ALLAHABAD HIGH COURT

J. K. Manufacturers Ltd

Vs.

Sales Tax Officer

Civil Misc. Writ No. 265 of 1966
(R.S. Pathak, M.H. Beg and H.C.P. Tripathi, JJ.)

08.05.1969

JUDGMENT

Pathak, J.

1. I have had the benefit of perusing the Judgment prepared by my brother Beg, J. and I agree with the order proposed by him.

2. I agree that the preliminary objection raised by the respondents on the ground that the petitioner should be referred to his statutory remedies under the U.P. Sales Tax Act should be rejected. The writ petitions were filed against the assessment orders and while they were pending the petitioner also filed appeals against these assessment orders. The appeals were dismissed as being defective. The writ petitions were amended to include a prayer for relief against the appellate orders. One of the grounds taken in these cases before us is that Rule 12-A is ultra vires. That is a ground which cannot be entertained by the authorities constituted under the U.P. Sales Tax Act. In *Behari Lal Shyam Sunder v. Sales Tax Officer*[1], the imposition of sales tax was challenged on the ground that a rule was ultra vires, and the Supreme Court repelled the contention that the question could have been examined and decided by the authorities constituted under the statute. Then there is the circumstance that the questions raised in these writ petitions are questions which should be decided authoritatively at the earliest as they affect a large number of cases where appeals are filed and are rejected because of apparent non-compliance with the rules. It is in the public interest that such questions should be resolved by adjudication by this Court expeditiously so that the statutory authorities are afforded adequate guidance in respect of matters which arise daily before them.

3. The appeals have been dismissed as defective because in all the three memoranda the petitioner failed to disclose the tax admittedly due. In the memoranda originally filed the petitioner stated that the tax admitted to be due was nil, and thereafter sought permission to amend the memoranda by inserting the figures of the admitted tax. The appellate authority rejected the prayer for amendment on the ground that it was not competent to permit any amendment. I agree with my brother Beg J. that the appellate authority has made an order which

cannot be sustained. The right of appeal against the assessment order is conferred by Section 9(1) of the U.P. Sales Tax Act and the proviso to that sub-

[1] Cutt (1966) 17 STC 508 (SC)

section declares that no appeal shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due or of such instalment thereof as may have become payable. The Supreme Court in *Lakshmi Ratan Engineering Works Ltd, v. Asst. Sales Tax Commr*[2]. has laid down that it is open to an appellant to adduce satisfactory proof of such payment at any time before the appeal is entertained, and the appeal is 'entertained' when it is first taken up for judicial consideration. What the appellant has to establish is that he has paid the amount of admitted tax. There is nothing in the U.P. Sales Tax Act or Rules which requires that there should be a statement in the memorandum of appeal as to the amount of tax admitted to be due and paid. Rule 66 which mentions what should be contained in the memorandum of appeal does not contemplate such a statement. It merely requires that as regards the admitted tax liability it shall be accompanied by the challan showing deposit in the treasury of the admitted tax. The Supreme Court has held in Lakshmi Ratan Engineering Works Ltd., AIR 1968 Supreme Court 488 : 21 STC 154 (supra) that even this requirement is directory only and that it is open to an appellant to prove by producing the challan or by any other mode available to him that the admitted tax has been paid, and he may do this at any stage before the appeal is entertained. The statement in the memorandum of appeal that the admitted tax has been paid, therefore, is not a requirement contemplated by the Act or the Rules, and if it is open to an appellant to prove at any time before the appeal is entertained that the admitted tax has been deposited, it is necessarily implied that he can at any stage before the appeal is entertained show what is the amount of admitted tax and that it has been paid. An erroneous statement made in the memorandum of appeal in that regard cannot be made a ground for rejecting the appeal as defective and cannot preclude the appellant from establishing at any time before the appeal is entertained that the admitted tax has been deposited. In this view of the matter, the appellate authority was wrong in holding that it was not open to the petitioner to show that the statement made in the memoranda of appeal was incorrect. In my opinion, the question whether the appellate authority enjoys the power to permit an amendment of the memorandum of appeal does not arise because the statement which the petitioner sought to correct is not a statement required by the Act and the Rules to be mentioned in a memorandum of appeal Shri K. N. Singh, the learned Chief Standing Counsel for the respondents, fairly concedes that the appellate order is erroneous and is liable to be quashed. The matter could have ended there so far as we are concerned. The consequence of the finding that the appellate orders are erroneous and must be quashed is that the appellate authority must now take up the appeals again and dispose them of in accordance with law.

4. But two questions have been raised on the merits. One is whether the assessing authority was justified in refusing to consider the Form III-A filed by the petitioner during the assessment proceedings. Those Forms were filed not with the quarterly returns but some time after. It is not in dispute that they were filed before the assessment order was made. In my opinion the

assessing authority erred in not taking those forms into consideration merely on the ground that they were not filed with the quarterly returns. I think the position is now well settled in this Court that the Forms may be filed by an assessee at any time before the assessment order is made.

5. Certain observations have been made by my brother Beg on the question whether the

[2] AIR 1968 SC 488:21 STC 154

decision in *Mansey Lakhansey and Co. v. State of U.P*[3]*.,* lays down the correct law in regard to the interpretation of R. 12-A which provides for Form III-A. With great respect to my learned brother, I find myself unable to agree with all that he has said in that regard.

6. In my opinion. Rule 12-A must be construed to provide merely a convenient mode of proving that the purchase of the goods is for resale in the same condition. It does not lay down that the only mode of proving this is by furnishing Form III-A. That is the opinion expressed by me in *Sales Tax Officer, Sector V. Kanpur v. Shahbuddin Zakir Hussain and Co*[4]*.,* and I shall reproduce my reasons for coming to that opinion.

7. Sub-section (1) of Section 3-AA provides that the turnover of the goods specified therein will be liable to tax at the point of sale by the dealer to the consumer. Sub-section (2) provides that unless the dealer proves otherwise every sale by a dealer shall for the purposes of sub-section (1) be presumed to be to a consumer. The Explanation which follows declares that a sale to a registered dealer who purchased the goods for resale in the same condition in which he has purchased them or to an unregistered dealer shall, for the purposes of the section, be deemed to be a sale to the consumer.

8. Rule 12-A says:

> "Exemption of Sales under Section 3-AA :
> "A' sale of any of the goods specified in Section 3-AA shall be deemed to be a sale to the consumer, unless it is to a dealer who furnishes a certificate in Form III-A to the effect that the goods purchased are for re-sale in the same condition. Details of all such certificates shall be furnished by the selling dealer with his return in Form IV."

9. There is no difficulty in appreciating what is ordinarily meant when we speak of a sale to the consumer. The Explanation to Section 3-AA has added two categories. One is where the sale is made to a registered dealer who does not purchase them for sale in the same condition in which he has purchased them, but sells them after processing them or altering them to produce a new article. The other is where the sale is made to an unregistered dealer. Both categories are deemed for the purpose of Section 3-AA to be sales made to the consumer. There can be little doubt that the word “deemed" in the Explanation has been used to give an extended meaning to the ordinary connotation of the expression “sale to the consumer". That the word “deemed" can be so used is now well settled. *Khatizabai v. Controller of Estate Duty*[5]*,*

10. Now, one thing is clear, and that is that the tax is levied only at the point of sale by the dealer to the consumer. In construing the provisions of Section 3-AA and Rule 12-A that must be kept clearly in mind. The Legislature appears to have anticipated that there would be considerable difficulty in determining whether a particular sale was made to the consumer. To obviate that difficulty, the Legislature enacted sub-section (2) of Section 3-AA. It provides that unless the dealer proves otherwise every sale by him would, for the purposes of sub-section (1) of Section 3-AA, be presumed to be to the consumer. The

[3](1962) 13 STC 898 (All) [5] AIR 1960 Bom 61 at p. 70

[4] Special Appeal No. 374 of 1963, D/-12-8-1969 (All)

burden is thrown upon the dealer to show that the sale was not made to the consumer. It is manifest that sub-section (2) merely enacts a rule of evidence for the purpose of giving effect to the substantive provision in sub-section (1), Sub-section (2), it will be noticed, does not indicate what should be the nature and mode of proof by which the dealer may establish that the sale made by him is not to the consumer. That has been left entirely to the choice of the dealer. In short, therefore, sub-section (2) lays the burden of proof on the dealer and leaves it to him to determine how he discharges that burden.

11. And so we come to Rule 12-A. At first blush, the rule gives the impression that unless the selling dealer is armed with a certificate in Form III-A from the purchasing dealer the sale made by him must be considered to be a sale to the consumer. On further consideration, however, I am unable to read the Rule to mean that. To my mind, the Rule suggests a convenient mode to the selling dealer for proving that the goods have not been sold to the consumer. It provides for no more than that. The certificate in Form III-A is one mode in which the selling dealer may establish that he has not sold the goods to the consumer. But that is not the only mode. If the contrary view is accepted, it will limit the selling dealer to that mode alone and will preclude from adopting any other mode of proof. It must not be forgotten that Rule 12-A has been framed for giving effect to the purposes of Section 3-AA. If it seeks to limit the selling dealer to a specific mode of proof it clearly attempts to impose restriction which was not contemplated by sub-section (2). It may have been a different matter if sub-section (2); had read, “unless the dealer proves other-wise in the manner prescribed.....",

when it could have been legitimately contended that the only mode of proof available to the dealer was the mode prescribed in Rule 12-A. But that the Legislature did not enact.

12. There is another aspect of the matter. If Rule 12-A provides the only mode for a selling dealer to prove that the sale by him is not to the consumer there will be cases where the Rule may operate to nullify the object of Section 3-AA. An illustration will demonstrate this. A registered dealer sells goods to another registered dealer. The goods are purchased by the purchasing dealer for resale in the same condition in which he purchased them. He sells them to a consumer. Inasmuch as the sale by him is a sale to the consumer, it is the purchasing dealer who is liable to tax. Ordinarily, the purchasing dealer would furnish a Form III-A to the selling dealer and on production of that Form the selling dealer could establish that he was not liable to tax. But there may be cases where the purchasing dealer does not furnish the Form III-A to the selling dealer. In

four Sales Tax References *Commr. of Sales Tax v. Lary Leather Agency*[5], *Commr. of Sales Tax v. Society Leather Stores*[6], *Commr. of Sales Tax v. Star Leather Agencies*[7], and *Commr. of Sales Tax v. Abdul Razzaq Leather Stores*[8], this Court had recently to consider a situation where the assessee had admittedly made the sale to the consumer and had not furnished Form III-A to the dealer from whom he had purchased the goods. The contention of the assessee in each case was that as the selling dealer could not furnish Form III-A the tax should be levied on the selling dealer, and the tax having been levied on the selling dealer it could not be levied upon him because it was a single-point levy. It is important to note that the statute places no obligation on the purchasing dealer to furnish the Form to the selling dealer. In that event, if Rule 12-A can

[5] STR No. 255 of 1966, D/d. 2-5-1969 (All)
[6] STR No. 256 of 1966, D/d. 2-5-1969 (All)
[7] STR No. 257 of 1966, D/d. 2-5-1969 (All)
[8] STR No. 258 of 1966, D/d. 2-5-1969 (All)

be said to provide the only mode for proving that the sale is not to the consumer, the selling dealer cannot establish that the sale by him is not to the consumer, and he will be liable to tax. By an act of his own volition, namely refusing to furnish the certificate in Form III-A, the purchasing dealer who sells to the consumer can cause the liability which sub-section (1) imposes on him to be visited instead on the dealer from whom he had purchased the goods, and escape the liability himself on the argument that the tax cannot be levied at more than one point. A construction such as this would enable a dealer, who sells to the consumer, to subvert the operation of sub-section (1) and make its application depend on his individual decision as to whether he furnishes Form III-A to the selling dealer or not. It could never have been contemplated by the Legislature that the application and operation of sub-section (1) should turn on the volition of an individual who could divert the course of the levy by withholding Form III-A. The conduct of such an individual is not controlled by the statute, there being no obligation on him to furnish the Form.

13. The illustration may be carried further. Consider a case where the goods are the subject of sale in a series of sales by many successive dealers. Let us assume that it is only the last sale where the goods are not purchased for resale in the same condition but are intended to be manufactured into a different commercial commodity. Clearly, in the light of the explanation to Section 3-AA it is only the last sale which must be deemed to be a sale to the consumer and which, therefore, attracts the tax under sub-section (1). If Form III-A is the only mode of proving that the sale is not to the consumer, and, for whatever reason, each selling dealer is not given the Form by the corresponding purchasing dealer, then all these selling dealers will be liable to tax on the sale made by them on the ground that they have not produced Form III-A before the assessing authority. It is immaterial that there is an understanding between the dealers that the purchasing dealer will furnish Form III-A to the selling dealer or even that there is a contract between them to that effect. Breach of contract is not unknown, and there will always be a case, no matter what the understanding or the circumstances, where Form III-A is not supplied by the purchasing dealer to the selling dealer. If Form III-A is the only proof permitted by the law to the selling dealer, then on his failure to produce it, it will be presumed that the sale by him is to the consumer. In the case taken by me of many successive dealers, the Sales Tax Officer will be bound to levy the tax at as many points of sale as there are selling dealers who have not been

given form III-A by their purchasing dealer. There can be little dispute that thus an essential requirement of sub-section (1), namely that the tax be levied at single point, will be flagrantly violated.

14. Rule 12-A, it must be remembered, embodies a rule of evidence. Provisions relating to evidence, specially those made in the exercise of a rule-making power, cannot be so construed as to limit or defeat the statutory provision laying down the substantive law. Rule 12-A, it is true, has been made in the exercise of the power conferred on the State Government under Section 24, sub-section (4) of which provides that the rules shall have effect as if enacted in the Act. But that consequence accrues only if the rules are made within the confines of the powers conferred by sub-section (1) of Section 24. See *Chief Inspector of Mines v. Karam Chand Thapar*, Sub-section (1) empowers the State Government to make rules"to carry out the purposes of this Act", and no rule can be made in the exercise of that power which nullifies the purposes of the Act or of any of its provisions. It cannot be forgotten that a rule is merely subordinate legislation, subordinate to the statute under which it is made. If Rule 12-A is construed as laying down that Form III-A is the only mode of proving that the sale is not to the consumer, it will, as I have attempted to show, defeat the provisions of Section 3-AA and be invalid on that ground. It is well settled that if a Rule can reasonably be so construed as to avoid it being declared invalid that construction must be given to it. If Rule 12-A is construed as laying down a convenient mode only that the goods are purchased for resale in the same condition and not as laying down the only mode of proof, then, in my opinion, it can be considered as a rule made for the purposes of Section 3-AA, and not made in violation of it.

15. I may refer to the decision of the Supreme Court in AIR 1968 Supreme Court 488: (1968) 21 STC 154. The proviso to Section 9 of the U.P. Sales Tax Act provides that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of payment of the amount of tax admitted by the appellant to be due. Rule 66(2) of the U.P. Sales Tax Rules provides that the memorandum of appeal shall be accompanied by the challan showing deposit in the treasury of the admitted tax. Before the Supreme Court it was contended that Rule 66 (2) provided the only mode of proving that the admitted tax had been deposited. The Supreme Court held that the terms of the proviso to Section 9 were general; all that the proviso required was satisfactory proof, and it was not open to a Rule to make the section narrower by prescribing a particular mode. The Supreme Court observed;

> "The rule lays down one uncontestable mode of proof which the Court will always accept but it does not exclude the operation of the proviso when equally satisfactory proof is made available to the officer hearing the appeal and it is proved to his satisfaction that the payment of the tax has been duly made and in time. In this sense, the rule can be regarded as directory since it lays down one of those modes which will be unquestioned for its validity. The other modes of proof are not necessarily shut out." And I might here add the Supreme Court's further observation:
> "It is to be remembered that all rules of procedure are intended to advance justice and not

to defeat it."

16. What we must not forget, I think, is that the provision for proof by furnishing Form III-A has been made by a Rule and not by a Section of the Act itself. Had that not been so, the problem would have taken on a different complexion, as is to be found in Section 8(4) of the Central Sales Tax Act and Section 5 (2) (a) (ii) of the Bengal Finance (Sales Tax) Act, where the Legislature itself declares that the exemption contemplated there will not be conferred unless the prescribed form is furnished. As I have already said, a rule is subservient to the Act and should not be so construed as to conflict with the Act. Section 5 (2) (a) (ii) of the Bengal Act was considered by the Supreme Court in *Kedarnath Jute Manufacturing Co., Ltd. v. Commercial Tax Officer*[9], which held the provision to be mandatory. That was a case where the statute exempted sales made to a registered dealer of goods of the class or classes specified in the registration certificate of the assessee dealer. It was a case of the statute conferring an exemption simply, without anything more. The position under Section 3-AA is more complex The mischief is far greater. The impact is felt not merely at the point of sale by the assessee dealer who is unable to produce Form III-A, but its repercussions extend over succeeding sales, which because of the single point levy, can be claimed to be exempt from tax. The position is complicated

[9] AIR 1966 SC 12= (1965) 16 STC 607

by the existence of the directive in sub-section (1) that the tax shall be levied at one point only, viz. at the point of sale by a dealer to the consumer. It is an injunction which cannot be disobeyed by the assessing authority. Disobedience of that injunction will result in the diversion of the levy to a point not considered taxable by the Legislature. In the example I have already given, if one or more successive selling dealers are unable to get Form III-A from their purchasing dealer, the sales made by them will attract the tax instead of the sale which has been actually made to the consumer. Because it is a single-point levy, the latter sale, which the Legislature has made taxable, escapes the tax. It must be remembered that the burden is not on the assessing authority to investigate and find out which is the sale to the consumer. The burden of proof has, by sub-section (2) of Section 3-AA, been cast on the assessee. If Rule 12-A is mandatory, then unless Form III-A is produced by the assessee, the sale by him will be treated as the sale to the consumer. As the position arising under Section 3-AA of the U.P. Sales Tax Act is materially different from that obtaining under Section 5(2)(a)(ii) of the Bengal Act, the observations of the Supreme Court in Kedarnath Jute Manufacturing Co., Ltd., AIR 1966 Supreme Court 12 : (1965) 16 STC 607 (supra) do not, in my opinion, apply to the case before us.

17. It has been said that the word"unless" in Rule 12-A makes the filing of Form III-A mandatory. That may be so in the usual kind of case, where it is a case of obtaining an exemption merely and the impact of that exemption is confined to the point of sale by the particular assessee dealer. But I feel great difficulty in agreeing, where that construction would lead to a conflict between the Rule and the Section and where it would lead to results opposed to the very intent of the Legislature. If Rule 12-A is not open to the construction I have suggested then, in my opinion, it will have to be struck down. To read it in the way I have done will enable it to survive

and to provide a convenient mode for the assessee to discharge the burden of proof cast upon him by sub-section (2) of Section 3-AA.

18. The respondent relied upon (1962) 13 STC 898 (All) where a learned single Judge construed Rule 12-A to the contrary. With respect, I am unable to agree with the opinion expressed in that case.

19. On the other question, namely whether the blankets under consideration are entitled to exemption from tax it was stated on behalf of the petitioner that it was a matter which could properly be disposed of by the authorities constituted under the Act it is not necessary therefore to express any opinion in respect of that question.

20. The petitioner urges that the assessment orders should be quashed by this Court and the cases sent down to the Sales Tax Officer for reassessment. Inasmuch as the petitioner deliberately chose the forum of appeal during the pendency of these writ petitions, and we have been invited to consider whether the orders of the appellate authority dismissing the appeals are well founded in law I think it only right that having held that the appellate orders are erroneous the cases should go back to the appellate authority for reconsideration and decision in accordance with law. There is also the undertaking given by the learned Chief Standing Counsel for the respondents, and accepted by us, that the petitioner will not be treated as being in default in respect of the balance of the tax assessed against it for the three assessment years so long as the appeals remain pending before the appellate authority.
21. I would quash the orders of the appellate authority dismissing the appeals and direct it to hear them again and dispose them of in accordance with law. In the circumstances, the parties should bear their own costs.

H. C. P. Tripathi, J.

22.I agree, with the judgment proposed by Hon'ble Pathak, J.

M. H. Beg, J.

23.Three connected writ petitions challenging a common assessment order for the three assessment years 1961-62 and 1962-63 and 1963-64 passed by the Sales Tax Officer, Sector II, Kanpur, opposite party No. 1, against the petitioning company, have been referred to this Full Bench for decision of the whole case. The petitions raised three common questions. One of these questions was whether sales of cotton blankets by the petitioning company, for Rs. 15, 63, 351-14 P, in the assessment year 1961-62, for Rs. 13,28,382-91 P. in the assessment year 1962-63, and for Rs. 30,60,437-84 P. in the assessment year 1963-64, could be exempted from tax under Section 3-AA of the U.P. Sales Tax Act (hereinafter referred to as the Act). It was indicated in the referring order that this question could be more appropriately decided on evidence on record by

the Sales Tax authorities themselves. This question resolved itself into: Did the blankets, after having been cut into convenient sizes, borders of another material stitched on at two ends, constitute garments when they were sold, as was held by a Division Bench of this Court in Firm, *Jaswant Ram Jai Narain v. Sales Tax Officer*[10], with regard to saris, lihaphs, phards, and bed-covers, or, did they still fall under the classification"cotton fabrics of all varieties" which are generally measured and cut at the time of sale? This question has not been argued before us by either side as it was assumed that it is to be decided by the Sales Tax authorities themselves on facts of the case. We, therefore, refrain from deciding it.

24. Two other questions, which have been argued before us remain to be decided by us. The first is whether the Sales Tax Officer was right in refusing exemption to sales of yarn, to the extent of Rs. 59,38,364-83 P. for the assessment year 1961-62, of Rs. 63,13,981-01 P. for the assessment year 1962-63 and of Rs. 60,59,755-30 P. for the assessment year 1963-64, on the ground that the petitioner had not submitted certificates in Form III-A, showing that these goods were sold to a dealer for re-sale in the same condition, either with its quarterly returns in Form IV or within a time obtained especially for filing them although the petitioning company had submitted these certificates long before the completion of the assessment proceedings on 30th November, 1964. The second question is whether the Commissioner, Sales Tax, U.P., added as an opposite party after the filing of the writ petitions, rightly rejected the appeals of the petitioning assessee against the orders of the Sales Tax Officer solely on the ground that the memorandum of appeal in each case did not disclose the tax admitted to be due with the result that the memoranda of appeals were defective.

25. A preliminary objection was taken by Mr. K. N. Singh, the Chief Standing Counsel for the State, that the writ petitions are liable to be dismissed on the ground that the petitioner had filed the writ petitions on 31st January 1966, during the pendency of the

[10] (1955) 6 STC 386 (All)

appeals before the Assistant Commissioner, Sales Tax who rejected the appeals on a preliminary ground, as indicated above on 21st February, 1966. The petitioner had thereafter filed amendment applications to implead the Assistant Commissioner Sales Tax, and had prayed for quashing of the common orders made by the Assistant Commissioner on common grounds in all the three appeals. This Court had allowed the amendment and permitted addition of grounds directed against the orders of the Assistant Commissioner as well. The learned counsel for the opposite parties submitted that there was, nevertheless, an alternative remedy open to the petitioner by means of an application for revision under Section 10 of the Act, and, thereafter, by means of a reference to this Court under Section 11 of the Act in each case. It was submitted that the petitioner, not having availed itself of these modes of redress, should not be allowed to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution.

26. In reply to the above mentioned preliminary objection, Mr. Jagdish Swarup, appearing on behalf of the petitioner, pointed out that the validity of R. 12-A of the Rules made under the Act

had been questioned by the petitioner. It was submitted that no relief could be given to the petitioner for such a grievance even by this Court when deciding a reference under Section 11 of the Act inasmuch as the limitations imposed by Section 11 of the Act upon the jurisdiction of this Court will preclude a consideration of the validity of either any provision of the Act or any rule made there under.

27. In *K. S. Venkataraman and Co. (P) Ltd. v. State of Madras*[11], the view of the majority of their Lordships of the Supreme Court, expressed by Subba Rao, J., with regard to the jurisdiction exercised under Section 66 of the Income Tax Act, 1922, was:"It has been held by this Court that the jurisdiction conferred upon the High Court by Section 66 of the Income-tax Act is a special advisory jurisdiction and its scope is strictly limited by the section conferring the jurisdiction. It can only decide questions of law that arise out of the order of the Tribunal and that are referred to it. Can it be said that a question whether a provision of the Act is ultra vires of the Legislature arises out of the Tribunal's order? As the Tribunal is a creature of the statute, it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction. In (1966) 17 STC 508 (SC) the question raised was whether an imposition of tax was"without authority of law or ultra vires the Sales Tax Act and the Rules". The precise form in which the validity of the imposition of a tax was questioned does not appear from the judgment. It was not specifically stated there whether the validity of any statutory provision or of any statutory rule had been questioned. But, their Lordships, following their earlier decision in Venkataraman Co.'s case (supra) held, in general terms, with regard to the power of the sales tax authority, that the question of ultra vires was foreign to its jurisdiction." Therefore, it was held that a writ petition could not be thrown out on the ground that an alternative remedy was open in such a case. Again, in *Circo's Coffee Co. v. State of Mysore, (1967) 19 STC 66 (SC)*, following Venkataraman Co.'s case (supra), the Supreme Court held that"the question as to the vires of a statute which a taxing officer has to administer cannot be raised before him". Similar views were expressed in *Dhulabhai v. State of Madhya Pradesh*[12],

[11] 7 STC 418 : AIR 1966 SC 1089

[12] 21 STC (Short Notes) 5

28. Although the Supreme Court has not specifically held in any case brought to our notice that an authority created by a statute cannot question the validity of even a rule purporing to be made under the Statute, yet, after the pronouncements of the Supreme Court, in the wide terms indicated above, Sales Tax authorities could not be expected to decide whether a rule, purporting to be made under a statutory provision declaring rules made there under to have the same effect as if enacted by the legislature, is valid.

29. An alternative reply to the preliminary objection was also given by learned counsel for the petitioner. This is that Rule 12-A having been held to be valid in a single judge decision of this Court, (1962) 13 STC 898 (All), which was binding upon the Assistant Commissioner, the

petitioner could only get an adjudication within a reasonable time on the question raised by it upon a petition under Article 226 of the Constitution. Learned counsel pointed out that the Supreme Court, In AIR 1968 Supreme Court 488 : 1968-21 STC 154 had, in a similar situation, refused to apply the principle that the existence of an alternative remedy bars relief by interference on grant of special leave to appeal under Article 136 of the Constitution. Moreover, as the referring order indicates, the questions raised by the petitioner before us are of sufficient importance to deserve an early authoritative pronouncement by this Court. We, therefore, overrule the preliminary objection.

30. Now, taking up the first of the two questions we have to decide, the impugned Rule 12-A, relied upon by the Sales Tax Officer, may be quoted. It reads as follows :

> "12-A. Exemption of Sales under Section 12-A.- A sale of any of the goods specified in Section 3-AA shall be deemed to be a sale to the consumer, unless it is delivered to a dealer who furnishes a certificate in Form III-A to the effect that the goods purchased are for resale in the same condition. Details of all such certificates shall be furnished by the selling dealer with his return in Form IV". This is clearly a rule of evidence made for the purpose of enabling a satisfactory adjudication on the statutory right given by Section 3-AA(l) of the Act to obtain an exemption of certain sales of goods, including those of cotton yarn, from sales tax"except at the point of the sale by a dealer to the consumer" and that too at a rate not exceeding two naya paise per rupee. Thus, a dealer selling to another dealer and not directly to a consumer will not pay any sales tax on the sale if he proves that it is a sale “for resale in the same condition."

31. Before determining the scope and meaning of Rule 12-A we must notice Section 12-AA(2) of the Act where the legislature itself has enacted a presumption of law, against the dealer claiming the benefit of Section 3-AA(l), in the following terms:"Unless the dealer proves otherwise, every sale by a dealer shall for purposes of sub-section (1), be presumed to a consumer." The Explanation to Section 3-AA adds:"A sale of any of the goods specified in sub-section (1) to a registered dealer who does not purchase them for resale in the same condition in which he has purchased them, or to an unregistered dealer shall, for purposes of this Section, be deemed to be a sale- to the consumer." It may well be that, with these stringent provisions with which the right to obtain an exemption of certain sales from taxation is hedged round, it was considered necessary to relieve the dealer claiming exemption from the rigour of the law provided he takes certain steps to safeguard his interests in selling to other dealers for resale of goods in the same condition. Viewed in this light, Rule 12-A would appear to be meant to protect the interests of dealers who comply with its terms and not to impair their rights.

32. Rule 12-A was made under Section 24 of the Act to carry out the purposes of the Act and not to defeat them. Section 24 (4) gives rules made under Section 24 the same effect as the provisions of the Act. It is significant that Rule 12-A, while reiterating the presumption found in

Section 3-AA (2), in a slightly different language, indicates the mode of rebutting it by means of the prescribed certificates. The language of the Rule certainly indicates that the mode prescribed here is the only method of rebutting the presumption. The question was, therefore, raised whether R. 12-A does not unduly curtail the right to an exemption found in Section 3-AA (1) and even circumscribe the means of rebutting a presumption which would be left open to the dealer to choose if Section 3-AA (2) was the only provision to be considered.

33. As already indicated by me, R. 12-A could very well be meant to aid a dealer claiming exemption in surmounting a presumption which would otherwise operate against him. It does not really conflict with Section 3-AA (2), but fills a gap on a matter on which Section 3-AA (2) is silent. Its effect is that the dealer is obliged to obtain the best and most convenient form of evidence, to show that he is entitled to get an exemption, at a time and in a manner which ensure that it is above suspicion and is not lost. The last sentence of the Rule which directs the dealer to furnish details of prescribed certificates with his returns in Form IV seems also intended to guard against spurious certificates supplied later and to enable authorities to check up in time the correctness of details given. The selling dealer can certainly refuse to sell without charging sales tax unless and until the purchasing dealer either certifies or undertakes to certify in prescribed form.

34. I am unable to see how prescribing the most convenient and reasonable mode of proof, in the circumstances of the case, so as to safeguard the interests of dealers as well as of the revenues of the State, can be prohibited even if, by prescribing such a mode of proof only, other modes of proof are necessarily barred by implication. Statutory provisions requiring certain transactions to be evidenced by writing are not unfamiliar. And, when transactions are reduced to writing. Section 91 of the Evidence Act, containing the best evidence rule, prohibits reception of oral evidence to prove the terms of the transactions. The notion is, therefore, not novel. It is a part of the basic norms of our law of Evidence. The Rule, viewed as a whole, reflects and satisfies two well recognized principles found in our law of Evidence; that of natural, ordinary, logical but optional presumptions of fact converted into obligatory rebuttable presumptions of law, and, the best evidence rule.

35. After having had the advantage of going through the judgment of my learned brother, R. S. Pathak. J., I reconsidered the question whether R. 12-A could be interpreted as laying down only one of the possible ways of rebutting a statutory presumption. I find that the primary object and the plain meaning of Rule 12-A is to prescribe certification by the purchasing dealer as the only means of protection for the selling dealer which enables him to repel the statutory presumption most conveniently. The use of the word “unless" in the Rule shows that the conditions in which the statutory presumption can be repelled are exhausted by the Rule although the language of the Rule leaves room for proof of certification in exceptional cases by methods other than filing certificates obtained which may have been lost. So long as certification is proved, a merely defective form of it will not matter. To go beyond this appears to me, with great respect for my

learned brother's opinion, to be not open to us. If the effect of the Rule, as it stands, is that it goes beyond the provisions of Section 3-AA and results in absurdities, we can declare it to be void on that ground. But, we cannot rewrite it or reconstruct it or interpret it out of existence if its meaning is, as it appears to me to be, clear and explicit.

36. In AIR 1966 Supreme Court 12 at p. 14 : 1965-16 STC 607 the Supreme Court, dealing with a statutory provision the meaning of which appeared to be clear and unambiguous to it, observed that it was for the Legislature and the rule making authority and not for the Court to soften the possible rigour of the provisions. It explained that the object of a proviso, prescribing the only mode of obtaining an exemption from sales tax by furnishing a declaration form, could not be defeated by so interpreting it that it become redundant and otiose. It rejected the submission that the proviso meant:"if the declaration form is furnished well and good; but, if not furnished, other evidence could be produced." The ground given for rejecting such a contention was that the clause could not be rewritten so as to ignore the proviso. In my opinion, the word" unless", used in Rule 12-A, clearly gives to what follows after it an effect exactly similar to that of the proviso considered by the Supreme Court. Such a conclusion appears inescapable to me on the language of the rule. In Kedaranath, J. M. Co.'s case (Supra) the Supreme Court, after explaining the object of the proviso considered there, observed:"The liberal construction suggested will facilitate the commission of fraud and introduce administrative inconveniences, both of which the provision of the said clause seeks to avoid." It seems to me that Rule 12-A, in addition to serving these very objects, was designed to facilitate the task of the dealer who sells. It is, therefore, reasonable and valid and does not go beyond the objects of Section 3-AA of the Act even on the strict and narrow construction I have adopted.

37. In (1962) 13 STC 898 (All) Brijlal Gupta. J., held:"So far as Rule 12-A is concerned, it in no way takes away from him the right or the opportunity to rebut the presumption. All that that rule does is to lay down that in order to rebut the presumption and to prove a contrary state of facts to exist, a certificate in Form III-A will be the only material or evidence. Thus, while the section deals with the right or the opportunity to prove or disprove a particular fact, the rule deals with the materials on the basis of which the fact might be proved or disproved. It follows that the subject-matter of Section 3-AA and of Rule 12-A is quite distinct. It must, therefore, be held that Rule 12-A does not in any way abridge or take away the right conferred by Section 3-AA..... The proceeding for assessment has to be initiated, and in due course, to be concluded. In the course of the proceeding, certain conclusions have to be reached on the basis of the evidence and the materials produced therein. From this it is quite clear that a rule providing for the mode of proof or providing for materials on the basis of which a particular fact might be established or a particular presumption rebutted is a rule for carrying out the purposes of the Act, and can be validly made under sub-section (1) of Section 24 in the exercise of the generality of the rule-making power. Further it seems to me that the impugned rule also falls within the ambit of the particular powers envisaged under Section 24 (2) (c) and (f). In either view, it appears to me to be quite clear that the rule-making authority was fully empowered to make Rule 12-A in

the exercise of the power conferred on it under the Act."

38. I would respectfully accept the statement of reasons given above for holding that Rule 12-A is valid after making a slight possible modification, resulting from the language of the Rule 12-A, in stating the effect of the Rule, if this statement of the law really means that the prescribed certificates must invariably be produced in evidence. The rule, while making certification by the purchasing dealers essential evidence of conditions of sales to them, does not, on the language used, make the filing of certificates themselves absolutely indispensable in every case. It leaves room for giving evidence of certification in very exceptional cases where, due to no fault of the assessee, the sales, though shown to have been certified, cannot be supported by the prescribed certificates at the time of assessment e.g. due to destruction by fire or a flood. Satisfactory proof, in such extraordinary cases, that the sales were duly supported by the prescribed certificates furnished by the purchasing dealers, will still meet the requirements of the Rule. The Rule as it stands, certainly has the effect of compelling an assessee who claims the benefit of Section 3-AA of the Act to prove certification by purchasing dealers. But, the rule cannot, in my opinion, be held to be ultra vires on this ground alone. The obligation imposed on assessees is quite reasonable and necessary. Even if a hypothetical situation, which has not arisen in any case before us, were to arise in which a purchasing dealer wrongly or dishonestly refuses to certify a purchase which is for resale in the same condition, the Sales' Tax Officer is not powerless. The power, impliedly contained in Section 14 (2) (h) of the Act, can be used, in such eventualities, to compel the purchasing dealer either to certify or to show cause why he does not do so. Thus, certification can take place, in exceptional cases, even after assessment proceedings have commenced.

39. This brings me to questions raised by the Sales' Tax Officer's orders about the stage and the precise form in which the assessee could prove certification. Rule 12-A clearly does not require the assessee to file certificates in Form 3-A also with his quarterly returns in Form 4. It certainly does not subject the assessee to the penalty of exclusion of these certificates from evidence altogether if they are submitted afterwards, or, if they are not in prescribed form. The last sentence of the rule apparently bears the character of a directory note appended to the first and essential part of the Rule. It indicates what returns in Form 4 should contain when exemption is claimed. It has to be read in conjunction with Form 4 which contains five columns to be filled in under the heading:"Details in respect of sale of goods specified in Section 3-AA on which exemption is claimed". These columns in Form IV require: Name and address of the purchasing dealer: Registration certificate no. if any; Date of sale; Sale price; No. of certificate in Form III-A. If these columns in Form IV are duly filled up, the requirements of the last sentence of R. 12-A are fully met. There is no additional obligation imposed by Rule 12-A, as the Sales Tax Officer erroneously assumed, that the prescribed certificates in Form III-A must also accompany the returns in Form IV or can be filed later only if time is especially obtained for the purpose of filing the certificates but not otherwise.

40. The Sales Tax Officer adopted what may be characterized not only as a Draconian but also an entirely unwarranted and unreasonable view, on the language of Rule 12-A itself, that the assessee could not file even the prescribed certificates long before the assessment proceedings were concluded simply because the certificates were neither filed with returns in Form IV nor within a time obtained from him for the purpose. If Rule 12-A were to have that effect, it would unreasonably curtail the assessee's right to obtain an exemption under Section 3-AA and become void. It is a well-established rule of construction that, even where two views are possible, a view which validates a legislative provision must be preferred. There is, however, no need here to resort to this principle. On the clear and explicit language of R. 12-A, all that the assessee need do, when filing his returns, is to fill up the columns giving the required particulars. Rule 12-A could not be held to be invalid simply because it makes a supply of this information in Form IV obligatory on an assessee. It does not go so far as to lay down that the presumption found in the earlier part of Rule 12-A cannot be rebutted if the obligation imposed by the last sentence of Rule 12-A is not discharged. On the language of Rule 12-A itself, a distinction must be drawn between the results of assessee's failure to discharge the obligation to prove certification, which means that the presumption raised is unrebutted, and of a non-compliance with the last sentence, the effect of which is not given by the Rule but is left to be determined by the Sales Tax Officer.

41. The question whether the fair and reasonable but obligatory presumption, raised by Section 3-AA (2) read with the first part of Rule 12-A, is rebutted or not, can only be decided, on the totality of evidence before the Sales Tax Officer, when the evidence has to be weighed and an assessment order has to be passed. At that time, the Sales Tax Officer may fairly use non-compliance with the last part of Rule 12-A as a piece of evidence for concluding that some certificates filed before him in assessment proceedings are not genuine. Although the prescribed certificate may provide prima facie evidence protecting the selling dealer it is not conclusive. Rule 12-A specifies the kind of evidence which is required for rebutting the presumption, but it does not purport to regulate the question of time at which this evidence should be admitted in the course of assessment proceedings. Nor does it deal with evidence for other purposes which may be needed for assessment. The Sales' Tax Officer can only act on legally sustainable grounds in excluding or admitting evidence.

42. In the cases before us, the Sales Tax Officer gave no legally acceptable ground for excluding the certificates filed by the assessee before him. There is no finding that the returns in Form IV were not duly filled up, Nor is there any finding that the certificates filed did not appear to be genuine. The Sales Tax Officer unreasonably restricted the assessee's right to rebut a presumption of law. The learned Officer illegally imposed a time limit and an unwarranted condition upon the submission of certificates in Form III-A. He failed to adjudicate upon their effect by excluding relevant evidence upon a clear misconception of the scope and meaning of Rule 12-A. Therefore, we conclude that, although, Rule 12-A is quite reasonable and valid, yet, the Sales Tax Officer has misapplied it in rejecting the certificates submitted and has erred in refusing exemption on the ground given by him. Our conclusion does not, we would like to clarify, preclude the Sales

Tax authorities from rejecting the certificates before them on any other legally valid ground which may exist.

43. Turning now to the second question before us, I find that the Assistant Commissioner of Sales Tax treated the memorandum of appeal in each of the three cases as defective because the petitioner had put down the word “nil" against the third of the five statements given by the assessee in each memorandum of appeal before setting out the grounds of appeal. To illustrate what was done by the petitioner the five statements made in the memorandum of appeal against the order under Rule 41 (5) of the U. P. Sales Tax Act for the assessment year 1961-62 may be reproduced. They are as follows :-

Taxed turn-over which is objected to	Rs. 75,01,716
Tax assessed on above not admitted payable.	1,50,034
Tax admitted payable thereon and paid since the aforesaid order	Nil
Date of receipt of order	10-2-1965.
Court-fee stamp affixed.	50

Subsequently, the petitioner filed a supplementary memorandum of appeal in each case giving an amended form in which the third head was altered into:"Tax admitted payable and already paid". After this change of caption, the assessee mentioned the actual sum paid in each case. To give an example, again from the case for assessment year 1961-62, the exact form of the amended statement is given as follows :-

> "Tax admitted payable and already paids Rs. 978-25". This was the only amendment the assessee wanted to make in the memoranda of appeals.

44. The Assistant Commissioner Sales Tax held that he had no power to allow an amendment of the original memorandum of appeal in each case by reason of the 2nd proviso to Section 9 of the Act which reads as follows :-

> "Provided, secondly, that the appellate authority shall not exercise any powers or perform any other function except those conferred on or entrusted to him as such authority."

The Assistant Commissioner held that, as neither the Act nor the rules framed there under conferred any specific power of allowing an amendment of a memorandum of appeal upon the appellate authority, the memorandum must be rejected in each case. Accordingly, each appeal was rejected on this preliminary ground without going into the merits of the case.

45. The memorandum of appeal in each case had been admitted, whether rightly or wrongly, under Rule 67 (3) and (4) and a date had been fixed for hearing in each of the three appeals. Sub-rules (3) and (4) of Rule 67 read as follows :-

"(3) If the memorandum of appeal is not in order it may be rejected or be returned, after the necessary endorsement on its back about its presentation and return, to the applicant for correction and representation within the time to be fixed by the Assistant Commissioner (Judicial) or be amended then and there.
(4) On admission of an appeal, the Assistant Commissioner (Judicial) shall fix a date for hearing the appeal, and may send for the record, if necessary."

46. It will be seen that there is a power of amendment of the memorandum of appeal contained in Rule 67 (3) set out above. This power of amendment could, according to this rule, be exercised at the time of admission of the appeal. Even if it is assumed that this power could not be exercised afterwards on the ground that the second proviso to Section 9 (1) set out above negatives the existence of such a power, yet, the appeals of the petitioner, having been admitted, it could be urged that there was no power to review the order admitting an appeal left in the Assistant Commissioner by reason of the provisions of the second proviso to Section 9 (1) of the Act itself.

47. It may be mentioned here that R. 66 framed under the Act setting out the form and contents of memorandum of appeal does not contain any set form for making the kind of statement which the appellant wanted to amend in each case. Rule 66 (1) and (2) runs as follows:"66. Contents of memorandum of appeal- (1) The memorandum of appeal shall specify the name and address of the appellant, shall set forth concisely and under distinct heads the grounds of objection and the relief prayed for, and shall be signed by the appellant or his lawyer or his duly authorized agent and verified in the form given below :- the appellant
I ---------- do hereby on behalf of the appellant declare that the contents of this memorandum are true to the best of my knowledge and belief.

(2) The memorandum of appeal shall be accompanied by adequate proof of payment of the fee and a certified copy of the order appealed against and the chalan showing deposit in the treasury of the tax admitted by the appellant to be due, or of such installments thereof as might have become payable."

48. It has been contended before us, on behalf of the petitioner, that even if it is assumed that there was a defect in each memorandum of appeal, the appeal itself would not become incompetent. It has been held by the Supreme Court, in *Garikpati Veerraya v. Subbiah Choudhry*[13], and also in *Daji Saheb v. Shanker Rao Vitharao Mane*[14], that a statutory right of appeal is a vested right. Such a right cannot, therefore, be taken away indirectly by making a rule prescribing the kind of statement which the petitioner appellant had made in each of the memoranda of appeals and which the petitioner wanted to amend. But, there is no rule, as already observed, which prescribed the form of such a statement in the memorandum of appeal. Rule 66 (1) indicates the form in very broad and general terms.

49. Learned counsel for the petitioner relied on *Mela Ram and Sons v. Commissioner of Income Tax*[15], where it was held that even an appeal presented beyond time, though liable to be dismissed in limine, was, nevertheless, an appeal in the eye of law. Again, *J. D. Bhargava v. J. L. Bhargava*[16], was cited before us to contend that even the infringement of mandatory requirement contained in Order 41, Rule 11, Civil Procedure Code, a certified copy of the decree must accompany the memorandum of appeal, did not make the appeal incompetent. It was held there that the defect could be removed even after the appeal had been admitted for hearing under Order 41, Rule 11. Civil Procedure Code.

50. These authorities were cited on the assumption that the memorandum of appeal, as filed in each case before the Assistant Commissioner, was really defective on account of a wrong statement in each memorandum. But, the petitioner also contends that the first statement, that no tax was admitted to be payable and that none was paid since the passing of the assessment order appealed against, was quite correct. It is explained that the petitioner meant that whatever was admitted to be due had been paid before the

[13] AIR 1957 SC 540 [15] AIR 1956 SC 367
[14] AIR 1956 SC 29 [16]AIR 1961 SC 832

assessment order so that nothing was payable after the assessment order and nothing was paid after it According to the petitioner, the amended statement merely clarified the position and stated what the admitted tax, which had already been paid before the assessment actually was. Therefore, the petitioner urged that there was no conflict at all between the two statements. It is the petitioner who could best explain the meanings of the two statements made by the petitioner on this matter at two different times. The explanation given appears to be quite satisfactory. The supposed amendment did not seek to introduce anything new or contradictory. A mere statement, in a memorandum of appeal, which is nothing more than a formal communication of some information which may be needed, should be capable of elucidation even at the stage of hearing of the appeal. The statement which the petitioner wanted to elucidate did not affect the maintainability of the appeals. Its elucidation, even by further evidence, which is permissible under Rule 68 (8), was possible as part of the right of hearing given to the appellant. Moreover Section 9 (5) of the Act confers the power upon the appellate authority specifically of admitting even time-barred appeals where sufficient cause for condonation of delay is shown as required by Section 5, Limitation Act. For all these reasons, the memoranda of appeals could not be rejected on the ground given by the Assistant Commissioner. The appellant could not be denied a decision on merits unless there was an incurable defect of such a character in the memoranda of appeals that it could be held that there were no appeals at all before the Assistant Commissioner.

51. The more important question about which the Assistant Commissioner of Sales Tax said nothing was whether the provisions of Rule 66 (2), set out above, had been complied with. Apparently, this rule has been made so as to give effect to a statutory obligation of the assessee to satisfy, the Court that the appeal is maintainable on a ground apart from either the form of the appeal or the merits of the questions raised by the appellant in the grounds of appeal. This statutory requirement is imposed by the first proviso to Section 9 (1) in the following terms :-

> "Provided that no appeal against an assessment shall be entertained unless it is accompanied by satisfactory proof of the payment of the amount of tax admitted by the appellant to be due, or of such installments thereof as may have become payable."

The proviso does restrict the right of appeal itself. In Laxmi Ratan Engineering Works' case, AIR 1968 Supreme Court 488 : (1968) 21 STC 154 (Supra), the Supreme Court dealt with what constitutes “entertaining" an appeal as contemplated by proviso to Section 9 (1) in the light of the decided cases interpreting such provisions. Their Lordships said :

> "In our opinion these cases have taken a correct view of the word “entertain" which according to Dictionary also means 'admit to consideration'. It would therefore, appear that the direction to the Court in the proviso to Section 9 is that the Court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax."

52. In this case, the Supreme Court also held that Rule 66 (2) was only directory and not mandatory. Thus the view expressed by a Division Bench of this Court in ***Swastika*** *Tannery of Jaimau v. Commr. of Sales Tax U. P., Lucknow*[17]*,* must be held to have been overruled by the Supreme Court in Laxmi Ratan Engineering Works' case (Supra). In other words, even if the memorandum of appeal is not accompanied by the challan showing deposits in the Treasury of the tax admitted by the appellant to be due or such installments thereof which might have become payable, satisfactory proof of it can be given afterwards before the appeal is actually heard. What is required is satisfactory proof, at the time of “entertainment" of the appeal, that the admitted tax has been paid. This “entertainment" may be either at the time of admission or at the hearing whenever it is taken up “for consideration". In the cases before us the appeals came up"for consideration" when arguments were heard by the Assistant Commissioner. At that time the mind of the appellate authority was applied to the relevant facts and considerations for the first time.

53. Although the proof of deposit of tax admitted to be due may be submitted before the hearing of the appeal and after its formal admission, yet, an appellant's right to be heard in appeal and the maintainability of the appeal are certainly curtailed by the first proviso to Section 9, sub-section (1). If this provision is not complied with, in the sense that the appellant does not give satisfactory proof of payment of the admitted amount of tax within the time given by law, an appeal has to be rejected on this ground. This is what a Full Bench of this Court held recently in *Janta Cycle Motor Mart V. Asst. Commr., Sales Tax*[18]*,* following the law declared by the Supreme Court in Laxmi Ratan Engineering Works' case, AIR 1968 Supreme Court 488 : (1968) 21 STC 154 (Supra). This question does not, therefore, require detailed consideration by us now.

54. Mr. K. N. Singh, the Chief Standing Counsel, appearing for the opposite parties, very rightly

and properly, conceded that the order of the Assistant Commissioner, Sales Tax, could not stand. He, however, prayed that the case should be sent back for a decision by the Assistant Commissioner, before hearing each appeal, whether the appeal was competent and could be heard in view of the first proviso to Section 9, sub-section (1) of the Act. If the admitted tax had not been paid within the time prescribed by law, the appeal itself would be incompetent and could be rejected even if wrongly admitted for hearing. Such a shortcoming would, unlike errors in drawing up the memorandum of appeal, affect the competence and maintainability of the appeal itself. Learned counsel for the petitioner, on the other hand, urged that it is more appropriate that we should quash the assessment order in each case as well as the order of the Assistant Commissioner so that fresh assessments may be made in the light of our decisions on the first of the two questions considered above.

55. Although the writ petitions were entertained against the assessment orders, the petitioner had already chosen an appropriate mode of redress and filed appeals before the Assistant Commissioner. The writ petitions were admitted because, inter alia, the assessee alleged that unreasonable terms had been imposed for stay of realisation of the whole tax assessed so that the petitioner's business was likely to be ruined. It was quite possible that the Assistant Commissioner, without considering the validity of the rule, may have placed the same interpretation on Rule 12-A as we have adopted in this case if merits of the appeals could nave been examined by the Assistant Commissioner. Moreover, the

[17](1963) 14 STC 518 (All)

[18]1968 All LJ 547 : (AIR 1969 All 200 (FB))

difficulty caused by the questions of law which arose having been removed by us now, it seems just and proper that the petitioner should be relegated to the remedy which the law provides under Section 9. sub-section (1) of the Act against any errors which may have been committed by the Sales Tax Officer on merits. There is no reason why the appeals, which would become pending appeals as soon as the orders of the Assistant Commissioner are quashed, should not be heard. In our opinion, the petitioner has not established any justice or equity for sending the cases back to the Sales Tax Officer. If we were to send them to the Sales Tax Officer, it may involve either unnecessary multiplicity of legal proceedings or helping the petitioner to overcome a legal obstacle in the way of the hearing of his appeals which may be there due to not depositing the tax admitted to be due. The petitioner had no sufficient ground to overlook such an obstacle. The provisions of the first proviso to Section 9 are quite clear on the requirements of law. It has been repeatedly held that equitable considerations, outside the statute, are not relevant in applying laws dealing with taxation.

56. For the reasons given above, the orders of the Asst. Commr., Sales Tax must be quashed and a direction must also issue so that the appeals pending before the Sales Tax Commissioner now may be heard and disposed of in accordance with law in the light of the questions decided above. The interim order must also be vacated in each case in view of the undertaking of the learned

counsel for the Opposite Parties that no further amounts of tax assessed for the three years will be realized from the petitioner until its appeals are disposed of by the Assistant Commissioner. The parties will bear their own costs.

57. BY THE COURT :- For the reasons set out in our respective judgments we allow the writ petitions in part and quash the orders of the Assistant Commissioner (Judicial) I, Sales Tax, Kanpur Range, Kanpur dated February 21, 1966 dismissing the appeals of the petitioner and direct him to hear them again and dispose them of in accordance with law. We also accept the undertaking given by the learned Chief Standing Counsel for the respondents that during the pendency of the aforesaid appeals the petitioner shall not be treated as being in default in respect of the balance of the sales tax assessed against it for the assessment years 1961-62, 1962-63 and 1963-64. The parties shall bear their own costs.

Petitions allowed in part.