

BOARD OF REVENUE, MADRAS

v.

M/S. RAJ BROTHERS AGENCIES ETC.

February 6, 1973

[K. S. HEGDE, P. JAGANMOHAN REDDY AND H. R. KHANNA, JJ.]

Madras General Sales Tax Act 1959—S. 34(1)—Meaning of the words "Subject of an appeal to the appellate Tribunal"—Whether an appeal against a time-barred order can be considered as an order which had been made the subject of an appeal.

The respondent was assessed to Sales Tax during the assessment years 1960-61 and 1961-62. Against the said orders of assessment, the respondent went up in appeal to the Appellate Assistant Commissioner, who dismissed the appeals. On a second appeal to the Sales Tax Appellate Tribunal, these appeals were also dismissed as being time barred. Thereafter, the assessee moved the Board of Revenue under s. 34(1) of the Madras Sales Tax Act, 1959 to revise the assessment orders. The Board came to the conclusion that it had no jurisdiction to entertain those petitions. On a writ petition, the High Court held that the Board has jurisdiction to entertain those appeals and therefore, issued a writ of mandamus to the Board, to entertain the revision petitions and to consider them on merits. The State against that decision, has come up in appeal before this Court.

The main question in these appeals was for determination of the true scope of s. 34. Section 34(1) gives power to the Board of Revenue *suo moto* to call for and examine an order passed by the appropriate authorities under some of the provisions of the Act. Section 34(2) provides that the Board of Revenue shall not pass any order under subsection (1), if the time for appeal against that order has not expired or that the order has been made the subject of an appeal to the Appellate Tribunal, or of a revision before the High Court, or that more than 4 years have expired after the passing of the order.

The question for consideration was whether an appeal against an order which was dismissed as time barred can be considered as an order which had been made the subject of an appeal.

Dismissing the appeal,

HELD: (i) The scope of s. 34 came up for consideration before the Madras High Court in *Erode Yarn Stores v. State of Madras* in which it was held by the High Court of Madras that before the jurisdiction of the Board to exercise its power under s. 34 is taken away, the appeal filed before the Tribunal must have been an effective appeal, and that an appeal which was dismissed on the ground of limitation, is not an effective appeal. That decision has stood the test of time and till now it is good law. After that decision of the High Court, the Act has been subjected to several amendments, the Legislature not thought fit to amend s. 34. Therefore, it would not be proper to upset that decision at this late stage and disturb the settled position in law. If the State wants to change the law, it is open to it to move the Legislature for making the necessary amendments. [495B-E]

Erode Yarn Stores v. State of Madras, 14 S.T.C. 734, referred to.

(ii) The second contention of the appellant that the assessee had no right to invoke the jurisdiction of the Board to exercise its revisional

A power has also no force. The power is conferred on the Board to remedy an injustice. It is open to an assessee or the revenue to bring to the notice of the Board any error made by the subordinate authorities. It is up to the Board to consider whether the case is fit case for exercising its revisional jurisdiction. If the Board had gone into the case and come to the conclusion that there was no justification for exercising its jurisdiction under s. 34, then in absence of any vitiating circumstances, the High Court would not interfere with the discretion of the Board. [495E-G]

B (iii) In the present case, the decision of the Board was vitiated by an error apparent on the face of the record. The Board had refused to exercise its jurisdiction under an erroneous view that the assessee's appeal was dismissed and therefore, it was not competent to entertain the petition. In the circumstances, the High Court was justified in interfering with that decision. [495G-H]

C *M/s. Melaram & Sons v. The Commissioner of Income-tax, Punjab*, [1956] S.C.R. 1966, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 492 to 493 of 1970.

D Appeals by certificate from the Judgment and order dated December 9, 1968 of the Madras High Court in W. Petition Nos. 4628 and 4630 of 1965.

A. V. Rangam and *A. Subhashini*, for the appellant.

Respondent did not appear.

The Judgment of the Court was delivered by

E HEGDE, J. These appeals are by certificate. They are directed against the Order of the Madras High Court in two writ petitions in which Mandamus was issued to the Board of Revenue to consider and decide the revision petitions filed by the assessee—respondent under S. 34(1) of the Madras General Sales Tax Act, 1959 (1 of 1959) (hereinafter called the 'ACT').

F The facts of the case lie within a narrow compass. The respondent-assessee was assessed to sales tax during the assessment years 1960-61 and 1961-62. Aggrieved by the orders of the assessing authorities, he went up in appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner dismissed his appeals. Thereafter, he filed second appeal to the Sales

G Tax Appellate Tribunal, Madras. Those appeals were dismissed as having been time-barred. After the Tribunal dismissed the appeals the assessee moved the Board of Revenue under S. 34(1) to revise the assessment orders. The Board came to the conclusion that it had no jurisdiction to entertain those petitions. The High

H Court, in the writ petitions filed held that the Board had jurisdiction to entertain those appeals and consequently issued a writ of mandamus to the Board to entertain the revision petitions and consider them on merits. It is against that decision the State of Tamil Nadu has come up in appeal.

In these appeals we are called upon to determine the true scope of s. 34. S. 34(1) confers on the Board of Revenue *suo motu* power to call for and examine an order passed or proceeding recorded by the appropriate authorities under some of the provisions of the Act. S. 34(2) reads thus :

“The Board of Revenue shall not pass any order under sub-section (1) if.....

- (a) the time for appeal against that order has not expired; or
- (b) the order has been made the subject of an appeal to the Appellate Tribunal or of a revision in the High Court; or
- (c) more than four years have expired after the passing of the order.”

The question for consideration is as to what is the meaning of the expression “the order has been made the subject of an appeal? Whether an appeal against an order which was dismissed as having been barred by time can be considered as an order which had been made the subject of an appeal?” This question does present some difficulty. But in view of the circumstances, which we shall presently set out, we will not be justified in examining the correctness of the conclusion reached by the High Court. As far back as 1963 the scope of s. 34 came up for consideration before the Madras High Court in *Erode Yarn Stores v. State of Madras*⁽¹⁾. Therein the assessee contended that once an appeal is filed before a Tribunal, the Board is precluded from invoking its power under s. 34. The State of Madras controverted that position. Therein the State contended that before the jurisdiction of the Board to exercise its power under s. 34 can be held to be taken away, the appeal filed before the Tribunal must have been an effective appeal and that an appeal which was dismissed on the ground of limitation is not an effective appeal. The High Court of Madras accepted that contention and decided the case in favour of the State. In arriving at the conclusion that the words “subject of an appeal” mean subject of an “effective appeal” High Court took into consideration the mischief that would otherwise arise namely, all that an assessee, who wants to stifle the Board’s *suo motu* power of revision, has to do is to file a time-barred appeal and get it dismissed. It was because of that difficulty the High Court in *Erode Yarn Stores’* case came to the conclusion that expression the order which has been the subject of an appeal as meaning “subject of an effective appeal”. In arriving at that decision, the High Court did take into consideration the decision of this Court in *Messrs. Mela Ram & Sons v. The Commissioner*

(1) 14 S.T.C. 724.

A of *Income-tax, Punjab*⁽¹⁾ wherein this Court ruled that an appeal presented out of time is an appeal and an order dismissing it as time-barred is one passed in an appeal. That was a decision rendered under the provisions of the Indian Income Tax Act, 1922. The question for decision in that case was whether an appeal lay against an order of the Appellate Assistant Commissioner dismissing an appeal as time-barred.

B In the circumstances of the present case it is not necessary for us to consider whether the decision of the High Court in *Erode Yarn Stores'* case was correctly decided. That decision was rendered in respect of a provision in a State Act. It was rendered as far back as 1963. In that case the High Court accepted the contention of the State. That decision has stood the field till now. It must have governed several cases, decided thereafter. After that decision was rendered, the Act had been subjected to several amendments. The Legislature has not thought fit to amend s. 34. To put it differently the State had prayed for and obtained a particular interpretation of s. 34. It has accepted that interpretation to be correct ever since 1963. Under these circumstances it is not proper for this Court to upset that decision at this late stage and disturb a settled position in law. If the State wants to change the law it is open to it to move the Legislature for making the necessary amendments. We find it difficult to appreciate the State conduct in taking inconsistent positions.

E Yet another contention was taken on behalf of the State. It was contended on behalf of the State that the assessee had no right to invoke the jurisdiction of the Board to exercise its revisional power. This contention too has to be rejected. The power is conferred on the Board to remedy any injustice. It is open to an assessee or the Revenue to bring to the notice of the Board any error made by the subordinate authorities. It is up to the Board to consider whether the case is a fit case for exercising its revisional jurisdiction. If the Board had gone into the case and come to the conclusion that there was no justification for exercising its jurisdiction under s. 34, then in the absence of any vitiating circumstance recognised by law the High Court would not have interfered with the discretion of the Board. But what has happened in this case is that the Board had refused to exercise its jurisdiction under the erroneous view that in view of the dismissal of the assessee's appeal it was not competent to entertain the petition. The decision of the Board was vitiated by an error apparent on the face of the record. Hence the High Court was justified in interfering with that decision. Whether the case is a fit one for exercising jurisdiction of the Board or not is entirely a matter for the Board to consider and decide. Mr. Rangam drew our atten-

(1) [1956] S.C.R. 166.

tion to two decisions of the Andhra Pradesh High Court where the High Court held that no appeal lay against the order of the Andhra Pradesh Revenue Board under s. 20(1) of the Andhra Pradesh General Sales Tax Act, 1957, which provision is similar to s. 34 of the Act. Those decisions lend no assistance to the appellants' case.

In the result these appeals fail and they are dismissed. The respondents are absent and hence there will be no order as to costs.

S.N.C.

Appeals dismissed.