

Santoshi Tel Utpadak Kendra

Vs

Deputy Commissioner of Sales Tax and Another

Civil Appeal No. 1968 of 1978

(P.N. Bhagwati, R.S. Pathak JJ)

24.07.1981

JUDGMENT

PATHAK, J. –

1. This appeal by special leave raises the important question whether the Commissioner of Sales Tax can revise under clause (a) of sub-section (1) of Section 57 of the Bombay Sales Tax Act, 1959, an appellate order passed by the Assistant Commissioner when the assessee's second appeal against that order is pending before the Maharashtra Sales Tax Tribunal.

2. The appellant is a partnership firm, carrying on the business of manufacturing and selling vegetable oil. The Sales Tax Officer estimated the turn over for the calendar year 1971 and made an order dated March 26, 1973 levying Sales Tax at Rs. 73,198.62 and a penalty of Rs. 36,197.64. On the same date, another assessment order was made for the first six months of the year 1972, where again on the basis of an estimate the Sales Tax Officer computed the tax at Rs. 81,745.71 and levied a penalty of Rs. 37,572.26. The two assessment orders were apparently made under Section 33 of the Bombay Sales Tax Act, 1959. Against the assessment and penalty orders for the two periods, the appellant appealed under clause (a) of sub-section (1) of Section 55 of the Act to the Assistant Commissioner. By a common order dated September 29, 1973, the Assistant Commissioner reduced the quantum of the turn over and, consequently, the tax liability to Rs. 30,494.67 and the penalty to Rs. 11,745.71 for the first period and a tax liability of Rs. 16,447.33 and penalty of Rs. 5,572.26 for the second period. Not fully satisfied by the relief granted, the appellant proceeded in second appeal to Maharashtra Sales Tax Tribunal on December 8, 1973. During the pendency of the appeals before the Tribunal, the Deputy Commissioner, Nagpur issued two notices to the appellant on April 24, 1974 requiring it to show cause why the appellate orders dated September 29, 1973 passed by the Assistant Commissioner should not be revised under Section 57 of the Act. The appellant objected to the exercise of revisional power by the Deputy Commissioner during the pendency of the appeals before the Tribunal. On September 12, 1975 the Deputy Commissioner rejected the objection. Against the order of rejection the appellant filed two appeals before the Tribunal, and by its order dated October 27, 1977 the Tribunal dismissed the appeals. At the same time, the Tribunal adjourned the two second appeals filed by the appellant against the appellate orders dated September 29, 1973 passed by the Assistant Commissioner. The Tribunal took the view that its deciding those appeals would result in nullifying the revisional power vested in the Deputy Commissioner.

3. The appellant filed a writ petition in the High Court of Bombay against the order of the Deputy Commissioner dated September 12, 1975 rejecting its preliminary objection and also against the order passed by the Tribunal on October 27, 1977 dismissing his appeals, as well as the notices

issued by the Deputy Commissioner on April 24, 1974 in the purported exercise of his revisional power.

4. The only point pressed by the appellant before the High Court was that the Commissioner of Sales Tax could not exercise his revisional power against the appellate order of the Assistant Commissioner when a second appeal against that order was pending before the Tribunal. The High Court turned down the plea by its order dated July 5, 1978, observing that it was always open to the Commissioner to interfere in revision with an order prejudicial to the Revenue notwithstanding that such order may be already under appeal before the Tribunal. The High Court felt compelled to take this view because, in its opinion, the statute did not provide any other forum or jurisdiction for protecting the interests of the Revenue. It relied on its earlier judgment in *C.S.T. v. Motor and Machinery Manufacturers Ltd.* ((1976) 38 STC 78 (Bom)), and also sought support from the observations of this Court in *C.I.T. v. Amritlal Bhogilal* ((1958) 34 ITR 130 : 1959 SCR 713). It spoke further of "the anomaly of overlapping jurisdiction" between the Commissioner and the Tribunal, and referred with approval to an earlier decision of the High Court in *H.B. Munshi v. Oriental Rubber Industries Pvt. Ltd.* ((1974) 34 STC 113 (Bom)).

5. An assessment order under the Bombay Sales Tax Act is appealable under Section 55 of the Act, and we may mention only that when the order is made by the Sales Tax Officer an appeal lies to the Assistant Commissioner, if the order is made by the Assistant Commissioner an appeal goes to the Commissioner and if it has been made by the Commissioner (or Deputy Commissioner or Additional Commissioner) an appeal lies before the Tribunal. Sub-section (2) of Section 55 provides for a second appeal against the appellate order of the Assistant Commissioner. The second appeal lies at the option of the appellant, to the Commissioner or the Tribunal. The Tribunal, if it will be noticed, exercises appellate jurisdiction by way of second appeal in respect of an assessment order made by the Sales Tax Officer. It also exercises, by way of first appeal, appellate jurisdiction over an assessment order made by the Commissioner. It is at the apex of the appellate hierarchy, the Sales Tax Officer, the Assistant Commissioner and the Commissioner all of them being, therefore, subordinate to it.

6. Section 57 of the Act provides for revisional jurisdiction.

57(1). Subject to the provisions of Section 56 and to any rules which may be made in this behalf :-

(a) the Commissioner may, of his own motion, call for and examine the record of any order passed (including an order passed in appeal) under this Act or the rules made thereunder by any officer or person subordinate to him, and pass such order thereon as he thinks just and proper :

Provided that, no notice in the prescribed form shall be served by the Commissioner under this clause after the expiry of three years from the date of the communication of the order sought to be revised, and no order in revision shall be made by him hereunder after the expiry of five years from such date;

(b) the Tribunal, on application made to it against an order of the Commissioner (not being an order passed under sub-section (2) of Section 55 in second appeal) within four months from the date record of the communication of the order, may call for and examine the record of any such order, and pass such order thereon as it thinks just

and proper.

7. It will be noticed that while the Commissioner exercises revisional jurisdiction over an order passed by the officer or person subordinate to him, the Tribunal is the revisional authority over an order of the Commissioner (not being an order passed by the Commissioner disposing of a second appeal). The Act thus constitutes the Tribunal an appellate as well as a revisional authority over the Commissioner. Plainly, therefore, in quasi-judicial matters the Commissioner is subordinate to the Tribunal.

8. Now it seems to us past question that when the appellate jurisdiction of superior authority is invoked against an order and that authority is seized of the case, it is inconceivable for a subordinate authority to claim to exercise jurisdiction to revise that very order. The Tribunal is the supreme appellate and revisional authority under the statute. It cannot be diverted of its jurisdiction to decide on the correctness of an order, it cannot be frustrated in the exercise of that jurisdiction, merely because a subordinate authority, the Commissioner, has also been vested with jurisdiction over the order. Unless the statute plainly provides to the contrary, that appears to us to be incontrovertible. It is not open to the Commissioner to invoke his power under clause (a) of sub-section (1) of Section 57 and summon the record of an order over which the Tribunal has already assumed appellate jurisdiction. The subordinate status of the Commissioner precludes that.

9. The High Court felt burdened by the compulsion that unless a contemporaneous exercise of concurrent jurisdiction was read into sub-section (1) of Section 57, so that both the Tribunal and the commissioner could be regarded as simultaneously enjoying "overlapping jurisdiction" in respect of the same order, it would be impossible to safeguard the interests of the Revenue; for, says the High Court, a second appeal is available only to a dealer and not to the Revenue, and an enterprising dealer could, by expeditiously filing a second appeal before the Tribunal effectively shut out the Commissioner from interfering with the order in the interests of the Revenue. The High Court found itself driven to the conclusion that the Commissioner was entitled to revise an order at any stage, otherwise there could be cases where the assessment could not be enhanced. The High Court, we think, has overlooked an important provision of the Act. In our opinion, the appellate powers elaborated in sub-section (6) of Section 55 take account of such a need. Their comprehensive sweep can be judged from the terms of the sub-section.

(6) Subject to such rules of procedure as may be prescribed, every appellate authority (both in the first appeal and the second appeal) shall have the following powers :

(a) in an appeal against an order of assessment, it may confirm, reduce, enhance or annul the assessment; or it may set aside the assessment and refer the case back to the assessing authority for making a fresh assessment in accordance with the direction given by it and after making such further inquiry as may be necessary; and the assessing authority shall thereupon proceed to make such fresh assessment and determine where necessary, the amount of tax, payable on the basis of such fresh assessment;

(b) in an appeal against an order imposing a penalty, the appellate authority may confirm or cancel such order or vary it so as either to enhance or reduce the penalty.

(c) In any other case, the appellate authority shall not enhance an assessment or a penalty or reduce the amount of draw-back, set off or refund of the tax, unless the

appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

10. Three distinct categories of cases are enumerated : An appeal against an assessment order, an appeal against a penalty order and an appeal in any other case. The power to enhance the liability is given to the appellate authority in the first two categories only. We are concerned with one of them, an appeal against an order of assessment.

11. Now the sub-section speaks of an "appellate authority both in the first appeal and the second appeal". It is quite clear, therefore, that the appellate powers detailed in clause (a) have the same amplitude in a second appeal as in a first appeal. An appellate authority disposing of a first appeal has power to enhance the assessment. So has an appellate authority in a second appeal. We may also point out that when an appellate authority is considering a second appeal against a "first appellate" order, it is examining an order which can be broadly described as an order of assessment. It is a final order disposing appeal which, in a sense, is a continuation of the assessment. A second appeal against such an order is an appeal against an order of assessment.

12. En passant, it will be noticed that sub-section (6) of Section 55 of the Bombay Sales Tax Act is in pari materia with sub-section (1) of Section 251 of the Income Tax Act, 1961. The language is almost identical. Sub-section (1) of Section 251 sets forth the same three categories and the power to enhance is confined to an order of assessment and an order imposing a penalty. But in the case of a second appeal under the Income Tax Act, there is a distinct departure from the scheme under the Bombay Sales Tax Act. Section 253 does not expressly speak of the "power to enhance", and makes no distinction in regard to the extent of the appellate power between any of the cases in which a second appeal lies from an order under Section 251.

13. It is evident then that in a second appeal under sub-section (2) of Section 55 of the Bombay Sales Tax Act, the Tribunal has power to enhance the assessment. That being so, plainly it is open to the Revenue to invoke that power in a pending second appeal filed by the dealer before the Tribunal. The High Court is in error in concluding that the power to enhance an assessment can be discovered only in the revisional jurisdiction of the Commissioner and nowhere else. The compulsion which drove the High Court to the construction placed by it on sub-section (1) of Section 57 of the Act does not have substance, and the entire sub-stratum underlying the High Court judgment must give way.

14. On the view which finds favour with us we cannot approve of the law laid down on the point in *Motor and Manufacturers Ltd.* ((1976) 38 STC 78 (Bom)) nor do we see any overlapping of, or conflict in, the powers of the Commissioner and the Tribunal inferred in *Oriental Rubber Industries Pvt. Ltd.* ((1974) 34 STC 113 (Bom)). As regards the observation of this Court in *Amritlal Bhogilal* ((1958) 34 ITR 130 : 1959 SCR 713: AIR 1958 SC 868), that was not a case where a subordinate authority sought to exercise its revisional jurisdiction over an order pending in appeal before a superior authority. No support can be derived by the respondent from that case. For the same reason, *Ramlal Onkarmal v. C.I.T.* ((1962) 44 ITR 578 (Assam)) decided by the Assam High Court, *Kelpunj Enterprises v. C.I.T.* ((1977) 108 ITR 294 (Ker)), decided by the Kerala High Court and *Russell Properties (P) Ltd. v. A. Chowdhury* ((1977) 109 ITR 229 (Cal)), decided by the Calcutta High Court, placed before us by the respondent have no relevance.

15. Our attention has been invited to Section 34 of the Maharashtra Agriculture Income Tax Act, 1962 where when defining the revisional power of the Commissioner the Legislature has expressly

incorporated a provision prohibiting the Commissioner from exercising his revisional power against an order pending in appeal before the Assistant Commissioner or Tribunal. It is urged that if a similar prohibition was intended against the Commissioner under the Bombay Sales Tax Act, an express provision to that effect would have been made. Reference has also been made to the provisions in the Customs Act, 1962 conferring revisional jurisdiction. We are not impressed by the contention. The absence of an express provision cannot detract from the conclusion reached by us-a conclusion flowing from the necessary intendment of the statute-that the Commissioner being a subordinate authority to the Tribunal, cannot interfere with an order pending in appeal before the Tribunal, and further that the interest of the Revenue is protected by the power of enhancement vested in the Tribunal while disposing of a second appeal filed by a dealer.

16. In the result, the appeal is allowed, the judgment dated July 5, 1978, of the High Court is set aside, and the order dated October 29, 1977 of the Tribunal and the revisional proceedings before the Deputy Commissioner including the orders made by him, are quashed. The appellant is entitled to its costs.

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