

GAHC010071892019



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Revn.Pet. 1/2019**

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LIMITED, A COMPANY REGD  
UNDER THE COMPANIES ACT AND HAVING ITS REGD OFFICE AT S S  
ROAD, LAKHTOKIA, GUWAHATI- 1, REP. BY ONE OF ITS DIRECTORS MRS.  
AFROZA RAHMAN

VERSUS

1:THE STATE OF ASSAM AND 4 ORS  
REP. BY THE COMMISSIONER AND SECRETARY OF FINANCE DEPTT,  
DISPUR, ASSAM

2:THE COMMISSIONER OF TAXES  
ASSAM  
KAR BHAWAN  
G S ROAD  
DISPUR  
GUWAHATI

3:THE ADDITIONAL COMMISSIONER OF TAXES  
ASSAM KAR BHAWAN  
G S ROAD  
DISPUR  
GUWAHATI

4:THE DEPUTY COMMISSIONER OF TAXES (APPEALS)  
KAR BHAWAN  
G S ROAD  
DISPUR  
GUWAHATI

5:THE SUPERINTENDENT OF TAXES  
UNIT A  
KAR BHAWAN COMPLEX  
G S ROAD  
DISPUR  
GUWAHAT

**Advocate for the Petitioner** : MR. K N CHOUDHURY

**Advocate for the Respondent** : SC, FINANCE DEPTT.

Linked Case : Revn.Pet. 10/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD.  
A COMPANY REGISTERED UNDER THE COMPANIES ACT AND HAVING ITS  
REGISTERED OFFICE AT S.S. ROAD  
LAKHTOKIA  
GUWAHATI-1  
REP. BY ONE OF ITS DIRECTORS MRS. AFROZA RAHMAN.

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3:THE ADDL. COMM. OF TAXES  
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4:THE DEPUTY COMMISSIONER OF TAXES (APPEALS)  
KAR BHAWAN  
G.S. ROAD  
DISPUR  
GHY.

5:THE SUPERINTENDENT OF TAXES  
UNIT-A  
KAR BHAWAN COMPLEX  
G.S. ROAD  
DISPUR  
GHY.

Advocate for the Petitioner : MR. KAMAL NAYAN CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE DEPTT.

Linked Case : Revn.Pet. 2/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD. A COMPANY REGISTERED  
UNDER THE COMPANIES ACT AND HAVING ITS REGISTERED OFFICE AT  
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GUWAHATI-1  
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UNIT-A  
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G.S.ROAD  
DISPUR  
GUWAHATI

Advocate for the Petitioner : MR. K N CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE DEPTT.

Linked Case : Revn.Pet. 5/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD.  
A COMPANY REGISTERED UNDER THE COMPANIES ACT AND HAVING ITS  
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DISPUR  
GHY.

Advocate for the Petitioner : MR. KAMAL NAYAN CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE

Linked Case : Revn.Pet. 9/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD.  
A COMPANY REGISTERED UNDER THE COMPANIES ACT AND HAVING ITS  
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G.S. ROAD  
DISPUR  
GHY.

Advocate for the Petitioner : MR. KAMAL NAYAN CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE DEPTT.

Linked Case : Revn.Pet. 8/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD.  
A COMPANY REGISTERED UNDER THE COMPANIES ACT AND HAVING ITS  
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DISPUR  
GHY.

Advocate for the Petitioner : MR. KAMAL NAYAN CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE DEPTT.

Linked Case : Revn.Pet. 11/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD.  
A COMPANY REGISTERED UNDER THE COMPANIES ACT AND HAVING ITS  
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Advocate for the Petitioner : MR. KAMAL NAYAN CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE

Linked Case : Revn.Pet. 12/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD.  
A COMPANY REGISTERED UNDER THE COMPANIES ACT AND HAVING ITS  
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DISPUR  
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Advocate for the Petitioner : MR. KAMAL NAYAN CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE DEPTT.

Linked Case : Revn.Pet. 6/2019

1:THE DYNASTY  
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DISPUR  
GUWAHATI

Advocate for the Petitioner : MR. K N CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE DEPTT.

Linked Case : Revn.Pet. 3/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD.  
A COMPANY REGISTERED UNDER THE COMPANIES ACT AND HAVING ITS  
REGISTERED OFFICE AT S.S. ROAD  
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REP. BY ONE OF ITS DIRECTORS MRS. AFROZA RAHMAN.

VERSUS

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Advocate for the Petitioner : MR. KAMAL NAYAN CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE

Linked Case : Revn.Pet. 4/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD. A COMPANY REGISTERED  
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Advocate for the Petitioner : MR. K N CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE DEPTT.

Linked Case : Revn.Pet. 7/2019

1:THE DYNASTY  
A UNIT OF M/S RAHMAN PROPERTIES LTD.  
A COMPANY REGISTERED UNDER THE COMPANIES ACT AND HAVING ITS  
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Advocate for the Petitioner : MR. KAMAL NAYAN CHOUDHURY  
Advocate for the Respondent : SC  
FINANCE DEPTT.

**B E F O R E**  
**HON'BLE THE CHIEF JUSTICE MR. AJAI LAMBA**  
**HON'BLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

**Date : 20-03-2020**

**JUDGMENT & ORDER (CAV)**

*(A.M. Bujor Barua, J)*

Heard Mr. KN Choudhury, learned senior counsel for the petitioner. Also heard Mr. D Saikia, learned senior counsel for the respondent authorities in the Finance and Taxation Department to the Government of Assam.

2. The revision petitioner, The Dynasty, is a star hotel located at Guwahati and in course of their regular business make sale of certain taxable goods such as cooked food etc., and for the purpose is a registered dealer under the Assam General Sales Tax Act, 1993 (for short, the AGST Act).

3. The assessment orders dated 10.11.2006 were passed by the Superintendent of Taxes, Guwahati Unit-A by which a total of Rs.2,72,72,199/- was assessed to be tax due from the petitioner.

The assessment orders related to a period April, 2006 under the Assam Value Added Tax Act, 2006 (for short, AVAT Act) for Rs.2,28,424/-, out of which Rs.52,034/- was paid; for the period April, 2006 under the Assam Luxuries (Hotel and Lodging Houses and Hospitals) Act 1989 (for short, Luxuries Act) for Rs.3,86,020/-, out of which Rs.1,03,233/- was paid; for the period from October 2004 to March 2005 under the Luxuries Act for Rs.35,18,457/-, out of which Rs.4,00,951/- was paid; for the period May 2005 to 2006 under the AVAT Act for Rs.23,51,608/-, out of which Rs.3,59,942/- was paid; for the period from October 2003 to March 2004 under the Luxuries Act for Rs.34,65,241/-, out of which Rs.1,76,484/- was paid; for the period from 2003 to 2004 under the Assam General Sales Tax Act, 1993 (for short, AGST Act) for Rs.23,34,248/-, out of which Rs.1,34,829/- was paid; for the period from April 2004 to September 2004 under the Luxuries Act for Rs.36,50,134/-, out of which Rs.2,63,010/- was paid; for the period from 2004 to 2005 under the AGST Act for Rs.23,14,223/-, out of which Rs.1,70,241/- was paid; for the period from April 2003 to September 2003 under the

Luxuries Act for Rs.34,50,180/-, out of which Rs.1,58,662/- was paid; for the period from October 2005 to March 2006 under the Luxuries Act for Rs.24,02,084/-, out of which Rs.5,25,196/- was paid; for the period from April 2005 to September 2005 under the Luxuries Act for Rs.29,56,606/-, out of which Rs.4,13,227/- was paid; for the period April 2005 under the AGST Act for Rs.2,14,974/-, out of which Rs.12,727/- was paid. Accordingly as per the assessment orders dated 10.11.2006 out of the total amount of tax due i.e. Rs.2,72,72,199/-, an amount of Rs.27,70,536/- was paid.

4. The facts as well as the questions of law involved in all the revision petitions being the same, we propose to give a consideration to the revisions by a common judgment and order. For the purpose, we take note of the factual basis in Rev.Pet No.8/2019 and it is a categorical statement of the learned senior counsel for the parties that except for the assessment years and the statutes under which the assessments were made, the basic facts leading to the dispute as well as the provisions and questions of law involved are same in all the petitions.

5. Assessment orders dated 10.11.2006 of the Superintendent of Taxes, Guwahati Unit A were made under Section 17(5) of the AGST Act, Section 107(2)(e) of the AVAT Act and Section 3(1) of the Luxuries Act, respectively, by which it was assessed that the petitioner was liable to pay a total amount of tax amounting to Rs.2,72,72,199.

6. In the assessment order in Review Petition No.08/2019, it was stated that a surprise inspection was conducted in the premises of the petitioner on 15.05.2006 and accordingly a notice under Section 74(1) of the AVAT Act was served requiring the petitioner to produce certain books of account, records and documents related to his business. Thereafter, upon arriving at a satisfaction that there was an attempt to keep a substantial part of the sales of taxable goods unaccounted and thereby causing evasion of tax, a seizure was made of the books of account, records and documents so produced under Section 74(3)(a) of the AVAT Act. It was further stated in the order of 10.11.2006 that an affidavit dated 22.08.2006 was furnished by the Manager F&A of the petitioner hotel that the income statements based on which the alleged sales were worked out by the department do not belong to them and they are mere estimates collected by their sales man from different hotels for preparing a projected account required for submission to the financial institutions for their loan application for the purpose of development of the hotel. But the Superintendent of Taxes rejected such contention by arriving at its satisfaction that 'it was simply beyond any iota of rational doubt and the exhibits under seizure are full of such characteristics and matching details pertaining to the

business of the dealer’.

7. It is taken note of that some of the assessment orders dated 10.11.2006 were in respect of the assessment made under the Luxuries Act. In this respect we take note of the provisions of Sections 5(1) and 5(2) of the Luxuries Act which is extracted below:-

*“5. Taxing authorities and exercise of powers :- (1) Subject to the provisions of the Act and the rules made thereunder, the authorities competent to register, receive returns, assess or re-assess, recover and enforce payment of tax and imposed penalty under the Assam Value Added Tax Act, 2003 (Assam Act VIII of 2003), hereinafter referred to as VAT law, shall, within their local jurisdiction under the VAT law, be competent to register, receive returns, assess, re-assess, recover and enforce payment of tax including imposition of penalty due from any hotelier or proprietor whose place of business is located within such jurisdiction as if the tax were a tax under the VAT law and the hotelier or the proprietor was a dealer, within the meaning of the VAT law carrying on business within such jurisdiction and for this purpose they may exercise all or any of the powers conferred upon them by or under the Act.*

*(2) Subject to the provisions of this Act and rules made thereunder, the provisions relating to security, interest, assessments and re-assessments, recover of tax, interest, penalty or any other sum including special mode of recovery, first charge, period of limitation, refund, retention of accounts, requirement to provide information, transfer of liability of any firm or Hindu undivided family to pay tax in the event of dissolution of such firm or partition of such family, inspection, search and seizure, appeals, revisions, reverences, refunds, compounding of offences and treatment of documents furnished by dealer as confidential, of the Assam Value Added Tax Act, 2003 (Assam Act VIII of 2003) and the rules made thereunder, orders, notifications issued thereunder shall mutatis mutandis apply to a hotelier or a proprietor in respect of tax levied and payable under this Act, as if those provisions were mutatis mutandis incorporated in this Act and the rules framed and orders and notification issues under those provisions were mutatis mutandis issued under the relevant provisions so incorporated under this Act.”*

Section 5(1) and 5(2) of the Luxuries Act was amended by the Notification No.LGL.72/2004/87 dated 29.08.2009 as published in the Assam Gazette extra ordinary dated 29.08.2009.



The provision of Section 5 of the Luxuries Act prior to its amendment is extracted as under:-

*“5. Exercise of powers and authorities:- The authorities competent to assess, recover and enforce payment of tax under the Assam General Sales Tax Act, 1993, hereinafter referred to as the sales tax law, shall, within their local jurisdiction under the sales tax law, be competent to assess, recover and enforce payment of tax due from any hotelier whose place of business is located within such jurisdiction as if the tax were a tax under the sales tax law and the hotelier a dealer, within the meaning of the sales tax law, carrying on business within such jurisdiction and subject to the provisions of this Act and the rules, notifications and orders made thereunder, the said authorities, for this purpose, may exercise all or any of the powers they have under the sales tax law, and the provisions of the sales tax law, including provisions relating to inspections, assessment, registration of the transferee of a business, imposition of tax liability of a person carrying on business on the transferee of, or successor to, such business transfer of liability of any firm or Hindu undivided family to pay tax in the event of dissolution of such firm or partition of such family, appeals, revisions, references, refunds, rebates, payment of interest compounding of offences and treatment of documents furnished by dealer as confidential, shall mutatis mutandis apply accordingly.”*

From a reading of the provisions of Section 5 prior to its amendment as well as Sections 5(1) and 5(2) subsequent to the amendment, it is discernible that all the powers exercisable by the various authorities under the AGST Act as well as the provisions for appeals, revisions etc, under the AGST Act would also mutatis mutandis be applicable in respect of an assessment and proceeding under the Luxuries Act in respect of such assessment orders which are of the period when the AGST Act was in force. Similarly all the powers exercisable by the various authorities under the AVAT Act as well as the provision for appeals, revision etc under the AVAT Act would also mutatis mutandis be applicable in respect of an assessment and proceeding under the Luxuries Act in respect of such assessment orders which are of the period when the AVAT Act has been in force.

8. The orders of the Superintendent of Taxes were assailed by the petitioner under Section 34(1) of the AGST Act or Section 79(1) of the AVAT Act, as the case may be depending upon the Act which were in force when the assessments were made for the respective years. The Deputy Commissioner

of Taxes (Appeals) being the appellate authority under the two statutes by the common order dated 29.01.2015 interfered with the respective assessment orders and directed the Assessing Officer to reframe the assessments as indicated therein.

9. The appellate authority in the order dated 29.01.2015 arrived at its satisfaction that although the seized documents were found in the business premises of the petitioner but no documents being bills or invoices related to any customer have been produced to support a nexus between the seized documents and the actual transactions that may have been carried out in the petitioner hotel and that a strong suspicion, strange coincidences or grave doubts cannot take the place of a legally acceptable proof to establish the charges against the petitioner. A question was also raised by the appellate authority as to why the Assessment Officer had not accepted the daily report of occupancy sent to the police in respect of the hotel, which were verified and accepted by the police. A doubt had also arisen in the mind of the appellate authority as to how it would be possible in a hotel business to have almost a 10 times increase in the turnover for a couple of assessment years as compared to the previous and subsequent years. By arriving at such satisfaction, the appellate authority was of the view that the orders of assessment were not sustainable.

10. The Additional Commissioner, Taxes, Assam in exercise of the power under Section 36(1) of the AGST Act, or under Section 82(1) of the AVAT Act, as the case may be, passed the common order dated 28.10.2015 by which the order dated 29.01.2015 of the appellate authority being the Deputy Commissioner of Taxes (Appeals) was quashed and the assessment orders dated 10.11.2006 of the Assessing Officer were restored.

The Additional Commissioner of Taxes in the order of 28.10.2015 was of the view that the appellate authority had gullibly accepted the contention of the petitioner that the occupancy figures of the hotel presented to the police authorities does not match with the sales turnover indicated by the seized documents and therefore are to be not accepted and raised a question as to if the petitioner can suppress the figures of the sales turnover in the returns submitted to the department, they could very well have submitted a matching report to the police authorities. The acceptance of the appellate authority as to how it would be possible to have a turnover of almost ten times for a couple of assessment years as compared to the previous or subsequent years was found by the Assistant Commissioner of Taxes to be a perverse and malafide logical conclusion. The Assistant Commissioner of Taxes by following the pronouncement in *VK Uchal Vs. Commissioner of Taxes, Mysore*, reported in

(1967) 20 STC 67 was of the view that impropriety can be said to have arisen where a decision is not based on evidence or is devoid of any such evidence and a reading of the order reveals that the decision was not based upon the materials upon which it was proceeded. A view was taken that if there is a lack of sufficient correlation between the evidence and the decision, it would constitute a source of impropriety. Accordingly, a conclusion was arrived that the order dated 29.01.2015 of the Deputy Commissioner of Taxes (Appeals) was found to be vitiated by errors of immense magnitude both in law and facts and, thereby causing grave prejudice to the interest of revenue where taxes legally due as per the seized documents were ignored. By arriving at such conclusion the Assistant Commissioner of Taxes was of the view that the circumstances justify the invocation of the revisional power under Sections 34(1) of the AGST Act and 82(1) of the AVAT Act, respectively.

11. Being aggrieved, the petitioner preferred an appeal before the Assam Board of Revenue, which under the statutes is to be construed to be the Appellate Tribunal for the purpose and the appeal was numbered as Cases No.4 to 15 STA/2016.

12. By the common judgment dated 30.01.2019, a final consideration was given in Cases No.4 to 15 STA/2010 and the appeal of the petitioner stood dismissed on the ground that they had failed to bring in any evidence that the information contained in the seized documents were of some other hotels obtained for the purpose of making a sales projection before the financial institution for availing a loan for developing the hotel. Apart from the affidavit by the Manager, F&A, wherein the stand was taken, no evidence was brought either in respect of which hotel the seized documents were related nor any evidence in respect of any prospective communication with the financial institutions as regards the availing a loan by the petitioner. On the question of maintainability of a suo moto revision under Sections 34(1) of the AGST Act and 82(1) of the AVAT Act, the judgment refers to the contention of the petitioner that against the order of the Deputy Commissioner of Taxes (Appeals) dated 21.09.2015, the remedy before the department was to file an appeal before the Assam Board of Revenue under Section 33(2)(b) of the AGST Act. The said contention of the petitioner was rejected by the Assam Board of Revenue by taking the view that the appellate provision under Section 32(2)(b) of the AGST Act would be against the order of the Commissioner alone and not against the order of the Deputy Commissioner.

13. Being aggrieved by the judgment dated 30.01.2019 of the Assam Board of Revenue, the revision petitions are being preferred under Section 35(1) of the AGST Act and Section 81(1) of the AVAT Act, respectively.

14. Mr. KN Choudhury, learned senior counsel for the revision petitioner raises the contention that the learned Assam Board of Revenue had erred in arriving at its conclusion that under Section 33(2) (b) of the AGST Act an appeal is maintainable only against an order of the Commissioner of Taxes and not that of the Deputy Commissioner of Taxes (Appeals) and that as Section 33 (2) (b) of the AGST Act provides for an appeal by the Commissioner before the appellate tribunal against an order by the appellate authority, therefore a suo-moto revision would not be maintainable under Section 36(1). The other contention raised by Mr. KN Choudhury is that the power of the Commissioner to exercise the suo moto power of revision under Sections 36(1) of the AGST Act and 82(1) of the AVAT Act are circumscribed and subjected to the satisfaction of the existence of the circumstances referred therein and in the instant case, the circumstances referred in the said two provisions for a suo moto revision are not satisfied. A contention is also raised that the view taken by the learned Assam Board of Revenue as regards the requirement of further evidence as to which hotel the information contained in the seized documents belonged and with regard to any communication from the financial institution as regards the prospective loan to be obtained by the petitioner, for which the information contained in the seized document were required for making a projection, was erroneous and extraneous to the issues at hand before the learned Board.

15. Mr. D Saikia, learned senior counsel for the respondent Finance and Taxation Department, on the other hand, contends that the suo moto power of revision exercised by the Additional Commissioner of Taxes in the order dated 28.10.2015 under Section 36(1) of the AGST Act and Section 82(1) of the AVAT Act was made upon a satisfaction that the circumstances provided in the aforesaid provisions for exercising the suo moto power of revision do exist in the instant case. As regards the contention of the petitioner that the learned Assam Board of Revenue had erred in arriving at its conclusion that further evidence was required as to which hotel the information contained in the seized documents belonged to, as well as the relevant communication with the financial institution as regards the proposed loan to be advanced to the petitioner necessitating the information in the seized document to make a sales projection, Mr. Saikia contends that they were germane and relevant to the issues involved.

16. Mr. KN Choudhury, learned senior counsel for the petitioner relies upon pronouncement of a Division Bench of this Court in *Shri Rajendra Singh & Ors. –vs- The Superintendent of Taxes & Ors.* reported in 1990 1 GLR 449, to substantiate his submission that the suo-moto power of revision under Sections 36 (1) of the AGST Act and 82 (1) of the AVAT Act is circumscribed and in order to enable the Commissioner to exercise the power of suo-moto revision, the two circumstances must exist, i.e. (i) the order is erroneous and (ii) the erroneous order has caused a prejudice to the interest of the revenue.

17. Further reliance has been placed by Mr. KN Choudhury on the pronouncement of the Supreme Court in *Malabar Industrial Co. Ltd. –vs- Commissioner of Income Tax, Kerala State* reported in (2000) 2 SCC 718 to substantiate his submission as to what would constitute an 'erroneous order' and also 'prejudicial to the interests of the revenue'.

18. Reliance has also been placed on the pronouncement of this Court in *Santalal Mehendi Ratta – vs- Commissioner of Taxes & Ors.* reported in 2002 (2) GLT 262 to substantiate his submission that an erroneous order cannot be equated with a wrong order as understood in common parlance and an order of assessment passed within the limits of jurisdiction of the assessing authority even if considered wrong by the revisional authority would not attract the exercise of suo-moto revisional power.

19. By relying on the aforesaid two pronouncements, Mr. KN Choudhury, learned Senior Counsel submits that the order dated 29.01.2015 of the appellate authority were neither an 'erroneous order' nor prejudicial to the interests of the revenue' and therefore the two circumstances required to exist in order to exercise a suo-moto power of revision were non-existent in the present case and hence the order dated 28.10.2015 of the Additional Commissioner of Taxes, Assam suffers from jurisdictional infirmity.

20. *Per-contra* Mr. D Saikia, learned senior counsel for the respondent authorities also relies upon the pronouncement of this court in *Shri Rajendra Singh* (supra) and also the pronouncement of the

Supreme Court in *Malabar Industrial Co. Ltd* (supra) to substantiate his submission that the requirement of the order being an 'erroneous order' and 'prejudicial to the interests of the revenue' has been satisfied in the instant case so as to enable the Assistant Commissioner of Taxes to invoke the suo-moto revisional power under Sections 36 (1) of the AGST Act and 82 (1) of the AVAT Act.

Against the reliance of Mr. KN Choudhury, learned senior counsel for the petitioner on the pronouncement of this Court in *Santalal Mehendi Ratta* (supra) to substantiate that an erroneous order cannot be equated with a wrong order and an order of assessment passed within the limits of the jurisdiction of the assessing authority even if considered to be wrong by the revisional authority would not attract the exercise the suo-moto revisional power, Mr. D Saikia, learned senior counsel for the respondent authorities refers to a view taken by the Madras High Court in *Venkatakrishna Rice Co.-Vs. CIT* reported in (1987) 163 ITR 129 (Mad) that there must be a grievous error in the order of the assessing authority which may set a bad trend or pattern for similar assessments in order to be prejudicial to the interest of the revenue, but such view taken was rejected by the Supreme Court in *Malabar Industrial Co. Ltd* (supra) by expressing the view that the interpretation is too narrow to merit acceptance.

21. In the instant case, the assessing authority in the assessment orders dated 10.11.2006 had imposed the taxes on the petitioner by arriving at its satisfaction that the seized documents reveals a concealment of the sales undertaken by the petitioner hotel. The appellate authority in the order dated 29.01.2015 was of the view that the return submitted by the petitioner assessee did conform to the occupancy rate of the hotel as submitted to the police authorities and further the petitioner assessee having taken a stand that the information contained in the seized documents pertain to some other hotel, which was obtained for the purpose of formulating a projected turnover to be presented to the financial institutions for availing a loan and therefore could not have been taken into consideration to arrive at the sales turnover of the petitioner. The revisional order of the Additional Commissioner of Taxes of 28.10.2015 leading to the judgment of the learned Assam Board of Revenue dated 30.01.2019 on the other hand proceeded on the premises that in the absence of any further evidence being led by the petitioner assessee, more particularly as to which hotel the information contained in the seized documents related to and there being no materials produced regarding any loan being negotiated with the financial institutions, a mere statement that that information contained in the seized documents related to some other hotel and was obtained for the purpose of projecting a

sales turnover for the purpose of availing a loan, would be unacceptable.

22. Considering the view taken by the appellate authority as regards the acceptance of the seized documents for the purpose of the assessments made and the view taken by the revisional authority and the learned Assam Board of Revenue that the petitioner assessee failed to provide the required evidence to arrive at a conclusion that the information contained in the seized documents were related to some other hotel and were procured for the purpose of making a sale projection, we are required to examine whether the view taken by the appellate authority in the order dated 29.01.2015 can be termed to be 'erroneous order' and 'prejudicial to the interests of the revenue'.

23. In Rajendra Singh (supra) in paragraphs 9, 10 and 12, it had been held as follows:

*“9. The power of suo motu revision under Sub-section (1) is in the nature of supervisory jurisdiction and the same can be exercised only if the circumstances specified therein exist. Two circumstances must exist to enable the Commissioner to exercise power of suo motu revision under this sub-section, (i) the order is erroneous ; (ii) by virtue of the order being erroneous prejudice has been caused to the interest of the revenue. It is not sufficient that the order is erroneous. It must be erroneous and also prejudicial to the interest of the revenue. If an order is erroneous but not prejudicial to the revenue, the Commissioner cannot exercise power under this sub-section. Likewise, it is not sufficient to exercise power under Section 21(1) that the order in question is prejudicial to the interest of the revenue. It must be erroneous first and if it is so then it can be revised in so far as it is prejudicial to the interest of the revenue. It has, therefore, to be considered firstly as to when an order can be said to be erroneous. We find that the expressions "erroneous", "erroneous assessment" and "erroneous judgment" have been defined in Black's Law Dictionary. According to definition "erroneous" means "involving error ; deviating from the law". "Erroneous assessment" refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officer in fixing the amount of valuation of the property. Similarly "erroneous judgment" means : "One rendered according to course and practice of court, but contrary to law, upon mistaken view of law, or upon erroneous application of legal principles".*

*“10. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an officer acting in accordance with law makes certain assessment and determines the turnover of a dealer, the same cannot be branded as erroneous by the Commissioner simply because according to him the order should have been written more elaborately. This section does not visualise a case of substitution of judgment of the Commissioner for that of the officer, who passed the order, unless the decision of the subordinate officer is held to be erroneous. Cases may be visualised where assessing officer while making an assessment examines the accounts, makes his enquiries, applies his mind to the facts and circumstances of*



*the case and determines the turnover either by accepting the accounts or by making some estimates himself. The Commissioner on perusal of the records may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the turnover at a higher figure than the one determined by the assessing officer. That would not vest the Commissioner with power to re-examine the accounts and determine the turnover himself at a higher figure. It is because the officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interest of the revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, namely, that the order is erroneous, is absent. Similarly if an order is erroneous but not prejudicial to the interest of the revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed."*

*"12. We, therefore, hold that in order to exercise power under Sub-section (1) of Section 21 of the Act there must be material before the Commissioner to consider that the order passed by the officer was erroneous in so far as it was prejudicial to the interest of the revenue. We have already held what is erroneous. It must be an order which is not in accordance with the law or which has been passed by the authority without making any enquiry in undue haste. We have also held as to what is prejudicial to the interest of the revenue. An order can be said to be prejudicial to the interest of the revenue if it is not in accordance with the law in consequence whereof the lawful revenue due to the State has not been realised or cannot be realised. There must be material available on record called for by the Commissioner to satisfy him prima facie that the aforesaid two requisites are present. If not, he has no authority to initiate proceedings for revision. Exercise of power of suo motu revision under such circumstances will amount to arbitrary exercise of power. It is well-settled that when exercise of statutory power is dependent upon the existence of certain objective facts, the authority before exercising such power must have materials on records to satisfy it in that regard. If the action of the authority is challenged before the court it would be open to the courts to examine whether the relevant objective factors are available from the records called for and examined by such authority. Our aforesaid conclusion gets full support from a decision of Sabyasachi Mukharji, J. in [Russell Properties Pvt. Ltd. v. A. Chowdhury, Addl. Commissioner of Income-tax \[1977\] 109 ITR 229 \(Cal\)](#). In our opinion any other view in the matter will amount to giving unbridled and arbitrary power to revising authority to initiate proceedings for revision in every case and start re-examination and fresh enquiries in matters which have already been concluded under the law. As already stated it is quasi-judicial power hedged with limitation and has to be exercised subject to the same and within its scope and ambit. So far as calling for the records and examining the same is concerned, undoubtedly it is an administrative act, but on examination "to consider" or in other words, to form an opinion that the particular order is erroneous in so far as it is prejudicial to the interest of the revenue, is a quasi-judicial act because on this consideration or opinion the*



*whole machinery of re-examination and reconsideration of an order of assessment, which has already been concluded and set at rest, is set in motion. It is an important decision and the same cannot be based on the whims or caprice of the revising authority. There must be materials available from records called for by the Commissioner."*

24. In Malabar Industrial Co.Ltd (supra), in paragraphs 7 and 10, it had been held as follows:

*"7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind."*

*"10. The phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue."*

25. Although in Sri Rajendra Singh (supra), a Division Bench of this court had held that for an order to be an erroneous order, it must be an order which is not in accordance with law or which has been passed by the authority without making an enquiry in undue haste, but in Malabar Industrial Co. Ltd. (supra) the Supreme Court had provided that even an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous.

26. From the point of view whether there was any incorrect assumption of facts or incorrect application of law by the appellate authority in respect of the seized documents, we take note of that the appellate authority had rejected the seized documents by accepting the statement of the Manager (F & A) of the petitioner assessee that the information contained therein relates to some other hotel and were obtained for the purpose of making a sales projection of the hotel before a financial institution. No further evidence had been brought in by the petitioner assessee that the information

contained in the seized documents were of some other hotel and if yes, as to of which hotel, nor any evidence had been brought in that it was used for the purpose for making a sales projection before any financial institution for obtaining a loan. The appellate authority had taken an assumption that the return submitted by the petitioner assessee conform to the occupancy rate of the hotel submitted to the police authority. We also take note of that the appellate authority had not arrived at any correlation between the occupancy rate of the hotel and the sales turnover in respect of the sale of taxable goods such as cooked food etc., which was the subject matter of the tax imposed by the assessing authority. Further, it being the stated stand of the petitioner assessee that the information contained in the seized documents were of some other hotel and were procured for the purpose of making a sales projection to a financial institution for the purpose of availing a loan, the burden of proof that it was so would be on the petitioner assessee, but no material is available that they had discharged such burden. Merely because a stand was taken by the assessee, the burden of proof would not shift to the department. In such view, it would have to be construed that there was an incorrect assumption of facts by the appellate authority.

27. The phrase 'prejudicial to the interests of the revenue' has been interpreted by the Supreme Court in Malabar Industrial Co. Ltd. (supra) to mean that where two views are possible and the assessing authority has taken one view to which the appellate authority do not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue, unless the view of the assessing authority is unsustainable in law or a sum not earned by a person is assessed as income in his hands. In other words if an income not earned or a sales not made is included for the purpose of imposing a tax, such order would be erroneous and prejudicial to the interests of the revenue. As a corollary if an income earned or a sales made is not submitted in the returns but, the documents relied upon by the assessing authority shows such income earned or sales made and such documents have incorrectly been rejected by the appellate authority on an incorrect assumption of facts or incorrect application of law, such incorrect rejection by the appellate authority would be prejudicial to the interests of the revenue.

28. In the circumstance, a considered view would be that there was an incorrect assumption of facts by the appellate authority in the order dated 29.01.2015 as well as an incorrect application of law, and therefore the order 29.01.2015 would be an erroneous order and also it would be prejudicial to the interests of the revenue.

29. In view of such conclusion arrived, the two circumstances required to exist for the purpose of invoking the suo-moto revisional power under Sections 36 (1) of the AGST Act and 82 (1) of the AVAT Act are present in the instant case and therefore we do not find any infirmity in the exercise of any suo-moto power by the Addl. Commissioner of Taxes in the order 28.10.2015.

30. As regards the other contention of Mr. KN Choudhury, learned senior counsel for the petitioner that a suo-moto power of revision under Section 36(1) of the AGST Act would not be maintainable in view of the provision of an appeal in the Appellate Tribunal by the Commissioner against an order of the appellate authority, said question can be answered from the provisions of Section 33(2)(b) and Section 36 (1) of the AGST Act.

31. In *Commissioner of Sales Tax, Orissa & anr. –vs- Halari Store* reported in (1997) 7 SCC 715, the Supreme Court in paragraph-10 has held as follows:

*“10. A perusal of the aforesaid provisions shows that Section 23 of the Act deals with appeals and revision. Sub-section (1) thereof provides that any dealer or person may prefer an appeal against the order of assessment or an order directing payment of interest or an order imposing penalty. Sub-section (2) of Section 23 deals with power of appellate authority in disposing of appeals preferred under Sub-section (1). Sub-section (3)(a) deals with second appeal which enables any dealer or State Government, as the case may be, to prefer appeal to the State Sales Tax Tribunal against the appellate order. Section 23 (4)(a) deals with the revisional power of the Commissioner of Sales Tax, which may be either suo motu or at the instance of a dealer or person against any order passed under the Act. The question, therefore, which requires consideration is whether an appellate order passed under Sub-section (2) of Section 23 of the Act comes within the ambit of the expression "any order made under the Act" occurring in Section 23(4)(a) of the Act. The language used in Section 23(4)(a) is plain, simple and there is no ambiguity in it. A plain reading of Section 23(4)(a) shows that the expression "any order made under the Act" is of a wide connotation and it includes an assessment order as well as an appellate order passed under the Act. This construction placed on the said expression neither runs contrary to the scheme envisaged in Section 23 of the Act nor it leads to any undesirable consequences, as observed by the High Court. We are, therefore, of the opinion that under Section 23(4)(a) of the Act, the Commissioner on his own motion can revise any order, including an appellate order made under the Act or the Rules by a person other than the tribunal or additional tribunal.”*

32. In *Halari Store* (supra), the relevant provision of the Act under consideration being Section

23(3) (a) provided that the State Government if dissatisfied with an appellate order may prefer an appeal in the prescribed manner to the tribunal whereas Section 23 (4) (a) provided that for reasons to be recorded in writing the Commissioner may even on his own motion revise any order made under the Act or the Rules made thereunder by any person other than the tribunal.

33. The Supreme Court by giving emphasis on the expression 'any order made under the Act' occurring in Section 23 (4) (a) of the Act under consideration was of the view that the said expression is of a wide connotation and includes an assessment order as well as appellate order and therefore the Commissioner on his own motion may revise any order, including an appellate order, other than an order of the tribunal.

34. In the instant case also, under Sections 36(1) of the AGST Act and 82(1) AVAT Act, the same expressions 'any order passed therein by any person' and 'any order passed by any authority subordinate to him' respectively are also provided for. Accordingly, Sections 36(1) of the AGST Act and 82(1) of the AVAT Act being *parimateria* with Section 23(4)(a) of the Act under consideration before the Supreme Court, the interpretation given by the Supreme Court would also be applicable in respect of Sections 36(1) of the AGST Act and 82(1) of the AVAT Act and the appellate order can be subjected to a suo-moto revision.

The Act under consideration before the Supreme Court, Section 23(3)(a) also provided for the State Government to file appeal before the tribunal against the order of the appellate authority. In spite of the provision of Section 23(3)(a) for an appeal before the tribunal, no interpretation had been given by the Supreme Court that in view of a provision for an appeal by the State Government against the appellate order, a suo-moto revisional power under Section 23(4)(a) would not be available.

35. Further to arrive at an adjudication as to whether the provision for an appeal by the Commissioner under Section 33(2)(b) of the AGST Act would also by implication mean that the Commissioner would invariably have to resort to preferring an appeal rather than invoking the suo-moto revisional power under Section 36(1) of the AGST Act, for the purpose, we look into the provisions of Sections 33(2)(b) and 36(1) of the AGST Act, which are extracted below:-

*“33(2)(b) By a dealer or a person or the Commissioner aggrieved by any final*

*order passed in Appellate Authority insofar as such order relates to the assessment of turnover or the tax payable or to the imposition of any penalty under this Act, within sixty days from the date on which such order was served on him.*

*36(1) 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 sub-section (1) of section 3 to assist him is erroneous insofar as it is prejudicial to the interests of the Revenue, he may, after giving the dealer or the person to whom the order relates an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order as the circumstances of the case justify, including an order enhancing or modifying the assessment of tax or penalty or cancelling such order and directing that a fresh order should be made:*

*Provided that no order under this sub-section shall be made after the expiry of eight years from the end of the financial year in which the order sought to be revised was made.*

*Explanation: The provisions of this sub-section shall apply, notwithstanding that the order sought to be revised has been made the subject of any proceeding by way of appeal, in respect of matters not actually considered and decided in such proceedings."*

36. Section 33(2)(v) of the AGST Act provides for an appeal to the Tribunal by the Commissioner, who may be aggrieved by any final order passed by an appellate authority insofar as such order relates to the assessment of turnover or the tax payable or the imposition of any penalty under the Act. Although on the other, hand as already discussed hereinabove, the suo-moto revisional power under Section 36(1) can be exercised by the Commissioner upon the existence of the two conditions that the order is erroneous and it is prejudicial to the interest of the revenue and although, the expression 'order relates to the assessment of turnover or tax payable, is a more broad based expression, which would include any issue or any infirmity in the order relating to the assessment of turnover or the tax payable, which again would also include an order that may be erroneous or prejudicial to the interest of the revenue, and therefore, would be appealable by the Commissioner before the Appellate Tribunal, but again Section 36(1) gives the discretion to the Commissioner to suo-moto revise such order, but subject to it being circumscribed that the order so revised, is erroneous and prejudicial to the interest of the revenue. In other words, if an order is erroneous and

prejudicial to the interest of the revenue in respect of any order passed by any person appointed under Section 3(1) of the Act, the Commissioner is provided with the discretion that a suo-moto revision may also be under taken to remedy the error or the prejudice caused to the revenue. The Statue having provided two alternative options to the Commissioner, it would be left to the discretion of the Commissioner to exercise either of the two options and not be limited to exercise only the option of an appeal under Section 33(2)(b) of the AGST Act, provided the two conditions of Section 36(1) are satisfied.

37 In view of such conclusion, we are of the view that the contention of the petitioner assessee that in view of the provisions of Section 33(2)(b), providing for an appeal by the Commissioner against the appellate order, the suo-moto power of revision against such appellate order would not be maintainable, is liable to be rejected.

38. As regards the further contention of Mr. KN Choudhury, learned senior counsel for the petitioner that the view taken by the Assam Board of Revenue regarding the requirement of further evidence as regards the hotel to which the information contained in the seized documents belonged to and that no communication was made available from the financial institution as regards the loan to be obtained by the petitioner assessee, was erroneous and extraneous to the issues at hand, we are of the view that it was a possible view taken by the appellate tribunal and therefore in the absence of any projection as to why the view taken by the appellate tribunal was erroneous or extraneous to the issues at hand, no interference is called for against such view taken. Further, the conclusions arrived at in paragraphs 26 herein above would also be relevant to arrive at a conclusion that the view taken by the Assam Board of Revenue in its judgment dated 30.01.2019 cannot be said to be a view not possible in the facts and circumstances of the present case. By following the principle that if two views are possible, an interference by an appellate or a revisional court would be unwarranted merely because the other view appears to be more attractive, we are of the view that no interference is required in the judgment dated 30.01.2019 of the Assam Board of Revenue in respect of the view taken that further evidences were required to have been provided by the petitioner assessee as regards the stand taken that the information contained in the seized documents were related to some other hotel and that they were procured to arrive at a projection of sales of the petitioner hotel for the purpose of obtaining loan from financial institution.

39. In view of the above conclusions arrived at, no interference of the judgment dated 30.01.2019 of the Assam Board of Revenue in Cases No. 4 to 15 STA/2016 is required and the revision petitions are accordingly dismissed.

40. Send back the LCR.

**JUDGE**

**CHIEF JUSTICE**

**Comparing Assistant**