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THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: **14.09.2010**

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Judgment Pronounced on: **01.11.2010**

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WP (C) No. 3001 of 2010 and CM No. 5987/2010

Reliance Infrastructure Ltd. ... Petitioner
Through: Mr. S. Ganesh, Mr. Neeraj Kishan
Kaul, Sr. Advs. with Mr. Sushil
Verma, Adv.

Versus

Commissioner of Trade Taxes & Ors. ... Respondents
Through: Mr. Parag P. Tripathi, ASG with
Mr. H.L. Taneja, Mr. Rajesh Mahana,
Mr. Amey Nargolkar, Advocates

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WP (C) No. 274 of 2010 and CM No. 581/2010

Dharam Pal Satya Pal Ltd. & Anr. ... Petitioner
Through: Mr. S. Ganesh, Mr. Neeraj Kishan
Kaul, Sr. Advs. with Mr. Ruchir
Bhatia, Mr. Sumit Batra, Adv.

Versus

The Commissioner, Value Added Tax & Anr. ... Respondents
Through: Mr. Parag P. Tripathi, ASG with
Mr. H.L. Taneja, Mr. Rajesh Mahana,
Mr. Amey Nargolkar, Advocates

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WP (C) No. 974 of 2010 and CM No. 1997/2010

M/s Kumagai Skanska HCC ITOCHU Group ... Petitioner
Through: Mr. Rajesh Jain, Ms. Neetika
Khanna, Mr. Sumit Batra, Advs.

Versus

The Commissioner, Value Added Tax & Anr. ... Respondents
Through: Mr. Parag P. Tripathi, ASG with
Mr. H.L. Taneja, Mr. Rajesh Mahana,
Mr. Amey Nargolkar, Advocates
Mrs. Avnish Ahlawat, Advocate.

**CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN**

1. Whether reporters of the local papers be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

DIPAK MISRA, CJ

Regard being had to the commonality of controversy, these writ petitions were heard analogously and are disposed of by a singular order. For the sake of clarity and convenience, the facts in WP(C) No. 3001/2010 are exposted herein.

2. Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner, a company incorporated under the Companies Act, 1956, has called in question the legality and validity of the initiation of the revisional proceedings against the petitioner by issuance of notice dated 08.04.2010 under Section 74A read with Section 106 of the Delhi Value Added Tax Act, 2004 (for brevity 'the DVAT Act') by the Commissioner, Trade Taxes, Delhi, the first respondent herein, purporting to revise the orders of the Additional Commissioner dated 14.01.2008 and 25.01.2008 and to restore the order passed by the assessing authority on 03.03.2006. It is pleaded that orders of the assessing authority as well as that of the first appellate authority relate to assessment year 2004-05 to which Delhi Sales Tax Act, 1975 (for brevity 'DST Act') was applicable and not the provisions of the DVAT Act which came into force with effect from 01.04.2005. It is contended that the initiation of the revisional proceedings against the petitioner is wholly without jurisdiction and without the authority

of law inasmuch as the power of revision engrafted in Section 74A of the DVAT Act cannot be pressed into service in respect of orders passed under the provisions of the DST Act. That apart, the provision of Section 74A of the DVAT Act has no application at all to the year 2004-05 during which the the said provision had not come into force. It is urged that the issue is squarely covered in favour of the petitioners by the decisions rendered by this Court in *International Metro Civil Contractors v. Commissioner of Sales Tax/VAT & Another*, [2008] 16 VST 329 (Delhi) and *LG Electronics (India) Ltd. v. Commissioner of Trade & Taxes, New Delhi* [2008] 16 VST 361 (Delhi) and, therefore, the petitioner should not be compelled to face the proceedings which is fundamentally not sustainable being *ab initio* void.

3. It is averred that the petitioner had effected sales of electrical equipments to the various undertakings such as M/s BSES Yamuna Power Ltd. and M/s BSES Rajdhani Power Ltd., etc. which are engaged in generation/distribution of electricity in Delhi. The sales were made against exemption certificates issued by the said companies under Rule 11 of Delhi Sales Tax Rules, 1975. The petitioner had not collected any tax on its sale to the said companies. The claim of the petitioner not to be brought under the net of tax was denied by the Value Added Tax Officer, the third respondent herein, on the sole ground that the said two buyers were not licencees under the Indian Electricity Act, 1919. Being dissatisfied with the said orders, the petitioner preferred an appeal before the respondent No.2 and the first appellate authority, under Section 43 of the DST Act, entertained the appeal subject to deposit of Rs.10 crores vide order dated 06.09.2006. The said

order was reviewed requiring the petitioner to deposit Rs.7.5 crores in cash and to furnish a bank guarantee for Rs.2.5 crores. The appeal was heard on merits and the first appellate authority remanded the matter to the original authority by order dated 14.1.2008. The assessing officer, on the initial date of hearing, took the view that the cases were only remanded without any clear guidelines to him. Thereafter, an application for review/rectification was filed before the appellate authority. The appellate authority, by order dated 25.11.2008, remanded the matter with specific direction that the exemption certificates issued by M/s BSES Yamuna Power Ltd. and M/s BSES Rajdhani Power Ltd. are valid for exemption on the ground that these companies were nothing but successors of Delhi Vidyut Board as all the assets and liabilities of Delhi Vidyut Board stood transferred to the said companies and, hence, they should be deemed to be licencees to issue certificates. Thereafter, the petitioner appeared before the Value Added Tax Officer who kept adjourning the matter and waited for instructions from his senior officers. The assessing officer did not pass any order on the basis of the remand order as a result of which it got time barred. At this juncture, the Sales Tax Department preferred an appeal before the appellate tribunal under Section 43(2) of the DST Act against the orders of the first appellate authority. Along with the appeal, an application for condonation of delay was filed. At that juncture, a preliminary objection was raised by the petitioner with regard to the maintainability of the appeal. Thereafter, the Department filed an application for withdrawal of the appeal which was allowed and the appeal was permitted to be withdrawn by the tribunal.

Thereafter, as set forth, the first respondent, namely, the Commissioner of Trade Taxes, has issued notice under Section 74A read with Section 106 of the DVAT Act proposing to suo motu revise the orders dated 14.01.2008 and 25.11.2008.

4. It is contended, inter alia, that the respondent No.1 has no jurisdiction to issue notice in view of the decisions rendered by this Court in *International Metro Civil Contractors* (supra) and *LG Electronics (India) Ltd.* (supra). It is further put forth that if Section 74A is read in conjunction with Section 106 of the DVAT Act, it is clear as day that the power of suo motu revision does not rest any more with the first respondent and, therefore, the recourse could not have been taken to the said provision for initiating a suo motu revision. Quite apart from the above, various other aspects have been highlighted relating to how the issuance of notice is without any application of mind and how the same is contrary to various decisions in the field. In this factual backdrop, prayer has been made to issue a writ of certiorari for quashment of the notice dated 08.04.2010 issued by the first respondent.

5. A counter affidavit has been filed by the answering respondents contending, inter alia, that after the decisions rendered in *International Metro Civil Contractors* (supra) and *LG Electronics (India) Ltd.* (supra), Section 74A of the DVAT Act has been amended by the Amendment Act, 2009 whereby sub-section (5) has been inserted to the said section as a consequence of which, Section 74A has become operational with effect from

01.04.2005. It is put forth that the result of the aforesaid amendment is that the defect pointed out by this Court in the aforesaid two decisions stand obliterated and as a fall out thereof, the legislative intention becomes clear to confer the power of suo motu revision on the Commissioner. Reference has been made to Section 106 of the DVAT Act to highlight that the power rests with the Commissioner for exercise of suo motu power under the DVAT Act in respect of the orders passed under DST Act. Quite apart from the above, various aspects have been highlighted to show how the petition is totally devoid of merit.

6. We have heard Mr. S. Ganesh and Mr. N.K. Kaul, Sr. Advocates with Mr. Ruchir Bhatial, Mr. Sumit Batra, Mr. Sushil Verma, Mr. Rajesh Jain, Ms. Neetika Khanna, advocates for the petitioners and Mr. Parag P. Tripathi, learned ASG with Mr. H.L. Taneja, Mr. Rajesh Mahana, Mr. Amey Nargolkar, Advocates for the respondent.

7. The submission of Mr. Ganesh, learned senior counsel appearing on behalf of the petitioner, is that the DST Act was repealed on 01.04.2005 and DVAT Act was brought into force and in the absence of anything in the Act especially Section 106 which deals with repeal and saving suo motu power of revision under Section 74A of the DVAT Act cannot be initiated. Learned senior counsel has heavily relied on Division Bench decisions in *International Metro Civil Contractors* (supra) and *LG Electronics (India) Ltd.* (supra). Learned senior counsel for the petitioners further submitted that when there is a detailed repeal and saving provision, then Section 6 of the

General Clauses Act has no application and further so there is no General Clauses Act as far as Delhi is concerned. The use of the term word 'right' occurring in Section 106(2) cannot possibly be understood to include a reference to any power conferred under the Statute on the authorities. It is further, contended by the learned senior counsel that Section 106(3) specifically refers to powers conferred by or under the said Act which includes the DST Act and, hence, Section 106 draws a clear distinction between "right" and "power". It is urged by him that when the legislature consciously uses two distinct terms in the same statute, even in two different sections, the two terms must be considered to mean different and distinct things. It is canvassed by Mr. Ganesh that revisional power has always been held to be a power and not a right and, therefore, the same could not be exercised by the authorities. To buttress his submissions, he has drawn inspiration from the decisions rendered in *Ravula Subba Rao and another v. The Commissioner of Income Tax, Madras*, 1956 SCR 577, *Bansidhar and others v. State of Rajasthan and others*, (1989) 2 SCC 557, *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Janatha Expeller Company*, (2001) 121 STC 80, *Kailash Nath Agarwal and others v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. and another*, (2003) 4 SCC 305, *G.K. Choksi and Company v. Commissioner of Income Tax, Gujarat*, (2008) 1 SCC 246, *Hari Shankar v. Rao Girdhari Lal Chowdhury*, AIR 1963 SC 698, *State of Kerala v. K.M. Cheria Abdullah and Company*, AIR 1965 SC 1585, *Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers and others*, (2003) 6 SCC

659 and *Hindustan Construction Company Ltd. v. State of Haryana*, (2005) 141 STC 119.

8. Mr. Parag Tripathi, learned Additional Solicitor General appearing for the respondents, per contra, submitted that this Court in *International Metro Civil Contractors* (supra) and *LG Electronics (India) Ltd.* (supra) interfered as the Section 74A was brought in the statute book on 16.11.2005 and, therefore, when the amendment was brought with effect from 1.4.2005 it would convey that the intention of the legislature became quite clear that the exercise of suo motu power of revision was kept alive at the time of commencement of the Statute. Learned counsel for the revenue further submitted that Section 106 has to be read in conjunction with the amendment and the conjoint reading of the said provisions would make it clear as crystal that the legislature intended that the suo motu power of revision would be applicable to the proceedings under the DST Act. Learned Additional Solicitor General further urged that the action is also saved under General Clauses Act inasmuch as Bengal General Clauses Act, 1891 (“Bengal Act”) had been made applicable to Delhi. It is contended by Mr. Tripathi that the power to exercise revisional jurisdiction contained in Section 46 of the DST Act has been specifically re-enacted w.e.f. 1.4.2005 under the DVAT Act as Section 74A has been brought into force from that day and, therefore it is fallacious on the part of the petitioner to contend that the suo motu power of revision cannot be exercised. It is also argued by him that 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 reasonably be inferred that the intention of the legislature is that the proceedings shall not continue but fresh proceedings for the same purpose can be initiated under the new provision. To bolster his submissions he has placed reliance upon *Shiv Shakti Coop. Housing Society* (supra), *Kolhapur Canesugar Works Ltd. and another v. Union of India and others*, (2000) 2 SCC 536, *Gammon India Ltd. v. Special Chief Secretary and others*, (2006) 3 SCC 354, *Commissioner of Income Tax, U.P. v. M/s Shah Sadiq and Sons*, (1987) 3 SCC 516, *Bansidhar and others* (supra), *Kalawati Devi Harlalka v. Commissioner of Income Tax, West Bengal & Ors.*, 66 ITR 680, *T.S. Baliah v. T.S. Rangachari, Income Tax Officer*, 72 ITR 787, *Director of Settlements, Andhra Pradesh and others v. M.R. Apparao and another*, (2002) 4 SCC 638 and *M/s Maheshwari Agencies v. State of U.P. and others*, (2010) UPTC 872.

9. The hub of the matter is whether after the repeal of the DST Act a suo motu power of revision under Section 74A of the DVAT Act can be initiated. At the very outset, we may appositely note that when suo motu power was exercised under Section 74A of the DVAT Act, the same was challenged in *International Metro Civil Contractors* (supra) and the Division Bench came to hold that on the repeal of the DST Act and the Works Contract Act coupled with the omission of the revisionary power of the Commissioner under the DVAT Act, the said power completely got obliterated or effaced and did not survive after 01.04.2005 and hence, no action could be taken against the petitioner therein. It is urged that in the

earlier case Section 74A was inserted on November 16, 2005 but the Bench held that the same did not resuscitate or resurrect the long-dead revisionary power conferred on the Commissioner under Section 46 of the DST Act as it had no retrospective effect and the legislature by amendment brought Section 74 of the DVAT Act w.e.f. 01.04.2005 and it has not really bestowed the power on the Commissioner to exercise the power of revision. It is urged by him that the power flows from Section 106(2) of the DVAT Act and in the absence of any amendment therein recourse cannot be taken by applying Section 74A w.e.f. 01.04.2005 on an erroneous conception that by such retrospective incorporation the power gets revived with the Commissioner. Quite apart from the above it is urged by him that Section 6 of the General Clauses Act would not apply to the cases at hand.

10. At this juncture, we may fruitfully refer to Section 46 of the DST Act which reads as follows:

“46. *Revision of orders prejudicial to revenue.* – The Commissioner may call for and examine the records of any proceeding under this Act and if he considers that any order passed therein by any person appointed under subsection (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 canceling the assessment and penalty (if any) imposed and directing 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. Section 74A of DVAT Act which was inserted initially w.e.f.

16.11.2005 reads as follows:

“74A. Revision

(1) After any order including an order under this section or any decision in objection is passed under this Act, rules or notifications made thereunder, by any officer or person subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such order and examine whether :-

(a) any turnover of sales has not been brought to tax or has been brought to tax at lower rate, or has been incorrectly classified, or any claims incorrectly granted or that the liability to tax is understated, or

(b) in any case, the order is erroneous, in so far as it is prejudicial to the interest of revenue, and after examination, the Commissioner may pass an order to the best of his judgment, where necessary.

(2) (a) For the purpose of the examination and passing of the order, the Commissioner may require, by service of notice, the dealer to produce or cause to be produced before him such books of accounts and other documents or evidence as he thinks necessary for the purposes aforesaid.

(b) Notwithstanding anything contained to the contrary in section 34, no order under this section shall be passed after the expiry of four years from the end of the year in which the order passed by the subordinate officer has been served on the dealer.

(c) Notwithstanding anything contained to the contrary in section 34, where in respect of any order or part of the said order passed by the subordinate officer, an order has been passed by any authority hearing the objection or any appellate authority including the Tribunal or such order is pending for decision in objection or in appeal, or an objection or an appeal is filed, then, whether or not the issues involved in the examination have been decided or raised in the

objection or the appeal, the Commissioner may, within five years of the end of the year in which the said order passed by the subordinate officer has been served on the dealer, make a report to the said objection hearing authority or the appellate authority including the Tribunal regarding his examination or the report or the information received by him and the said appellate authority including the Tribunal shall thereupon, after giving the dealer a reasonable opportunity of being heard, pass an order to the best of its judgment, where necessary.

(3) If the Commissioner has initiated any proceeding before an appropriate forum against an issue which is decided against the revenue by an order of the Tribunal, then the Commissioner may, in respect of any order, other than the order which is the subject matter of the order of the Tribunal, call for the record, conduct an examination as aforesaid, record his findings, call for the said books of account and other evidence and pass an order as provided for under this section as if the issue was not so decided against the revenue, but shall stay the recovery of the dues including the interest or penalty, insofar as they relate to such issue until the decision by the appropriate forum and after such decision, may modify the order of revision, if necessary.

(4) No proceedings under this section shall be entertained on any application made by a dealer or a person.”

12. Section 106 which deals with Repeal and savings is 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.”

13. The submission of Mr. Ganesh, learned senior counsel for the petitioners is that the Division Bench in *International Metro Civil Contractors* (supra) and *LG Electronics (India) Ltd.* (supra) had not accepted the stand of the revenue that the Repeal and savings provision conferred any power or saved the power of the Commissioner to exercise the revisional jurisdiction under Section 74A of the DVAT Act. Per contra Mr. Tripathi, learned Additional Solicitor General would submit that the Division Bench addressed itself with regard to the legislative intention as the power was exercised prior to insertion of Section 74A of the DVAT Act on 24.11.2005 and, therefore, after the legislature amended the provision w.e.f. 1.4.2005 the power got revived.

14. In *International Metro Civil Contractors* (supra), the Division Bench referred to Section 46 of the DST Act and 106 of the DVAT Act and addressed the meat of the matter as follows:

“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 July 18, 2007 seeking to revise the assessment order dated March 31, 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 March 31, 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 March 31, 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.”

15. While dealing with the first question, the Bench referred to the decisions in *Gajraj Singh v. State Transport Appellate Tribunal*, [1997] 1 SCC 650, *Gammon India Ltd.* (supra) and opined thus:

“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.”

16. Thereafter, the Bench came to hold as follows:

“The matter may be looked at from another point of view. Before the order dated August 12, 2004 could be acted upon, its operation was stayed by this Court on September 20, 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 November 18, 2005 by which time the DST Act and the Works Contract Act were repealed.

In other words, as on April 1, 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 August 12, 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 August 12, 2004 was set aside by this Court in the November 3, 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.”

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

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 August 12, 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 April 1, 2005. The effect of this is that the “right” stood extinguished when the DST Act and the Works Contract Act were repealed.

17. While dealing with the second question, namely, whether the revisionary proceedings (if they were initiated) were saved by the DVAT Act, the Bench looked into two “sub-issues” and, thereafter, addressed whether notwithstanding anything else, Section 106(3) of the DVAT Act comes to the rescue of the revenue and whether Section 106(2) of the DVAT Act saves the previous operation of the DST Act. The Division Bench

referred to the decision in *Indira Sohanlal v. Custodian of Evacuee Property*, AIR 1956 SC 77 and came to hold as follows:

“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.”

18. After so stating, the Bench referred to the decisions in *Bishambhar Nath Kohli v. State of Uttar Pradesh*, AIR 1966 SC 573 and *Gajraj Singh* (supra) and expressed the view thus:

“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 favor of the Revenue?”

19. Thereafter, the Bench adverted to three kinds of revisionary powers and referred to the decisions in *Siemens India Ltd. v. State of Maharashtra*, [1986] 62 STC 40, *Hari Shankar* (supra), *Swastik Oil Mills Ltd. v. H.B. Munshi, Deputy Commissioner of Sales Tax*, [1968] 21 STC 383 (SC) : AIR 1968 SC 843, *Shiv Shakti Coop. Housing Society* (supra), *Hindustan Construction Company Ltd.* (supra) and eventually held thus:

“The power of revision is an enabling power available to a superior authority to correct an error committed by a subordinate authority. *Shiv Shakti* (supra) 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 March 31, 2003 could not have been re-opened by the Revenue in the manner that we are concerned with.”

20. Being noted, after dealing with second issue the Division Bench proceeded to address the third issue which pertains to the effect of omission of a provision in a legislation subsequent to the repeal of an earlier legislation. The Bench noted the fact that no revisionary proceedings were initiated by the revenue till 1.4.2005 and, thereafter further referred to the certain aspects in *Gajraj Singh* (supra), *Kolhapur Canesugar Works Ltd.* (supra), *Shiv Shakti Coop. Housing Society* (supra), *Gammon India Ltd.* (supra) and opined thus:

“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.

Learned Counsel for the Revenue, however, contended that the taxable event is when the petitioner incurs a liability. Reliance was placed on *Tata Iron and Steel Co. Ltd. v. State of Bihar* [1958] 9 STC 267 (SC); AIR 1958 SC 452, *Kedarnath Jute Mfg. Co. Ltd. v. Commissioner of Income-tax* [1971] 82 ITR 363(SC); [1972] 3 SCC 252 and *T.K. Khadar Mohiuddin v. State of Andhra Pradesh* [1968] 21 STC 45 (AP). 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.

21. After so holding, the Division Bench repealed the stand of the revenue and expressed thus:

“The intention of the legislature was clear on April 1, 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.

The learned counsel for the Revenue referred to *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and 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, the court may take recourse to purposive construction. It is also a well-settled principles of law that casus omissus cannot be supplied. (See J. Srinivasa Rao v. Government of Andhra Pradesh [2006] 12 SCC 607).”

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 April 1, 2005. There is nothing in the DVAT Act to suggest that the power was intended to survive or be acted upon.

It is true that a fresh power of revision was conferred on the Commissioner by an amendment brought about to the DVAT Act on November 16, 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.”

22. It is worth nothing that on the basis of the aforesaid analysis the Division Bench has held that the power of revision earlier available with the Commissioner has suffered a legal death. The submission of Mr. Tripathi, learned Additional Solicitor General is that the Division Bench had categorically opined that had Section 74A being in the statute book w.e.f. 1.4.2005 the revisional authority could have exercised the power and the

legislature by making the said provision retrospective w.e.f. 1.4.2005 has clothed the authority with the said power. Per contra, Mr. Ganesh submitted that this was an ancillary observation but the real rationale for allowing the writ petition and holding that Section 74A is not applicable is that Section 106(2) does not enable the revisional authority to exercise the power and secondly the General Clauses Act does not apply to Delhi and further the principle that is being inferred by the learned Additional Solicitor General that the retrospective amendment would confer the power to revise an order in the absence of necessary amendment of Section 106 of the DVAT Act is impermissible in law.

23. From the submissions raised at the Bar, it is noticeable that the legislature has initially introduced Section 74A w.e.f. 24.11.2005 and after the decision was rendered in *International Metro Civil Contractors* (supra) has brought the said Section into effect from 1.4.2005. The question that emerges is whether by such incorporation with retrospective effect the revisional power is saved. That apart there has been a debate with regard to the interpretation placed by the Division Bench under Section 106 of the Act. Additionally, a further cavil has been raised with regard to the applicability of Bengal Act to Delhi.

24. In view of the aforesaid, we are disposed to think that the decisions rendered in *International Metro Civil Contractors* (supra) and *LG Electronics (India) Ltd.* (supra) require reconsideration by a larger Bench apart from the fact that there has to be an authoritative pronouncement of

law on this score. We are disposed to think so as the legislature has presumed that the Division Bench possibly would have upheld the action had the amendment would have come into effect w.e.f. 1.4.2005. That apart, learned Additional Solicitor General has seriously contended that the interpretation placed on Section 106 is not correct and the said submission has been seriously opposed by Mr. Ganesh, learned senior counsel for the petitioners. Ordinary, we would have proceeded to address the same but the first question, we are inclined to think, really requires to be addressed.

24. In view of the preceding analysis, let this matter be placed before the Hon'ble Chief Justice for constitution of an appropriate larger Bench.

CHIEF JUSTICE

MANMOHAN, J.

November 1, 2010
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