

No.VATO/Policy-III/2005-06/34

Dated: 19-04-2007

ORDER

In supersession of order No.LSC/Tr.Appeal&Rev./2006-07/1110-1114 dated 24-8-2006 and in exercise of the powers conferred upon me under section 11 of Delhi Sales Tax Act, 1975 read with Section 106 of DVAT Act, 2004, I, Archna Arora, Commissioner, Value Added Tax, Department of Trade & Taxes, do hereby transfer the jurisdiction in respect of M/s International Metro Civil Contractors for the assessment year 2001-02 onwards, under Delhi Sales Tax on Works Contract Act, 1999 and Central Sales Tax Act, 1956,

from Assistant Commissioner Zone-I to Deputy Commissioner, Special Zone.

This order shall come into force with immediate effect.

sd/-
(ARCHNA ARORA)
Commissioner, Value Added Tax”

31. The second event that occurred was that a notice dated 7th February, 2007 was served upon the Petitioner requiring it to appear before the Deputy Commissioner (Special Zone) on 19th February, 2007 along with all relevant records and to show cause why the assessment order dated 31st March, 2003 be not revised pursuant to the show cause notice dated 21st February, 2006 (in respect of which the third writ petition was still pending, but in which liberty was granted to the Revenue to proceed with the adjudication without passing a final order).

32. Be that as it may, it is not clear why, but the third writ petition came to be listed before the Division Bench on 30th March, 2007 (that is almost a year later). On that date, the writ petition was ordered to be re-heard. It was then adjourned a couple of times and eventually taken up on 27th July, 2007.

33. On 27th July, 2007 the Division Bench noted the submission of learned senior counsel for the Revenue that the show cause notice dated 21st February, 2006 has been withdrawn and a fresh notice dated 18th July, 2007 has been served upon the Petitioner. Consequently, the writ petition had become infructuous.

34. Learned counsel for the Petitioner admitted receipt of the notice dated 18th July, 2007 and sought liberty to challenge it. Liberty was granted to the Petitioner as prayed for and the third writ petition was dismissed as infructuous.

35. It is under the above circumstances that the present writ petition (the fourth writ petition) has been filed challenging the two orders dated 19th April, 2007 and the notice dated 18th July, 2007 whereby the Petitioner has been asked to show cause why the assessment order dated 31st March, 2003 be not revised.

36. It is worth mentioning at this stage that the notice dated 18th July, 2007 was issued in exercise of powers conferred by Section 16 of the Works Contract Act read with Section 46 of the DST Act (both

repealed statutes). The notice was not issued under any provision of the DVAT Act.

Proceedings in the fourth writ petition:

37. On 10th August, 2007 a Division Bench of this Court issued notice to the Revenue in the fourth writ petition as well as in the application seeking stay of further proceedings pursuant to the show cause notice dated 18th July, 2007. In the meanwhile, an ad interim stay as prayed for was also granted to the Petitioner. On 15th November, 2007 learned counsel for the parties were heard and the writ petition was admitted for final hearing and the interim order passed on 10th August, 2007 was confirmed.

38. Thereafter, on 4th January, 2008 an early hearing application filed by the Respondents was taken up for consideration and dismissed. Against the order rejecting early hearing, the Respondents preferred Special Leave Petition (C) No. /2008 [CC 2612-2613/2008] in which the following order was passed on 22nd February, 2008:

“Heard.

Delay condoned.

We request the High Court to dispose of the writ petition as early as practicable preferably by 15th March, 2008 so that the apprehension of the petitioner that the proceedings may get barred by time can be avoided. Let parties appear before the Chief Justice of the High Court with a copy of our order so that an appropriate Bench can be fixed and a firm date of hearing can also be fixed.

The special leave petitions are accordingly disposed of.”

This is how the fourth writ petition was listed before us for expeditious disposal.

39. We heard learned counsel for the parties from 27th to 29th February, 2008 and then again from 3rd to 5th, 7th and 10th March, 2008 when judgment was reserved.

40. During the course of hearing, we required learned counsel for the Revenue to produce before us the order withdrawing the show cause notice dated 21st February, 2006 and the order on the basis of which the fresh show cause notice dated 18th July, 2007 was issued. Learned counsel placed before us an order passed by the Deputy Commissioner dated 15th June, 2007 in the revision proceedings (initiated pursuant to the earlier show cause notice dated 21st February, 2006) and the

operative portion thereof reads as follows:

“Considering the objections raised by the dealer and that the proper delegation to the D.C. (Spl. Zone) was issued on 19.4.2007, there remains scope for some confusion/ambiguity about the jurisdiction of the then Joint Commr. Special Zone/Joint Commr. V who initiated the proceedings on 21.2.2006 and also of the Deputy Commissioner (Special Zone) before 19.4.2007.

“Without going into the merits of the case, it may be appropriate that a fresh notice be issued to the dealer calling for revision proceedings under Section 46 and the case under Section 46 to be taken up accordingly.”

41. We are unable to appreciate how the Deputy Commissioner could have ‘withdrawn’ the show cause notice dated 21st February, 2006 issued by his superior officer, the Joint Commissioner, but we leave it at that. In any event: no order was passed withdrawing the show cause notice dated 21st February, 2006 but the withdrawal finds a mention in the fresh show cause notice dated 18th July, 2007 and no order was passed permitting the issuance of the show cause notice dated 18th July, 2007.

Submissions and discussion:

42. At the outset, we may note two preliminary objections raised by learned counsel for the Revenue. Firstly, it was contended that on the

principles of estoppel and *res judicata* the Petitioner cannot challenge the jurisdiction of the Revenue to issue the show cause notice dated 18th July, 2007. Secondly, in the second writ petition decided on 3rd November, 2006 this Court had permitted the Revenue to act in accordance with law and it was thereby accepted that the Revenue could issue the impugned show cause notice.

43. Both the preliminary objections are only stated to be rejected. The question of a challenge to the jurisdiction of the Revenue could arise only when the show cause notice was issued and not earlier. There is no question of the Petitioner being estopped or barred by the principles of *res judicata* from challenging a show cause notice that was not in existence earlier. There is also nothing that prevents the Petitioner from challenging the show cause notice dated 18th July, 2007 on all available grounds, including jurisdictional ones. For the record, we may only note that learned counsel for the Revenue relied upon ***M.P. Raghavan Nair v. State Insurance Officer, AIR 1971 Kerala 175, State of Uttar Pradesh v. Nawab Hussain, (1977) 2 SCC 806*** and ***State of Punjab v. Varinder Kumar, (2005) 12 SCC 806***.

44. In so far as the second preliminary objection is concerned, that this Court permitted the Revenue to act in accordance with law cannot, by any stretch of imagination, be construed to mean tacit acceptance of the legitimacy of the actions of the Revenue. This goes without saying.

45. Coming to the meat of the matter, we are required to consider whether, after the DVAT Act came into force, the Revenue could issue the show cause notice dated 18th July, 2007 seeking to revise the assessment order dated 31st March, 2003. To answer this question, we would need to consider the following three issues:

1. Whether any proceedings for revising the assessment order were at all initiated by the Revenue before 31st March, 2005 when the DST Act and the Works Contract Act were repealed? If not, the impact thereof.
2. If the answer to the above question is in the affirmative, whether the proceedings initiated by the Revenue were saved by the DVAT Act on the repeal of the DST Act and the Works Contract Act on 31st March, 2005?
3. What is the effect (if any) of the omission, in the DVAT Act, of the power to revise an assessment that was available to the Commissioner under Section 16 of the Works Contract Act read with Section 46 of the DST Act?

46. The answer to the first question is entirely factual and that question must be answered in the negative. The order dated 12th August, 2004 passed by the Commissioner directed the Zonal Assistant Commissioner to revise the assessment order dated 31st March, 2003 in exercise of powers delegated to him under Section 46 of the DST Act. However, the Zonal Assistant Commissioner took no steps to call for or examine the record relating to the assessment order; nor was any opportunity given to the Petitioner in this connection, either by issuing a show cause notice or in any other manner calling upon the Petitioner to place its case before him on or before 31st March, 2005.

47. The Joint Commissioner, Special Zone took the first step only on 21st February, 2006 when he issued a notice to the Petitioner requiring it to show cause (somewhat indirectly though) why the assessment order dated 31st March, 2003 be not revised. The Petitioner was asked to appear before him on 27th February, 2006 along with relevant records for the assessment year 2001-2002. Needless to say, this notice was issued well after the repeal of the DST Act and the Works Contract Act and also well after the DVAT Act came into force.

48. Quite clearly, therefore, no steps were initiated by the Revenue on or before 31st March, 2005 to revise the assessment order dated 31st March, 2003. What is the impact of this?

49. In *Gajraj Singh v. State Transport Appellate Tribunal, (1997) 1 SCC 650* the issue of inchoate rights is discussed just before paragraph 30 of the Report under the heading *Effect upon inchoate rights*. It was said:

“Rights of action which are dependent upon a statute, and which are still inchoate and not reduced to possession or perfected by final judgment, are lost by the repeal of the statute from which they stem. This rule of construction is simply a restatement of the common law principle of construction that the repeal of a statute operates to divest all rights accruing under the repealed statute and all proceedings not concluded prior to the repeal, since inchoate rights are by definition not vested rights such as to escape the common law rule of effacement. The inchoate rights are but an incident to the statute and fall with its repeal.”

50. Similarly, in *Gammon India Ltd. v. Special Chief Secretary, (2006) 145 STC 1* it was held in paragraph 71 of the Report as follows:

“Since the effect of a repeal is to obliterate the statute and to destroy its effective operation in future, or to suspend the operation of the common law, when it is a common law principle which is abrogated, any proceedings which have not culminated in a final judgment prior to the repeal are abated at the consummation of the repeal.”

51. The effect of this is, quite clearly, that the process of a revisionary proceeding, not having been initiated by the Revenue, dies a natural death on the repeal of the DST Act and the Works Contract Act - unless the right of the Revenue is otherwise saved by the DVAT Act – an issue that we will presently consider.

52. The matter may be looked at from another point of view. Before the order dated 12th August, 2004 could be acted upon, its operation was stayed by this Court on 20th September, 2004 in a miscellaneous application filed by the Petitioner in the first writ petition. No steps were taken by the Revenue to have that stay lifted or vacated and so the interim stay continued till 18th November, 2005 by which time the DST Act and the Works Contract Act were repealed.

53. In other words, as on 1st April, 2005 there was no operative order as far as the Petitioner is concerned. It was submitted by learned counsel for the Revenue that the order dated 12th August, 2004 nevertheless existed. As far as a theoretical and academic existence is concerned, learned counsel may be correct but the existence was purely academic and theoretical, since the order dated 12th August, 2004 was

set aside by this Court in the 3rd November, 2006 in the second writ petition. The effect of such a setting aside is explained in *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association*, (1992) 3 SCC 1 wherein it is held in paragraph 10 of the Report:

“Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed.”

54. Therefore, whichever way one considers the matter, the inevitable conclusion is that no proceedings for revising the assessment order were pending on 1st April, 2005.

55. What existed, if at all, was a direction given by the Commissioner to the concerned Assistant Commissioner to revise the assessment order and that direction had not even been implemented by that officer. Moreover, that direction was stayed before it could be implemented and to make matters worse for the Revenue, the order dated 12th August, 2004 was eventually struck down by this Court in the second writ petition. Therefore, even if the Commissioner had any right to revise the assessment order, neither he, nor his delegate ever exercised that right (assuming it to be a right) till 1st April, 2005. The

effect of this is that the “right” stood extinguished when the DST Act and the Works Contract Act were repealed.

56. This leads us to the second question, namely, whether the revisionary proceedings (if they were initiated) were saved by the DVAT Act. To answer this, we need to look at two ‘sub-issues’. Firstly, we need to interpret Section 106 of the DVAT Act and consider the case law on the subject. It may be recalled that Section 106(2) of the DVAT Act saves the previous operation of the DST Act and the Works Contract Act and any right, title, entitlement, obligation or liability already acquired, accrued or incurred there under. Therefore, we need to consider whether the Revenue had any right to revise the assessment order dated 31st March, 2003 on the repeal of the DST Act and the Works Contract Act. Secondly, Section 106(3) of the DVAT Act provides that anything done or any action taken under the repealed statutes shall be deemed to have been done or taken in exercise of powers conferred by the DVAT Act as if the DVAT Act was in force on that date. Therefore, what we need to consider in this respect is whether, notwithstanding anything else, Section 106(3) of the DVAT Act comes to the rescue of the Revenue.

57. Section 58(3) of the Administration of Evacuee Property Ordinance 27 of 1949 (for short the Ordinance) is a combination of Section 106(2) and Section 106(3) of the DVAT Act. Section 58(3) of the Ordinance reads as follows:

“The repeal by this Act of the Administration of Evacuee Property Ordinance, 1949 (XXVII of 1949)..... shall not affect the previous operation thereof, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under that Ordinance shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the day on which such thing was done or action was taken.”

58. In *Indira Sohanlal v. Custodian of Evacuee Property*, AIR 1958 SC 77 the Constitution Bench of the Supreme Court ‘divided’ the above provision into two parts, namely, the first part (which it described as being in negative terms) whereby the previous operation of the repealed statute survived the repeal. The second or positive part of the provision deemed that the repealing statute was in force at an earlier date.

59. The Supreme Court drew a very important distinction between the “previous operation of the repealed law” and the “future operation of the previous law”. Amplifying this, in the context of the

second part of Section 58(3) of the Ordinance, it was held in paragraph 15 of the Report:

“Broadly speaking, the second portion of section 58(3) refers to the whole range of things that may be done, or action that may be taken, under the previous Ordinance and the rules framed thereunder, while the first portion of section 58(3) relates to the legal consequences resulting under the Ordinance or the rules from certain facts or from completed acts or things done thereunder.

Without attempting to be meticulously accurate, it may be stated in general terms, that the scheme underlying section 58(3) appears to be that every matter to which the new Act applies has to be treated as arising, and to be dealt with, under the new law except in so far as certain consequences have already ensued or acts have been completed prior thereto, to which it is the old law that will apply.

In this view of section 58, the application of the appellant for confirmation pending on the date when Central Act XXXI of 1950 came into force had to be dealt with and disposed of under this Act and the order of confirmation passed in 1952 would clearly be subject to the revisional power of the Custodian General under section 27 of the said Act.”

60. The need for such a long quotation is to emphasize what the Supreme Court held, namely, that the first portion of Section 58(3) of the Ordinance (which is similar to Section 106(2) of the DVAT Act) relates to the legal consequences of a repeal. The second portion of Section 58(3) of the Ordinance (which corresponds to Section 106(3) of

the DVAT Act) requires that every matter, to which the repealing Act applies, has to be dealt with under the repealing Act and not under the repealed statute.

61. Therefore, even if revisionary proceedings had been initiated in respect of the Petitioner under Section 46 of the DST Act, they would have to be dealt with under the DVAT Act (which is not what has happened in the present case that we are dealing with). But, as the Legislature would have it, the DVAT Act did not provide for revisionary proceedings in the first instance. Consequently, even if it were to be argued that the revisionary proceedings initiated by the Revenue were somehow or the other ‘saved’, they died a legal death because they could not be dealt with under the DVAT Act since no revisionary jurisdiction was provided for under the DVAT Act.

62. In *Bishambhar Nath Kohli v. State of Uttar Pradesh*, AIR 1966 SC 573 the Constitution Bench of the Supreme Court again considered Section 58(3) of the Ordinance. It was clarified, in respect of the first part of Section 58(3) of the Ordinance that: “By the first part of Section 58(3) repeal of the statutes mentioned therein did not operate to

vacate things done or actions taken under those statutes.” Thereby matters and transactions past and closed remain operative.

63. What this simply means (in so far as we are concerned) is that in respect of the previous operation of the repealed statutes, a legal fiction is created as a result of which it must be deemed that the repealed statutes never existed, except as to transactions past and closed.

64. This is made explicit in *Gajraj Singh*. In paragraph 22 of the Report, it is said:

“Whenever an Act is repealed it must be considered, except as to transactions past and closed, as if it had never existed. The effect thereof is to obliterate the Act completely from the record of Parliament as if it had never been passed; it never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. Legal fiction is one which is not an actual reality and which the law recognizes and court accepts as a reality. Therefore in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which is actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances.”

65. Applying the law laid down by the Supreme Court, it must be held that by virtue of Section 106(2) of the DVAT Act since the

previous operation of the DST Act and the Works Contract Act was saved, the assessment order being a transaction past and closed under those statutes, was also saved. As far as Section 106(3) of the DVAT Act is concerned, the deeming provision only means that an order passed under the repealed statute would have to be dealt with as if the repealing Act was in force on that day and the powers and jurisdiction of the authorities under the repealing Act must also be deemed to have been in force on the date when that order was passed. But, it must be remembered that the DVAT Act did not provide for any revisionary power and so, no such power or jurisdiction was available on the date of the assessment order, if the deeming fiction is taken to its logical conclusion. However, it is not necessary for us to go to that extent, because the next issue that we are required to consider is the right or entitlement (if any) of the Revenue to revise the order of assessment – is that saved by the provisions of the DVAT Act, even if everything is assumed in favour of the Revenue?

66. To answer this, it must be appreciated that there are three kinds of revisionary powers. One in which a suitor or litigant may approach a superior authority to revise an erroneous order. Section 115

of the Code of Civil Procedure is an obvious example of this; second, where a superior authority has a *suo motu* power to revise an erroneous order. Section 46 of the DST Act is an example of this. Third, a hybrid revisionary power such as the one that existed in Section 36 of the Central Excises and Salt Act, 1944 where the ‘suitor’ could approach the Central Government to revise an erroneous order and the Central Government could *suo motu* and independently revise an erroneous order. We are concerned with the second category of the revisionary power.

67. The Supreme Court has interpreted the meaning of revisionary power and that interpretation is applicable to all the above three kinds of revisions. Three important decisions of the Supreme Court were cited before us on the subject, and one of the Punjab and Haryana High Court. Learned counsel for the Revenue relied upon a decision of the Bombay High Court in *Siemens India Ltd. v. State of Maharashtra*, [1986] 62 STC 40 but that decision did not even note the earlier decisions of the Supreme Court and was even otherwise rightly distinguished by the Punjab and Haryana High Court. Moreover, the observations made by the Bombay High Court (relied on by learned

counsel for the Revenue) are *obiter* and not binding. We are, therefore, not advertent to that decision in any detail.

68. The sum and substance of the contention of learned counsel for the Petitioner was (and we agree with him) that the power of revision is not a right and, therefore, it is not saved by the second part of Section 106(2) of the DVAT Act.

69. In *Hari Shankar v. Rao Girdhari Lal Chowdhury*, AIR 1963 SC 698 the Supreme Court held in paragraph 7 of the Report:

“The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeals arising under the Code of Civil Procedure. The power to hear a revision is generally given to a superior Courts so that it may satisfy itself that a particular case has been decided according to law. Under Section 115 of the Code of Civil Procedure, the High Court's powers are limited to see whether in a case decided, there has been an assumption of jurisdiction where none existed, or a refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other acts, the power is not so limited, and the High Court is enabled to call for the record of a case to satisfy itself that the decision therein is according to law and to pass such orders in relation to the case, as it thinks fit.”

In other words, the Supreme Court drew a distinction between a right of appeal given to a suitor and an enabling power conferred on an authority to correct an erroneous decision of a subordinate authority.

70. The *State of Kerala v. K.M. Charia Abdullah, AIR 1965 SC 1585* contains an oft quoted passage from the decision rendered by K. Subba Rao, J. Unfortunately, that passage appears in the minority judgment and gives a rather narrow interpretation to the scope of the revisionary power of a superior authority. We are not concerned with the scope and extent of the power of revision but the distinction between a revision and an appeal. It is in this context that the view of K. Subba Rao, J is important. This is what is said in paragraph 5 of the Report:

“When the Legislature confers a right of appeal in one case and a discretionary remedy of revision in another, it must be deemed to have created two jurisdictions different in scope and content. When it introduced the familiar concepts of appeal and revision, it is also reasonable to assume that the well-known distinction between these two jurisdictions was also accepted by the legislature. There is an essential distinction between an appeal and a revision. The distinction is based on differences implicit in the said two expressions. An appeal is a continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to the statutory limitations prescribed. But in the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power.”

Purely by way of academic interest, it may be mentioned that the broad interpretation given to the scope and extent of the power of revision by J.C. Shah and S.M. Sikri, JJ in *Charia Abdullah* was upheld in *Swastik Oil Mills Ltd. v. H.B. Munshi*, AIR 1968 SC 843 without disturbing the distinction drawn between an appeal and a revision.

71. All these decisions came up for consideration in *Shiv Shakti Coop. Housing Society v. Swaraj Developers*, (2003) 6 SCC 659. In that decision, the Supreme Court was dealing with the power of revision. It was noted, in paragraph 13 and 14 of the Report that the right of appeal is a substantive right, but there is no substantive right in making an application for revision. Section 115 of the Code of Civil Procedure is essentially a source of power to supervise a subordinate Court and it does not confer any right on a litigant to have an erroneous order corrected. “The scope for making a revision under Section 115 is not linked with a substantive right.” In paragraph 33 of the Report, it was categorically stated:

“Section 6 of the General Clauses Act has no application because there is no substantive vested right available to a party seeking revision under Section 115 of the Code [of Civil Procedure].”

72. All the above decisions were considered by the Punjab and Haryana High Court in *Hindustan Construction Co. Ltd. v. State of Haryana*, [2005] 14 STC 119. Additionally, in that decision, a contention was raised that *Shiv Shakti* concerned itself only with the scope of revisionary powers under Section 115 of the Code of Civil Procedure, but that contention was rejected. Eventually, in paragraph 23 of the Report, it was held:

“Even otherwise, we find that section 40 of the 1973 Act merely conferred a power on the revisional authority giving *suo motu* power to the revisional authority. No corresponding right was conferred upon the department to file a petition seeking revision of the order. An enabling provision in a statute conferring certain power upon a competent authority cannot be taken to be any right, much less a vested right in favour of a suitor-department.”

73. Based on the law cited before us, it is clear:

- The power of revision is an enabling power available to a superior authority to correct an error committed by a subordinate authority.
- *Shiv Shakti* is not limited in its application to Section 115 of the Code of Civil Procedure but follows the law earlier laid down, generally, on the revisionary power of an authority.
- The power of revision being only an enabling power and not a substantive right, it is not saved by Section 106(2) of the DVAT

Act, which only saves a 'right' or an 'entitlement', both being synonymous.

- Consequently, whichever way one considers the problem, the assessment order dated 31st March, 2003 could not have been re-opened by the Revenue in the manner that we are concerned with.

74. For a decision on the third issue, it is necessary to appreciate the effect of the omission of a provision in a legislation enacted subsequent to the repeal of an earlier legislation. We have already held that no revision proceedings were initiated by the Revenue before 1st April, 2005 pursuant to the order dated 12th August, 2004. We have also held that the enabling power of revision was not saved by Section 106(2) of the DVAT Act. Even if revision proceedings were initiated and pending, we now have to consider the effect of the omission by the Legislature to confer the power of revision under the DVAT Act.

75. In paragraph 32 of the Report in ***Gajraj Singh*** the effect of an omission in a subsequent legislation is discussed in the following words:

“Existence of the corresponding provisions similar to the repealed provisions is a condition precedent. If the operation

of the provisions in the Act is inconsistent and incompatible, it gets obliterated and the earlier provisions no longer revive or survive. If analogous provision in the Repealed Act does not find place in the Act, the rights accrued or acquired thereunder would not continue under the Act unless fresh rights are acquired under the Act.”

76. *Kolhapur Canesugar Works Ltd. v. Union of India, (2000)*

2 SCC 536 is far more categorical. In paragraph 34 of the Report, it is held:

“It is our considered view that ... the court is to look to the provision in the rule which has been introduced after omission of the previous rule to determine whether pending proceedings will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such proceedings will continue..... In the absence of any such provision in the statute or in the rule the pending proceedings would lapse on the rule under which the notice was issued or proceedings were initiated being deleted/omitted.”

Similarly, in paragraph 37 of the Report, it is held:

“In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision.”

Earlier, in the same paragraph 37 of the Report, it has been held:

“If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards.”

This passage has been referred to by the Supreme Court in *Shiv Shakti*.

77. Finally, in *Gammon India Ltd.* it has been held in paragraph 73 of the Report:

“On critical analysis and scrutiny of all relevant cases and opinions of the learned authors, the conclusion becomes inescapable that whenever there is a repeal of an enactment and simultaneous re-enactment, the re-enactment is to be considered as reaffirmation of the old law and the provisions of the repealed Act which are thus re-enacted continue in force uninterruptedly unless, the re-enacted enactment manifests an intention incompatible with or contrary to the provisions of the repealed Act. Such incompatibility will have to be ascertained from a consideration of the relevant provisions of the re-enacted enactment and the mere absence of saving clause is, by itself, not material for consideration of all the relevant provisions of the new enactment. **In other words, a clear legislative intention of the re-enacted enactment has to be inferred and gathered whether it is intended to preserve all the rights and liabilities of a repealed statute intact or modify or to obliterate them altogether.**” (Emphasis supplied)

78. It is clear, therefore, that the Supreme Court is emphatic in holding that where an existing power is not conferred on the given

authority by the repealing statute, it cannot survive the repeal; nor can its ghost be invoked to revive a transaction that gets closed on the repeal of an enactment. Furthermore, if a power does survive, it does so under the new statute and not under the repealed statute.

79. Learned counsel for the Revenue, however, contended that the taxable event is when the Petitioner incurs a liability. Reliance was placed on *Tata Iron & Steel Co. Ltd. v. State of Bihar*, AIR 1958 SC 452 and *The Kedarnath Jute Manufacturing Co. Ltd. v. The Commissioner of Income Tax*, (1972) 3 SCC 252 and *T.K. Khadar Mohiuddin v. State of Andhra Pradesh*, [1968] 21 STC 45. It was submitted that since the Petitioner had incurred a liability to pay tax, all subsequent actions taken by the Revenue to recover the tax are permissible and survive. We do not think this is correct for two reasons. The question of the liability of the Petitioner to pay tax had come to an end on the passing of the assessment order, which gave it an entitlement to a refund. The liability of the Petitioner to tax would have arisen (if at all) only after the revision of the assessment order - until then the Revenue was liable for a refund. The liability of the Petitioner could have arisen only if the assessment order was validly revised, and not

otherwise or until then.

80. Secondly, the submission of learned counsel seeks to give future operation to a previous law – which is clearly not permissible. Section 106(3) of the DVAT Act cannot come to the rescue of the Revenue because it proceeds on the basis that anything done under the repealed Act would be deemed to have been done under the DVAT Act. We have held that the power of revision was not exercised by the Commissioner under the DST Act and so it could not continue under the DVAT Act. Assuming that the Commissioner had exercised power under the DST Act, it would (at best) be deemed to have been taken under the DVAT Act by virtue of Section 106(3) thereof. But, the fiction could continue only 31st March, 2005 because thereafter the DVAT Act actually came into force and it did not provide for a power of revision. In other words, the real state of affairs overtook the imagined state of affairs on 1st April, 2005 and it is only the real state of affairs that could be recognized after 1st April, 2005. Section 106(3) of the DVAT Act did not save the future operation of a previous law.

81. The intention of the legislature was clear on 1st April, 2005

that it did not wish the Commissioner to have the power of revision, otherwise it would certainly have been provided for. In any event, we cannot read into the repealing statute a substantive provision that is not provided for.

82. Learned counsel for the Revenue referred to *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO*, (2007) 5 SCC 447. The submission was that the provisions of Section 6 of the General clauses Act, 1897 do not apply to the facts of the present case. This was also the submission of learned counsel for the Petitioner, though his reasons were different. Therefore, we need dwell at length on this decision. There is, however, a passage in this decision in paragraph 92 of the Report, which is of some importance. This reads as follows:

“Omission of words in a particular statute may play an important role. The intention of the legislature must be, as is well known, gathered from the words used in the statute at the first instance and only when such a rule would give rise to an anomalous situation, may the court take recourse to purposive construction. It is also a well-settled principle of law that casus omissus cannot be supplied. (See *J. Srinivasa Rao v. Government of Andhra Pradesh*, (2006) 12 SCC 607).

83. The consequence of this is that the repeal of the DST Act and

the Works Contract Act coupled with the omission of the revisionary power of the Commissioner under the new enactment, that is, the DVAT Act completely obliterated or effaced that power such that it did not survive after 1st April, 2005. There is nothing in the DVAT Act to suggest that the power was intended to survive or be acted upon.

84. It is true that a fresh power of revision was conferred on the Commissioner by an amendment brought about to the DVAT Act on 16th November, 2005 when Section 74A was inserted in that Act but this did not resuscitate or resurrect the long-dead revisionary power conferred on the Commissioner under Section 46 of the DST Act. It had no retrospective effect.

85. What is the consequence of all this as on 1st April, 2005? There were no pending proceedings for revision of the assessment order. The power of revision earlier available with the Commissioner had suffered a legal death. The natural consequence of this is that all the delegated powers conferred by the Commissioner in relation to the exercise of revisionary powers also suffered a legal demise. This includes the power delegated under the order dated 19th September,

1994 (as mentioned in the order dated 19th April, 2007). Similarly, all orders transferring the revisionary jurisdiction in respect of the Petitioner from one jurisdiction to another also experienced a legal death. This includes the order dated 16th January, 2006 (transferring jurisdiction over the Petitioner to the Special Zone) and the order dated 24th August, 2006 (transferring the revisionary jurisdiction concerning the Petitioner from the Joint Commissioner (Zone-I) to the Deputy Commissioner, Special Zone). A copy each of both these orders was handed over to us in Court by learned counsel for the Revenue.

86. At this stage, we may mention that on our asking, learned counsel for the Revenue informed us that the revisionary power conferred on the Commissioner by Section 74A of the DVAT Act with effect from 16th November, 2005 has not yet been delegated to anybody. That being so, it is quite obvious that the order dated 16th January, 2006 transferring jurisdiction over the Petitioner to the Special Zone cannot have any relation to the power to exercise revisionary jurisdiction.

87. In so far as the order dated 24th August, 2006 is concerned it was not explained to us how it could transfer jurisdiction in respect of

revisions (which power has admittedly not been delegated) concerning the Petitioner from the Joint Commissioner (Zone-I) to the Deputy Commissioner, Special Zone. It is nobody's case that the Joint Commissioner (Zone-I) ever had jurisdiction over the Petitioner and so the transfer of the Petitioner's case from his jurisdiction simply does not arise.

88. For these very reasons, both the orders dated 19th April, 2007 (impugned in the writ petition) cannot be sustained. The show cause notice dated 18th July, 2007 (impugned in the writ petition) issued by the Deputy Commissioner pursuant to the orders dated 19th January, 2007 and under the repealed Works Contract Act read with the DST Act must also fall through for the very same reasons.

89. We note that the Deputy Commissioner also realized the bind that he was in when he passed the order dated 15th June, 2007. He was aware that the revisionary power had been delegated to the Assistant Commissioner by the order dated 19th September, 1994. The show cause notice dated 21st February, 2006 was issued by the Joint Commissioner while the hearing was being conducted by him as the Deputy

Commissioner. It is for this reason that he stated in his order dated 15th June, 2007 that there was “scope for some confusion/ambiguity about the jurisdiction of the then Joint Commr. Special Zone/Joint Commr. V who initiated the proceedings on 21.2.2006 and also of the Deputy Commissioner (Special Zone) before 19.4.2007.” This was quite an understatement and under these circumstances, the Deputy Commissioner ‘withdrew’ the show cause notice dated 21st February, 2006 issued by an officer superior to him and issued a fresh show cause notice dated 18th July, 2007 without reserving any right to do so and without having the power to do so. The Revenue created a *chakravyuh* and found itself trapped in it.

90. This being so, we have no option but to allow the writ petition and quash both the orders dated 19th April, 2007 and the show cause notice dated 18th July, 2007. We do so.

Costs:

91. In paragraph 37 of the decision of the Supreme Court in *Salem Advocate Bar Association v. Union of India (2005) 6 SCC 344* it is said:

“Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer’s fee, typing and other costs in relation to the litigation.”

92. Following the law laid down by the Supreme Court, we requested learned counsel for the parties to indicate the costs incurred by their respective clients. Both the parties have filed their memo of costs. Since we have decided this writ petition in favour of the Petitioner, we award costs incurred by it as per the memo filed, which is Rs. 26,18,000/-. The costs be deposited by the Revenue by a cheque drawn in favour of the Registrar General of this Court within four weeks from today.

93. List for compliance on 23rd April, 2008.

94. A copy of this judgment be given *dasti* to learned counsel for both the parties.

MADAN B. LOKUR, J.

March 14, 2008
ncg

V.B. GUPTA, J.

Certified that the corrected copy of the judgment has been transmitted in the main Server.