

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Appeal No. 697 of 2018**

1. State Of Chhattisgarh Through The Secretary, Government Of Chhattisgarh, Commercial Tax Department, Mahanadi Bhawan, Mantralaya, Naya Raipur, Chhattisgarh.
2. Commissioner Commercial Tax, Chhattisgarh, Raipur, Chhattisgarh.
3. Additional Commissioner (Appeals), Commercial Tax, Raipur, Chhattisgarh.
4. Deputy Commissioner Commercial Tax, Division-1, Raipur, Chhattisgarh.

---- Appellants**Versus**

Ultra Tech Cement Ltd. A Company Incorporated Under The Companies Act, 1956, Having Registered Office At B Wing Ahura Centre, 2nd Floor Mahakali Caves Road, Andheri East, Mumbai 400093 And Factory At Hirmi, Tehsil Simga District Baloda Bazar- Bhatapara, Chhattisgarh. Through Its Authorised Signatory Anil Purohit, Aged About 33 Years. S/o Shri Suraj Prakash Purohit.

---- Respondent**Writ Appeal No. 702 of 2018**

1. State Of Chhattisgarh Through The Secretary, Government Of Chhattisgarh, Commercial Tax Department, Mahanadi Bhawan, Mantralaya, Naya Raipur, Chhattisgarh.
2. Commissioner Commercial Tax, Chhattisgarh, Raipur, Chhattisgarh.
3. Additional Commissioner Appeals Commercial Tax, Raipur Chhattisgarh.
4. Deputy Commissioner Commercial Tax, Division - I, Raipur, Chhattisgarh.

---- Appellants**Versus**

Ultra Tech Cement Ltd. Incorporated Under The Companies Act Having Registered Office At B Wing, Ahura Centre, 2nd Floor, Mahakali Caves Road, Andheri East, Mumbai 400093 And Factory At Hirmi Tehsil Simga District Baloda Bazar Bhatapara Chhattisgarh, Through Its Authorised Signatory Anil Purohit Aged About 33 Yrs. S/o Shri Suraj Prakash Purohit.

---- Respondent**Writ Appeal No. 703 of 2018**

1. State Of Chhattisgarh Through The Secretary Government Of Chhattisgarh, Commercial Tax Department Mahandi Bhawan, Mantralaya Naya Raipur, Distirct Raipur Chhattisgarh.
2. Commissioner Commercial Tax, Chhattisgarh Raipur Chhattisgarh.
3. Additional Commissioner (Appeals), Commercial Tax, Raipur Chhattisgarh.
4. Assistant Commissioner Commercial Tax, H/q Raipur Chhattisgarh.=

---- Appellants

Versus

Ultra Tech Cement Ltd. Incorporated Under The Companies Act Having Registered Office B Wing, Ahura Centre, 2nd Floor Mahakali, Caves Road Andheri, East Mumbai 400093 And Factory At Harmi, Tahsil Simga Distirct Baloda Bazar Bhatapara Chhattisgarh Thorug Its Authorised Signatory Shri Ss. Kvd. Parsada Rao, Vice President (Finance And Commercial).

---- Respondent

Writ Appeal No. 708 of 2018

1. State Of Chhattisgarh Through The Secretary, Government Of Chhattisgarh, Commercial Tax Department, Mahanadi Bhawan, Mantralaya, Naya Raipur Chhattisgarh.
2. Commissioner, Commercial Tax, Chhattisgarh, Raipur Chhattisgarh.
3. Deputy Commissioner, Commercial Tax, Division-1, Raipur Chhattisgarh.

---- Appellants

Versus

Ultra Tech Cement Ltd. (Earlier Known As M/s Grasim Cement M/s Grasim Industries Limited) A Company Incorporated Under The Companies Act, 1956, Having Its Registered Office At Mumbai And Factory At Rawan, District Baloda Bazar Bhatapara Through Its Manager Sunanda Basu Age 47 Years, S/o. Late Sanat Kumar Basu.

---- Respondent

Writ Appeal No. 712 of 2018

1. State Of Chhattisgarh Through The Secretary, Government Of Chhattisgarh, Commercial Tax Department, Mahanadi Bhawan, Mantralaya, Naya Raipur, Chhattisgarh.
2. Commissioner Commercial Tax, Chhattisgarh, Raipur, Chhattisgarh.
3. Deputy Commissioner Commercial Tax, Division-Ii, Raipur, Chhattisgarh.
4. Commercial Tax Officer Bhatapara, Chhattisgarh.
5. Assistant Commissioner Enforcement Cell Division, Commercial Tax Office, Civil Lines, Raipur, Chhattisgarh.

---- Appellants

Versus

Ambuja Cements Limited A Company Incorporated Under The Companies Act, 1956, Having Its Registered Office And Factory At P.O. Ambuja Nagar, Taluk, Kodinar, District- Somnathgiri (Gujarat) And Unit At Village And Po Rawan, District- Baloda Bazar Chhattisgarh Through Its Authorised Signatory Anoop Kumar Jaiswal, Manager (Law), P.O. Rawan, District- Baloda Bazar, Chhattisgarh.

---- Respondent

Writ Appeal No. 699 of 2018

1. State Of Chhattisgarh Through The Secretary, Government Of Chhattisgarh

Commercial Tax Department Mahanadi Bhawan Mantralaya, Naya Raipur Chhattisgarh.

2. Commissioner, Commercial Tax, Chhattisgarh, Raipur Chhattisgarh.
3. Additional Commissioner (Appeals) Commercial Tax Raipur Chhattisgarh.
4. Deputy Commissioner, Commercial Tax, Division - 1, Raipur, Chhattisgarh.

---- Appellants

Versus

Ultra Tech Cement Ltd. Incorporated Under The Companies Act, Having Registered Office At B Wing, Ahura Centre, 2nd Floor Mahakali Caves Road, Andheri East, Mumbai 400093 And Factory At Hirni, Tehsil Simga District Baloda Bazar - Bhatapara, Chhattisgarh, Through Its Authorized Signatory Anil Purohit, Aged About 33 Years S/o Shri Suraj Prakash Purohit.

---- Respondent

For Appellants/State	: Shri Prafull N. Bharat, Additional Advocate General.
For respective Respondents	: Shri M.P. Devnath, Shri Raja Sharma and Shri Animesh Verma, Advocates.

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

Judgment on Board

26/11/2018

Per Ajay Kumar Tripathi, Chief Justice

1. Heard counsel for the parties.
2. A batch of writ appeals have been preferred by the State of Chhattisgarh against a common order passed on 09.08.2017 by a learned Single Judge, the lead case being Writ Petition (T) No.118 of 2015 and other analogous cases, relating to Ultra Tech Cement Limited as well as an order dated 17.07.2017 passed in Writ Petition (T) No.157 of 2014 i.e. Ambuja Cements.
3. Since the first case which came to be decided by the learned Single Judge was Writ Petition (T) No.157 of 2014, the case of Ambuja Cement Limited v. State of Chhattisgarh and Others, which in turn formed the basis for passing the order dated 09.08.2017 in the batch of cases relating to Ultra Tech Cement Limited. For

the purposes of convenience as well as since reliance has been placed on the paper-book of Ambuja Cement Limited, the same has formed the basis for adjudication of this appeal.

4. Writ application was filed by Ambuja Cement Limited challenging a communication dated 16.06.2014 (Annexure P/1) issued by the Commissioner, Commercial Taxes, Chhattisgarh to the Deputy Commissioners, indicated in the said communication, wherein a direction was issued that keeping in mind the amendment which has been brought about to the Chhattisgarh Entry Tax Act, 1976 (hereinafter referred to as “the Act, 1976”) with effect from 01.04.2014, especially in relation to the definition which has given to the word “Market Value”, the assessments made earlier and closed for varying periods were required to be reopened under Section 22(1) of the Chhattisgarh Value Added Tax Act, 2005 (hereinafter referred to as “the Act, 2005”).

5. Based on Annexure P/1 i.e. direction of the Commissioner. Commercial Taxes notice dated 18.07.2014 (Annexure P/2) was issued by the concerned Deputy Commissioner, Commercial Taxes demanding payment of entry tax by including expenses which have been incurred in payment of royalty for extraction of lime stones from the captive mines.

6. The question which came up for consideration before the learned Single Judge was whether the Chhattisgarh Entry Tax (Amendment) Act, 2014 (hereinafter referred to as “the Amendment Act, 2014”) which was made effective from 01.04.2014 defining to the word “Market Value” will have a prospective effect or whether such amendment can be used retrospectively to reopen assessments already made, in exercise of power under sub-section (1) of Section 22 of the Act, 2005.

7. The provision under Section 22(1) of the Act, 2005 reads as under:-

“(1) Where an assessment or re-assessment of a dealer has been made under this Act or the Act repealed by this Act and for any reason any sale or purchase of goods liable to tax under this Act or the Act repealed by this Act during any period,—

- (a) has been under-assessed or has escaped assessment; or
- (b) has been assessed at a lower rate;
- (c) any wrong deduction has been made while making the assessment; or
- (d) a rebate of input tax has incorrectly been allowed while making the assessment;
- (e) is rendered erroneous and prejudicial to the interest of revenue consequent to or in the light of any judgment or order of any Court or Tribunal which has become final,

the Commissioner may, at any time within a period of three calendar years from the date of order of assessment or from the date of judgment or order of any court or Tribunal, proceed in such manner as may be prescribed, to assess or re-assess, as the case may be, the tax payable by such dealer after making such enquiry as he considers necessary, and assess or re-assess to tax.”

8. While dealing with the said provision, the learned Single Judge while relying on series of judicial precedents emerging from the judgment passed by various Courts including the Hon'ble Apex Court reached an opinion that different or divergent views while perusing same material, cannot form the basis for “reason to believe” in matter of reopening of concluded assessments. He had this to say as under:-

“18. The M.P. High Court in the matter of **Laduram Ramniwas v. State of M.P. and others, (1996) 102 STC 240 (MP)** while dealing with Section 19 (1) of the M.P. General Sales Tax Act, 1958, which is *pari materia*

provision to Section 22 (1) of the Act, 2005, and which also provides reassessment by employing the words “for any reason”, held that such a provision has a restrictive meaning. The M.P. High Court relying upon the earlier decision of that Court in the matter of **Firm Janta Hardware Stores v. B.S. Parihar, Assistant Sales Tax Officer, (1963) 14 STC 67 (MP)** narrated with approval the following paragraph of that judgment which states as under: -

“But the requirement after the amendment is of a certainty of there being for any reason an under-assessment or escaped assessment. There must be a causative and rational connection between the reason stated and the consequence of under-assessment or escaped assessment. The result of the amendment actually effected is that proceedings under the section cannot be initiated merely on the chance of under-assessment or escaped assessment or assessment at a lower rate or a wrong deduction being established in those proceedings.”

19. Thus, the phrase “for any reason” has same import and consequences as that of phrase “reason to believe” because reason cannot exist in vacuum i.e. formation of belief that reason exists, it must and this formation of belief must have live link with material on record.

20. Their Lordships of the Supreme Court in the matter of **Sales Tax Officer, Ganjam v. M/s. Uttareswari Rice Mills, (1973) 3 SCC 171** while dealing with Section 12 (8) of the Orissa Sales Tax Act, 1947 which also empowers the assessing authority “if for any reason the turnover of sales or the turnover of purchases of a dealer has escaped assessment or has been under-assessed”, the Supreme Court while examining the ambit and scope of reassessment has held that existence of a reason that the

turnover of dealer escaped assessment or has been under-assessed is a condition precedent to issuance of notice of reassessment under Section 12 (8) of the Act and the existence of such reason is sine qua non for the issuance of notice. Their Lordships concluded in paragraph 8 of the report as under: -

“8. Although the opening words used in section 12(8) are "if for any reason" and not "if the sales tax authority has reason to believe", the difference in phraseology, in our opinion, should not make much material difference. A reason cannot exist in vacuum. Somebody must form the belief that reason exists and looking to the context in which the words are used, we are of the view that it should be the sales tax authority issuing the notice who should have reason to believe that the turnover of a dealer has escaped assessment or has been under-assessed. The approach in this matter has to be practical and not pedantic. Any view which would make the opening words of section 12(8) unworkable has to be avoided. It may be noted in this context that in Form VI appended to the rules, which has been prepared in pursuance of Rule 23, the words used are "whereas I have reason to believe that your turnover.....has escaped assessment.....””

21. Similar proposition has been stuck by this Court in the matter of **Shree B.R. Steels v. Additional Commissioner of Commercial Tax, MANU/CG/0359/2014** while dealing with the provisions contained in Section 28 (1) of the Chhattisgarh Commercial Tax Act, 1994, and this Court held that concluded assessment can be reopened, in other words, reassessment can be done on the grounds mentioned therein on satisfaction of the condition precedent being “for any other reason”.

22. Their Lordships of the Supreme Court in the matter of **Commissioner of Income Tax, Delhi v. Kelvinator of India Limited, (2010) 2 SCC 723** have held that the concept of “change of opinion” is an inbuilt safeguard in all reassessment proceedings, otherwise power to reassess would become power to review and it would give arbitrary power to the assessing officer to open concluded assessment on mere change in opinion. Their Lordships observed as under: -

“5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4-1989), they are given a go-by and only one condition has remained viz. that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1-4-1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be *per se* reason to re-open.

6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain precondition and if the

concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. ...”

23. It is well settled law that mere change in opinion/reaching different or divergent view (as to one reached at the time of original assessment) while perusing same material cannot give rise to necessary precondition of “reason to believe” to reopen concluded assessments and accordingly, reassessment cannot be done on mere change in opinion. The Supreme Court in the matter of **State of Uttar Pradesh and others v. M/s. Aryaverth Chawl Udyoug and others, 2014 SCC Online SC 1205** has clearly held that discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to re-initiate the concluded assessment and has held in paragraph 31 as under: -

“31. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing Authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to re-initiate proceedings under section 21(1) of the Act on the basis of change in subjective opinion (CIT v. Dinesh Chandra H. Shah, (1972) 3 SCC 231; CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360).”

24. Their Lordships further held in **M/s. Aryaverth Chawl Udyoug's case** (supra) that subsequent change in law according to which the assessment proceedings were conducted, cannot constitute “change in opinion” of the

assessing Authority so as to initiate reassessment proceedings, and held in paragraph 35 as under: -

“35. A perusal of the show-cause notice and also the order issued by both, the Additional Commissioner while exercising jurisdiction under Section 21(2), and the assessing authority while re-opening assessment proceedings under Sections 21(1) and 21(2) would clarify that both the Authorities have only noticed and reiterated the contents of the Circular. The assessing authority has substantiated its "reason to believe" by placing reliance on the change in position of law under Section 15(c) of the Act, as contained in the Circular and thus, issued the show cause notice. It is trite that subsequent change in law according to which the assessment proceedings were conducted, cannot constitute "change in opinion" of the assessing authority so as to initiate reassessment proceedings. In fact, the same is impermissible if the Act does not specify the operation of law as retrospective.”

25. Their Lordships also held that without having any additional material, merely on “change of opinion”, assessment already concluded cannot be reopened and observed in paragraph 37 as under: -

“37. In the instant case, reliance placed on the change in law as specified under the Circular and action taken on the basis of directions issued by the Commissioner of Trade Tax, the assessing Authority has reached the purported "reason to believe" that reassessment proceedings are required to be initiated. The material in existence remains the same during both, the assessment and the reassessment

proceedings and no additional material or facts have been referred to explaining such "reason to believe" as per the mandate of Section 21(1) of the Act before initiating reassessment proceedings. In fact, the assessing Authority has not indicated any material at all that has given rise to such reason and thus, on the basis of mere "change of opinion" concluded that exemption on purchase tax has wrongly been allowed."

9. There is no dispute or argument that by virtue of notices issued to the cement companies assessments already made and having attained finality, beginning financial years 2007-2008, 2008-2009 and 2009-2010 were sought to be reopened.

10. The communication brought on record as Annexure P/1 dated 16.06.2014, issued under the signature of the Commissioner, Commercial Taxes is unambiguous as to the reason for reopening of assessments i.e. amendment notified in the year 2014 effective 01.04.2014 by defining the word "Market Value" by adding Section 2(ffff). The notification reads as under:-

"2(fff) **"Market Value"** means the value at which the goods are generally sold in the market or where the goods are not generally sold in the market or the correct sale price thereof is not ascertainable, such value as may be notified by the State Government."

11. The learned Single Judge taking into consideration that the notification was made effective 01.04.2014 defining the word "Market Value" held that a change in law or amendment brought about and notified subsequently to the assessments cannot form the basis for exercising power of reassessment under Section 22(1) of the Act, 2005 as the ingredients for the said Section is not satisfied.

12. For the above reasons, the writ applications came to be allowed and both the communication issued by the Commissioner, Commercial Tax dated 16.06.2014 and the subsequent notices issued for reassessment came to be quashed. It is in this background that appeals have come to be filed by the State of Chhattisgarh.

13. The stand of learned Additional Advocate General representing the State is that the notification giving a definition to the word “Market Value” under Section 2(fff) of the Amendment Act, 2014 was only clarificatory in nature and it is not an amendment as such. This clarification was warranted and necessary only to ensure due clarity to a provision which had already talked about the concept of “Market Value” while defining the word “Value of goods” in Section 2(l) of the Act, 2005. Section 2(l) of the Act, 1976 is reproduced hereinbelow since reliance has been placed thereon.

“2(l) “*Value of goods*” in relation to a dealer or any person who has effected entry of goods into a local area shall mean the purchase price of such goods as defined in [clause (q) of Section 2 of the Chhattisgarh Value Added Tax Act, 2005 (No.2 of 2005)] [and shall include excise duty and/or additional excise duty and/or customs duty, if levied under the Central Excise and Salt Act, 1944 (No.1 of 1944), the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (No.58 of 1957) or the Customs Act, 1962 (No.52 of 1962), as the case may be] or the market value of such goods if they have been acquired or obtained otherwise than by way of purchase;]”

14. To take the argument further, submission of State is that a reading of Section 2(l) i.e. definition of “Value of goods” by itself envisages market value of such goods if they have been acquired or obtained, otherwise than by way of purchase. Despite the said provision, while making earlier assessments, certain components including the expenses met by these companies towards payment of royalty was

not being disclosed and there was under valuation of the goods. In this case limestone, and therefore, in the interest of revenue, such clarificatory notification was in order and formed the “reason to believe”.

15. The line of argument pleaded and urged on behalf of State, while assailing the judgments of the two learned Single Judges passed in the writ applications, does not satisfy the test of legal principles in matter of interpretation which is required to be given, especially, to taxing statute.

16. The assessing authorities had made assessments on the declarations made by the companies on the basis of understanding of law as stood then. If the assessing authorities subsequently found some ambiguity or shortfall in the definition of “Value of goods” in Section 2(l), for which a corresponding amendment was required to be brought about in the year 2014, the same is a substantive amendment. It further ties down the State since the amendment itself indicates that the amended definition will be in force from 01.04.2014 and not from retrospective date.

17. The Court is informed that after the amendment, compliance by these companies are being made in terms of the new meaning having been given to the word “Market Value” under Section 2(fff) of the Amendment Act, 2014, but to allow the assessing authorities to reopen past assessments on a new definition prospective in nature would be doing violence to law, as in our opinion, the amendment of 2014 in no manner can form the reason to believe which can permit the assessing authority to exercise power under Section 22(1) of the Act, 2005.

18. We also notice that the amendment of 2014 is unworkable unless the State notifies the market value of “such goods” which has been done only on 01.07.2014. We therefore repel the argument made on behalf of the State that the definition so given to the word “Market Value” is only clarificatory and that by itself can be used

as the basis for reopening the assessments which have attained finality prior to the amendment dated 01.04.2014.

19. The view therefore taken by the learned Single Judges that since the Commissioner, Commercial Taxes himself in his communication to the Deputy Commissioners had clearly indicated that the assessments will have to be reopened under Section 22(1) of the Act, 2005 because of the amendment brought about with effect from 01.04.2014, the State cannot be permitted to turn around or resile from that ground as to why notices for reassessment was being issued.

20. To sum, therefore, keeping in mind the settled principles of law the Appellants/State authorities have no case to interfere with the view and the decisions rendered by the learned Single Judges in their order dated 17.07.2017 passed in Writ Petition (T) No.157 of 2014 and the order dated 09.08.2017 passed in a batch of writ petitions, lead case being Writ Petition (T) No.118 of 2015 and other analogous cases.

21. All these appeals therefore stand dismissed.

Sd/-

(Ajay Kumar Tripathi)
CHIEF JUSTICE

Sd/-

(Parth Prateem Sahu)
JUDGE