

A

STATE OF KERALA

v.

M/S. VIJAYA STORES

September 1, 1978

B

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

Kerala General Sales Tax Act 1963—Section 39(4)—Scope of—Appellate Tribunal—If possesses jurisdiction or power to enhance assessment in the absence of an appeal or cross-objection by one of the parties.

Section 39(4)(a)(i) of the Kerala General Sales Tax Act 1963 provides that in disposing of an appeal, the Appellate Tribunal, may, after giving the parties a reasonable opportunity of being heard either in person or by a representative, confirm, reduce, enhance or annul the assessment or penalty or both.

C

On the ground that 50% of the transactions recorded in a rough note-book detected and seized by the Inspecting Officer from the Head Office of the firm were not entered in the regular books of accounts maintained by the assessee, the Sales Tax Officer made an addition of 10% to the admitted turnover and completed the assessment.

D

In an appeal, the Appellate Assistant Commissioner, reduced the addition to 5% of the admitted turnover.

The respondents preferred a second appeal before the Appellate Tribunal. But the Department neither filed an appeal against the Order of the Appellate Assistant Commissioner nor raised any cross-objections in the assessee's appeal. After issuing a show-cause notice to the assessee, the Tribunal, under section 39(4) of the Kerala General Sales Tax Act 1963, directed the addition of a certain amount to the taxable turnover.

E

In its Tax Revision Petition, the respondent contended before the High Court that the Order of the Tribunal was wrong in that it had no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the Department. Setting aside the impugned Order of the Tribunal the High Court remanded the case for hearing the appeal afresh.

F

In appeal to this Court, the appellant (Department) contended that on a true construction of section 39(4) of the Act, the Appellate Tribunal should be regarded as possessing the power to enhance the assessment even in the absence of any appeal or cross-objections by the Department against the Appellate Assistant Commissioner's Order.

G

Dismissing the appeal held :

(1) The Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the Department. [543 E]

(2) To accept the construction placed by the counsel for the appellant on sub-section (4)(a)(i) would be really rendering sub-section (2) of section 39 otiose, for if in an appeal preferred by the assessee against, the Appellate Assistant Commissioner's Order, the tribunal would have the power to enhance the assessment, a provision for cross-objections by the Department was really unnecessary. [543 D]

H

- (3) The elementary principle found in the Code of Civil Procedure that the respondent who has neither preferred his own appeal nor filed cross-objections in the appeal preferred by the appellant must be deemed to be satisfied with the decision of the lower authority and that he will not be entitled to seek relief against a rival party in an appeal preferred by the latter, is equally applicable to revenue proceedings. [543 G]

Motor Union Insurance Co. Ltd. vs. Commissioner of Income Tax Bombay (1945) 13 ITR 272 and *New India Life Assurance Co. vs. Commissioner of Income Tax, Excess Profits Tax, Bombay City.* (1957) 31 ITR 844 approved.

Commissioner of Sales Tax, Orissa vs. Chunnilal Parmeshwar Lal (1961) 12 STC 677 distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 477 of 1976.

Appeal by Special Leave from the Judgment and Order dated 11-4-1975 of the Kerala High Court in T.R.C. No. 59 of 1973.

P. A. Francis and N. Sudhakaran for the Appellant.

Ex parte against the Respondent.

The Judgment of the Court was delivered by

TULZAPURKAR, J.—The short question raised in this appeal by special leave is whether the Appellate Tribunal has power under s. 39(4) of the Kerala General Sales Tax Act, 1963 to enhance the assessment in the absence of any appeal or cross-objections by the Revenue?

The respondent firm (M/s. Vijaya Stores) is a dealer in stationery having its head office at Cochin and branches at Ernakulam and Kottayam. For the assessment year 1965-66 the respondent firm returned a total turnover of Rs. 25,54,974.58 and a net taxable turnover, after claiming exemptions, of Rs. 12,99,996.49. The Sales Tax Officer rejected the Book results on the basis of certain material gathered from a rough note-book detected and seized by the Inspecting Officer from the Head Office at Cochin; it was found that about 50% of the transactions recorded in that rough note-book were not entered in the regular books maintained by the assessee; the Sales Tax Officer, therefore, made an addition of 10% (Rs. 45,654.73) to the admitted turnover of the Cochin shop and accordingly completed the assessment by his order dated January 16, 1967. In an appeal preferred by the respondent-firm to the Appellate Assistant Commissioner, the assessee raised a two-fold contention that the rejection of accounts was not justified and that the addition made on the basis of the rough note-book was excessive and arbitrary. The Appellate Assistant Commissioner by his order dated November 1, 1968 negatived the first contention and

A as regards the second he gave relief to the assessee by reducing and limiting the addition to 5% (Rs. 22,823.00) of the admitted turnover of the Cochin shop. Against the order of the Appellate Assistant Commissioner the respondent firm preferred a second appeal to the Appellate Tribunal challenging the addition of 5% to the taxable turnover. No appeal nor any cross-objections were filed by the Revenue to the Tribunal

B against the said order of the Appellate Assistant Commissioner. The Appellate Tribunal was of the view that the Sales Tax Officer and the Appellate Assistant Commissioner had no reason to make addition at any figure less than Rs. 80,218.22 as was seen from the detected rough note-book; the Tribunal, therefore, by invoking the power under

C s. 39(4) of the Act issued notice to the assessee to show cause against the proposed enhancement of the turnover and after hearing the objections of the assessee by its order dated May 10, 1973 directed an addition of a sum of Rs. 80,218.22 to the taxable turnover. The respondent-firm preferred a Tax Revision Petition (being T.R.C. 59 of 1973) to the Kerala High Court contesting that the Tribunal had no jurisdiction

D or power to enhance the assessment in the absence of an appeal or cross-objections by the Department and prayed for quashing of the order. The Kerala High Court by its judgment and order dated April 11, 1975 accepted the contention of the respondent-firm and set aside the impugned order of the Tribunal and remanded the case for hearing the appeal of the assessee afresh in accordance with law and in the

E light of what it had said in its judgment; in doing so the High Court relied upon two decisions of the Bombay High Court in *Motor Union Insurance Co., Ltd. v. Commissioner of Income Tax, Bombay*⁽¹⁾ and *New India Life Assurance Co. Ltd. v. Commissioner of Income-Tax, Excess Profits Tax, Bombay City*⁽²⁾. The State of Kerala has come up in appeal to this Court.

F Counsel for the appellant raised two contentions in support of the appeal. He first contended that on a true construction of s. 39(4) of the Act the Appellate Tribunal should be regarded as possessing the power to enhance the assessment in the absence of any appeal or cross-objections by the Department against the Appellate Assistant Commissioner's order and that the only requirement before making such

G enhancement was to give a reasonable opportunity of being heard against the proposed enhancement which the Appellate Tribunal had done in this case; secondly, he contended that s. 39(4) of the Kerala General Sales Tax Act, 1963 was not in *pari materia* with s. 33(4) of the Indian Income Tax Act, 1922, and, therefore, the High Court

H ought not to have relied upon the decisions of the Bombay High Court

(1) [1945] 13 I. T. R. 272.

(2) [1957] 31 I.T.R. 844.

rendered under s. 33(4) of the Indian Income Tax Act, 1922. He also pressed the contrary view taken by the Orissa High Court in the case of *Commissioner of Sales Tax, Orissa v. Chunilal Parameshwar Lal*⁽¹⁾, for our acceptance. For the reasons which we shall presently indicate it is not possible to accept either of these contentions urged by counsel for the appellant.

The question raised before us really turns upon the correct interpretation to be placed on s. 39(4) of the Act, but sub-ss. (1), (2), (3) and (4) of s. 39 are material for our purposes which run thus :

“39. *Appeal to the Appellate Tribunal.*

(1) Any officer empowered by the Government in this behalf or any other person objecting to an order passed by the Appellate Assistant Commissioner under sub-section (3) of section 34 and any person objecting to an order passed by the Deputy Commissioner under sub-section (1) of section 35, and any person objecting to an order passed by the Inspecting Assistant Commissioner under clause (c) of sub-section (4) of section 28 may, within a period of sixty days from the date on which the order was served on him in the manner prescribed, appeal against such order to the Appellate Tribunal;

Provided that the Appellate Tribunal may admit an appeal presented after the expiration of the said period if it is satisfied that the appellant had sufficient cause for not presenting the appeal within the said period.

(2) The Officer authorised under sub-section (1) or the person against whom an appeal has been preferred, as the case may be, on receipt of notice that an appeal against the order of the Appellate Assistant Commissioner has been preferred under sub-section (1) by the other party, may, notwithstanding that he has not appealed against such order or any part thereof, file, within thirty days of the receipt of the notice, a memorandum of cross-objections, verified in the prescribed manner against any part of the Appellate Assistant Commissioner, and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (1).

(1) [1961] 12 S.T.C. 677.

- A** (3) The appeal or the memorandum of cross-objections shall be in the prescribed form and shall be verified in the prescribed manner, and, in the case of an appeal preferred by any person other than an officer empowered by the Government under sub-section (1),
- B** it shall be accompanied by such fee not exceeding one hundred rupees as may be prescribed.
- (4) In disposing of an appeal, the Appellate Tribunal may, after giving the parties a reasonable opportunity of being heard either in person or by a representative.
- C** (a) in the case of an order of assessment or penalty.
- (i) confirm, reduce, enhance or annul the assessment or penalty or both;
- (ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further enquiry as may be directed; or
- D** (iii) pass such other orders as it may think fit; or
- (b) in the case of any other order, confirm, cancel or vary such order."

E Considerable emphasis was laid by counsel for the appellant upon sub-s.(4) which indicates what things the Appellate Tribunal may do while disposing of an appeal and in particular it was pointed out that under sub-s.(4)(a)(i) the Appellate Tribunal has been given power "to enhance the assessment" while disposing of an appeal against an

F order of assessment after giving the party a reasonable opportunity of being heard and it was urged that such power could be exercised even when the appeal against the Appellate Assistant Commissioner's assessment order had been preferred by the assessee and not by the Department. To place such a construction on sub-s. (4)(a)(i) would amount to ignoring the scheme of s. 39. Sub-s. (1) provides

G for an appeal being preferred against an assessment order passed by the Appellate Assistant Commissioner under s. 34(3) either by the assessee or by the Department through an officer empowered by the Government in that behalf. Further, sub-s. (2) provides for filling of cross-objections by a party, against whom an appeal has been preferred, notwithstanding that he has not himself appealed against the

H decision or any part thereof and such cross-objections are to be disposed of by Appellate Tribunal as if it were an appeal. Then comes sub-s. (4) which enumerates the various powers conferred upon

the Appellate Tribunal while disposing of such appeals (including cross-objections) and the power conferred upon the Appellate Tribunal under s. 4(a)(i) is "to confirm, reduce, enhance or annul the assessment"; the power to enhance the assessment must be appropriately read as relatable to an appeal or cross-objections filed by the Department. The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it. and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-s.(4)(a)(i) above. In other words, in the absence of an appeal or cross-objections by the Department against the Appellate Assistant Commissioner's order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment. Further, to accept the construction placed by the counsel for the appellant on sub-s. (4)(a)(i) would be really rendering sub-s. (2) of s. 39 otiose, for if in an appeal preferred by the assessee against the Appellate Assistant Commissioner's order the tribunal would have the power to enhance the assessment, a provision for cross-objections by the Department was really unnecessary. Having regard to the entire scheme of s. 39, therefore, it is clear that on a true and proper construction of sub-s.(4)(a)(i) of s. 39 the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the Department.

It is true that the two Bombay decisions reported in 13 I.T.R. 272 and 31 I.T.R. 844 (supra) on which the High Court has relied have been rendered in relation to s. 33(4) of Indian Income Tax Act, 1922 but in our view the said provisions of Income Tax Act is in *pari materia* with the provision of s.39(4) of the Kerala General Sales Tax Act, 1963. Moreover, the Bombay High Court has pointed out in those decisions that s. 33(4) merely enacted what was the elementary principle to be found in Civil Procedure Code that the respondent who has neither preferred his own appeal nor filed cross-objections in the appeal preferred by the appellant, must be deemed to be satisfied with the decision of the lower authority and he will not be entitled to seek relief against a rival party in an appeal preferred by the latter. In the first mentioned case the elementary principle is stated at page 282 of the report thus :

"Apart from statute, it is elementary that if a party appeals, he is the party who comes before the Appellate Tribunal to redress a grievance alleged by him. If the other side has any grievance, he has a right to file a cross-appeal

- A or cross-objections. But if no such thing is done, the other party, in law, is deemed to be satisfied with the decision. He is, of course, entitled to support the judgment of the first officer on any ground open to him, but he is not entitled to raise a ground so as to work adversely to the appellant and in his favour.”
- B

As regards the decision of the Orissa High Court in *Commissioner of Sales Tax, Orissa v. Chunnilal Parmeshwar Lal* (supra), the same cannot avail the appellant for the decision in that case was rendered on a concession made by the assessee's counsel.

- C In the result we are clearly of the opinion that the High Court was right in the view it took and the appeal, therefore, fails and is dismissed. Since the respondent has not appeared, there is no question of any costs.

N.V.K.

Appeal dismissed.