

SANTOSHI TEL UTPADAK KENDRA

v.

DEPUTY COMMISSIONER OF SALES TAX

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July 24, 1981.

[P.N. BHAGWATI AND R.S. PATHAK, JJ.]

Bombay Sales Tax Act 1959, S. 51 (1) (a)—Scope of—Assessment order by Sales Tax Officer—Assessee's first appeal before Assistant Commissioner disposed of—Assessee's second appeal before Sales Tax Tribunal pending—Commissioner of Sales Tax whether competent to revise the appellate order of Assistant Commissioner.

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The appellant, a partnership firm, was assessed by the Sales Tax Officer, who estimated the turnover for the Calendar year 1971, and for the first six months of the year 1972 and made two orders of assessment dated 26 March 1973 under section 33 of the Bombay Sales Tax Act, 1959 levying Sales Tax and penalty. 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 29th September, 1973 the Assistant Commissioner reduced the quantum of the turnover and, consequently, the tax liability for each of the periods. Not fully satisfied by the relief granted, the appellant proceeded in second appeal to the Sales Tax Tribunal on 8th December, 1973. During the pendency of the appeals before the Tribunal, the Deputy Commissioner, issued two notices to the appellant on 24th April, 1974 requiring it to show cause why the appellate orders dated 29th September, 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 12th September 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 27th October, 1977 the Tribunal dismissed the appeals. The Tribunal took the view that its deciding those appeals would result in nullifying the revisional power vested in the Deputy Commissioner. The two second appeals filed by the appellant against the appellate orders dated 19th September, 1973 passed by the Assistant Commissioner were adjourned.

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The appellant filed a writ petition in the High Court against the order of the Deputy Commissioner dated 12th September, 1975 rejecting its preliminary objection and also against the order passed by the Tribunal on 27th October, 1977 dismissing his appeals as well as the notices issued by the Deputy Commissioner on 24th April, 1974 in the purported exercise of his revisional power, contending 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.

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A The High Court rejected the appellant's contention observing that as the statute did not provide any other forum or jurisdiction for protecting the interests of the Revenue, 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.

Allowing the appeal to this Court,

B HELD : 1. 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. [102 G]

C 2. An assessment order under the Bombay Sales Tax Act is appealable under section 55 of the Act. When the order is made by the Sales Tax Officer an appeal goes 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 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, subordinate to it. [101 C-E]

E 3. While the Commissioner exercises revisional jurisdiction over an order passed by any officer or person subordinate to him, the Tribunal is the revisional authority over an order of the Commissioner. The Act constitutes the Tribunal an appellate as well as a revisional authority over the Commissioner. In quasi-judicial matters the Commissioner is therefore subordinate to the Tribunal.

[102 D]

F 4. The Tribunal is the supreme appellate and revisional authority under the statute. It cannot be divested 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 that order. Unless the statute plainly provides to the contrary that appears to be incontrovertible. [102 F]

G 5. The High Court was 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. [104 H-105 A]

H 6. 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, it is open to the Revenue to invoke that power in a pending second appeal filed by the dealer before the Tribunal. [104 G]

7. The Commissioner being a subordinate authority to the Tribunal cannot interfere with an order pending in appeal before the Tribunal, especially when

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. [105 G]

Commissioner of Sales Tax v. Motor and Machinery Manufacturers Ltd., (1976) 38 STC 78 over-ruled.

Commissioner of Income Tax v. Amritlal Bhogilal (1958) 34 ITR 130 (SC) distinguished.

Ramlal Onkarmal v. Commissioner of Income Tax, Assam (1962) 44 ITR 578, *Kelpunj Enterprises v. Commissioner of Income Tax Kerala*. (1977) 108 ITR 294, *Russell Properties (P.) Ltd. v. A. Chowdhury*, (1977) 109 ITR 229 inapplicable.

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1968 of 1978.

Appeal by special leave from the judgment and order dated 22nd/23rd June/5th July 1978 of the High Court of Bombay (Nagpur Bench) in Special Civil Application No. 238 of 1978.

V. S. Desai, P. H. Parekh, C. B. Singh, B. L. Verma & Miss V. Caprihan for the Appellant.

R.H. Dhebar & M.N. Shroff for the Respondent.

The Judgment of the Court was delivered by

E **F** PATHAK, J. This appeal by special leave raises the important question whether the Commissioner of Sales Tax can revise under cl. (a) of sub-s. (1) of s. 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.

G The appellant is a partnership firm, carrying on the business of manufacturing and selling vegetable. The Sales Tax Officer estimated the turnover for the calendar year 1971 and made an order dated 26th March, 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 Rs. 81,745.71 and levied a penalty of Rs. 37,572.26. The two assessment orders were apparently made under s.33 of the Bombay Sales Tax Act, 1959. Against the assessment and penalty orders for

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A the two periods, the appellant appealed under cl. (a) of sub-s. (1) of s. 55 of the Act to the Assistant Commissioner. By a common order dated 29th September, 1973 the Assistant Commissioner reduced the quantum of the turnover 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 the Maharashtra Sales Tax Tribunal on 8th December, 1973. During the pendency of the appeals before the Tribunal, the Deputy Commissioner, Nagpur issued two notices to the appellant on 24th April, 1974 requiring it to show cause why the appellate orders dated 29th September, 1973 passed by the Assistant Commissioner should not be revised under s. 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 12th September, 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 27th October, 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 29th September, 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.

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The appellant filed a writ petition in the High Court of Bombay against the order of the Deputy Commissioner dated 12th September 1975 rejecting its preliminary objection and also against the order passed by the Tribunal on 27th October, 1977 dismissing his appeals, as well as the notices issued by the Deputy Commissioner on 24th April, 1974 in the purported exercise of his revisional power.

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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 5th July, 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 *Commissioner of Sales Tax v. Motor and Machinery Manufactures Ltd.*, ⁽¹⁾ and also sought support from the observations of this Court in *Commissioner of Income Tax v. Amritlal Bhogilal*. ⁽²⁾ 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.* ⁽³⁾.

An assessment order under the Bombay Sales Tax Act is appealable under s.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-s. (2) of s.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, 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.

S.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;

(1) [1976] 38 STC 78

(2) [1958] 34 ITR 130 (SC)

(3) [1974] 34 STC 113.

A 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 (b) the Tribunal, on application made to it against an order of the Commissioner (not being an order passed under sub-section (2) of s.55 in second appeal) within four months from the date 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.

C It will be noticed that while the Commissioner exercises revisional jurisdiction over an order passed by any 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.

E 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 divested 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 that 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 cl. (a) of sub-s. (1) of s. 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.

H The High Court felt burdened by the compulsion that unless a contemporaneous exercise of concurrent jurisdiction was read into sub-s. (1) of s.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-s. (6) of s.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 may pass such orders in the appeal as it deems just and proper;

Provided that, the appellate authority shall not enhance an assessment or a penalty or reduce the amount

A 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".

B 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.

C 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 cl. (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 appellate authority in a second appeal. We may also point out that when an appellate authority is considering a second appeal 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 of an 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.

E *En passant*, it will be noticed that sub-s. (6) of s.55 of the Bombay Sales Tax Act is in *pari materia* with sub-s. (1) of s. 251 of the Income Tax Act, 1961. The language is almost identical. Sub-s. (1) of s. 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. S.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 s.251.

G It is evident then that in a second appeal under sub-s. (2) of s.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

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revisional jurisdiction of the Commissioner and nowhere else. The compulsion which drove the High Court to the construction placed by it on sub-s. (1) of s.57 of the Act does not have substance, and the entire sub-stratum underlying the High Court judgment must give way.

On the view which finds favour with us we cannot approve of the law laid down on the point in *Motor and Manufacturers Ltd.* (supra) 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.* (supra). As regards the observation of this Court in *Amritlal Bhogila* (supra), 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. Commissioner of Income-tax, Assam* (1) decided by the Assam High Court *Kelpunj Enterprises v. Commissioner of Income-tax, Kerala*, (2) decided by the Kerala High Court and *Russell Properties (P) Ltd. v. A. Chowdhury*, (3) decided by the Calcutta High Court, placed before us by the respondent have no relevance.

Our attention has been invited to s.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 intentment 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.

(1) [1962] 44 ITR 578.

(2) [1977] 108 ITR 294.

(3) [1977] 109 ITR 229.

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In the result, the appeal is allowed, the judgment dated 5th July, 1978 of the High Court is set aside, and the order dated 29th October, 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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N.V.K.

Appeal allowed.