

(1983) 01 BOM CK 0046

In the Bombay High Court

Case No : Sales Tax Reference No. 60 of 1980

Amar Dye Chem Limited

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 12-01-1983

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 14, 55, 55(1), 55(2), 55(3)

Citation : (1983) 53 STC 14

Hon'ble Judges : D.P. Madon, C.J.; Sujata V. Manohar, J

Bench : Division Bench

Judgement

Madon, C.J.—The applicants carry on business of manufacturing various types of dyes and chemicals. They are registered as dealers under the Bombay Sales Tax Act, 1959 (hereinafter for the sake of brevity referred to as "the Act"). During the period 1st January, 1965, to 31st December, 1965, the applicants purchased raw materials for the purpose of the manufacturing business carried on by them. Out of the quantity of raw materials purchased by them, raw materials of the aggregate value of Rs. 10,56,643 were purchased by the applicants by giving certificates in form 15 prescribed under the Bombay Sales Tax Rules, 1959, to the effect that the goods so purchased would be used by them for the manufacture of taxable goods which would be sold by them and that such sales would not take place outside the State of Maharashtra. For the purposes of the said certificates a sale in the course of inter-State trade or commerce, or in the course of the export of the goods out of the territory of India, where such sale occasioned the movement of the goods from the State of Maharashtra, is to be considered as a sale within the State of Maharashtra. By reason of the aforesaid certificates given by the applicants to their vendors, the sales of raw materials covered by the said certificates made by the applicants' vendors to the applicants were eligible to tax at a reduced rate. During the said period, the applicants also purchased machinery of the aggregate value of Rs. 12,74,412 by giving certificates in form 15. The applicants had also purchased raw materials of the aggregate value of Rs. 36,01,414 otherwise than against certificates in form

15. The applicants also have branches outside the State of Maharashtra. They despatched to their said branches outside the State about one-third quantity of the total goods manufactured by them, the remaining quantity being sold by them in terms of the certificates in form 15 given by them. The goods transferred by the applicants to their branches outside the State were sold by the said branches and such sales were, therefore, outside-State sales and in breach of the certificates in form 15 given by the applicants. The applicants did not keep any separate account of the raw materials purchased by them against certificates in form 15 and the products manufactured out of the stock of such raw materials, the reason being that from the nature of things it would not have been possible for them to have maintained such accounts because it would be well-nigh impossible to pinpoint in what manner each item of manufactured goods was disposed of - whether by sale or transfer to a branch outside the State.

2. In the assessment of the applicants for the aforesaid period, the applicants contended that if the quantum or percentage of the total purchases made by them against certificates in form 15 were compared to the total sales made by them (i.e., without considering the goods transferred to their branches outside the State), there would be no infraction of any of the certificates in form 15 given by them because the entire quantity of raw materials purchased by them against certificates in form 15 would be less than the total sales, and that therefore, the applicants had not become liable to pay any purchase tax u/s 14 of the Act to the extent of the percentage by which the tax payable on the sales of raw materials to the applicants had become reduced.

3. In cases such as the above, the practice followed by the department was to take the percentage of sales made by an assessee against certificates in form 15 as against the total disposals by an assessee of the goods manufactured, that is to say, the percentage of goods so sold as compared to the goods sold as also despatched to the assessee's branches outside the State, and to the extent of the ratio thus arrived at, to disallow an identical percentage of purchases of raw materials made by an assessee against certificates in form 15. The Sales Tax Officer, thus, held that the quantum of the total sales made by the assessees, including the branch transfers made by them, to be of the value Rs. 3,09,84,562, out of which he deducted the value of the goods returned to the applicants by their purchasers and arrived at the net total of Rs. 3,08,06,869. As out of this, goods of the aggregate value of Rs. 1,02,82,887 were transferred by the applicants to their branches outside the State, the proportion of the value of such goods so transferred as compared to the value of the net total sales amounted to 33.37 per cent. The Sales Tax Officer, therefore, disallowed an identical percentage of the purchases of raw materials by the applicants against certificates in form 15, viz., purchases of the value of Rs. 3,52,597 and held that the said purchases were exigible to purchase tax at the rate of 3 per cent. The assessment order was passed by the Sales Tax Officer on 2nd May, 1969.

4. Against the said order of the Sales Tax Officer, the applicants filed an appeal to

the Assistant Commissioner of Sales Tax on 21st June, 1969.

5. Appeals are provided for by section 55 of the Act. u/s 55(1) an appeal, from every original order made by a Sales Tax Officer, or any other officer subordinate thereto, lies to the Assistant Commissioner of Sales tax; from an original order made by the Assistant Commissioner, to the Commissioner of Sales Tax; and from an original order made by a Deputy Commissioner, Additional Commissioner, or Commissioner, to the Sales Tax Tribunal. u/s 55(2), in the case of an order passed in appeal by an Assistant Commissioner, a second appeal lies at the option of the appellant, either to the Commissioner or to the Tribunal. u/s 55(3), subject to revision, reference to the High Court and rectification as provided for in sections 57, 61 and 62 respectively, every order passed in appeal is to be final. The powers of the appellate authority are dealt with in sub-section (6) of section 55. The said sub-section (6) as originally enacted provided as follows :

"Subject to such rules of procedure as may be prescribed, an appellate authority may pass such order on appeal as it deems just and proper."

6. During the pendency of the appeal filed by the applicants, the State Legislature passed the Bombay Sales Tax (Amendment) Act, 1971 (Maharashtra Act No. 42 of 1971). This amending Act came into force on 1st December, 1971. By section 8 of this amending Act sub-section (6) of section 55 was substituted. The substituted sub-section provides as follows :

"(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 to 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 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."

7. Prior thereto, by the Bombay Sales Tax (Amendment and Validating Provisions) Act, 1970 (Maharashtra Act No. 1 of 1971), a new sub-section, namely, sub-section (2A) was inserted with retrospective effect in section 14 of the Act. The said sub-section (2A) provided as follows :

"(2A) The purchase tax leviable under this section in respect of any goods specified in Schedule B, C, D or E shall be the aggregate of all taxes which would have been leviable thereon but for the certificate given u/s 11 or 12."

8. The said amending Act was brought into force with effect from 18th November, 1970. The above amendment to section 14 was effected because in some of the decisions of the Tribunal a doubt had been raised as to the at which the purchase tax u/s 14 of the Act was leviable. Even after this amendment, some of the decisions of the Tribunal raised a doubt about the rate of purchase tax u/s 14 and yet another Amending and Validating Act was passed by the State Legislature in 1973 being the Bombay Sales Tax (Amendment and Validating Provisions) Act, 1973 (Maharashtra Act No. 13 of 1973). The said Amendment Act came into force with effect from 7th February, 1973. By that Act sub-section (2A) of section 14 was substituted with retrospective effect as follows :

"(2A) Where any dealer or commission agent becomes liable to pay purchase tax under sub-section (1) or (2), as the case may be, there shall be levied a purchase tax -

(a) on the turnover of purchases of goods specified in columns 2 of Schedules B, C and D, at the rate set out against each of such goods in column 4 of the said schedules;

(b) on the turnover of purchases of goods specified in column 2 of Schedule E, at a rate, which would be aggregate of the rates specified against each of such goods in columns 3 and 4 of that schedule."

9. If the Amendment Act of 1973 were to apply to the applicants, the rate at which the purchase tax would be payable by them in respect of sales which were held to be in contravention of the certificates given by them in form 15, would be 5 per cent.

10. On 20th March, 1976, the Assistant Commissioner of Sales Tax (Appeals-XI), Bombay City Division, Bombay, issued a notice to the applicants that he proposed to pass an order levying purchase tax u/s 14 at the rate of 5 per cent on goods of the value of Rs. 7,69,246 which was one-third of the total value of purchases against certificates in form 15 made by the applicants. The figure of Rs. 7,69,246 as being one-third of the total purchases made against certificates in form 15 was arrived at by the Assistant Commissioner by taking the total purchases not only of raw materials made by the applicants but also of machinery purchases by the applicants. A similar question had arisen in the assessment of the applicants for the period 1st January, 1963, to 31st December, 1963, and a notice similar to the one in the present case had also been issued in

respect of the said period by the Assistant Commissioner. Common arguments were advanced at the hearing of both these appeals. The appellants contended at the hearing of the appeals that there was no contravention of any of the certificates in form 15 given by them. The Assistant Commissioner basing his decision on a decision given by the Division Bench of this High Court in Commissioner of Sales Tax v. Berar Oil Industries [1975] 36 STC 473 rejected the contentions of the appellants. In Berar Oil Industries" case [1975] 36 STC 473 the court had held that the pro rata method followed by the department was the correct one in cases where, either by reason of the circumstances of the case or because separate accounts were not kept by the assessee, it was not possible for the assessee to prove that the goods purchased by him against certificates in form 15 had been utilised in the manner specified in the declaration given by him in the said certificates. The Assistant Commissioner accordingly passed an order in appeal in terms of the said notice issued by him holding that the goods purchased of the value of Rs. 7,69,246 and not of the value of Rs. 3,52,597 as held by the Sales Tax Officer, were utilised in contravention of the declaration made by the applicants in the certificates in form 15 given by them, and were exigible to purchase tax at the rate of 5 per cent.

11. Against the said appellate order of the Assistant Commissioner, the applicants filed a second appeal to the Tribunal. Before the Tribunal the applicants, inter alia, contended that the Assistant Commissioner had no jurisdiction u/s 55(6) of the Act to enhance the rate of purchase tax or to enhance the quantum of turnover of purchases of goods which were utilised in contravention of the declarations contained in certificates in form 15 given by the applicants, inasmuch as their appeal was governed by the provisions of sub-section (6) of section 55 prior to its amendment and the amended sub-section (6) had no application to their appeal. These contentions were negated by the Tribunal which dismissed the said second appeal.

12. At the instance of the applicants the following four questions have been referred by the Tribunal to us u/s 61(1) of the Act :

"(1) Whether, on the facts and circumstances of the case and considering the dates of filing of returns, assessment order and filing of the first appeal, all prior to 1971, the Tribunal was right in holding that the Assistant Commissioner of Sales Tax did have power of enhancing the quantum of purchases from Rs. 3,52,597 to Rs. 7,69,246 while deciding the appeal ?

(2) Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the Assistant Commissioner of Sales Tax possessed jurisdiction of enhancing the rate of purchase tax from 3 per cent to 5 per cent taking recourse to sub-section (2A) of section 14 of the Bombay Sales Tax Act, 1959, as substituted and always deemed to have been substituted by Maharashtra Act 13 of 1973 ?

(3) On the facts and circumstances of the case and regard being had to 67 per

cent of local sales as against purchases on form 15 only of 45 per cent, was the Tribunal justified in law in holding that the applicant made breach of recitals of form 15 and thereby was liable to purchase tax u/s 14 of the Bombay Sales Tax Act, 1959 ?

(4) On the facts and circumstances of the case and regard being had to overall purchases made within and without the State of Maharashtra, was the Tribunal justified in law in holding that the applicant was not entitled to the full set-off of Rs. 1,26,634 ?"

13. It would be convenient to dispose of questions Nos. (3) and (4) first. So far as the third question is concerned, in view of the judgment of this High Court in *Berar Oil Industries*" case [1975] 36 STC 473 referred to earlier, Mr. R. V. Patel, learned Advocate for the applicants, has not contended before us that the pro rata method adopted by the department was incorrect or that the branch transfers made by the assessee should be excluded from consideration. What he, however, contended was that the Assistant Commissioner ought not to have taken into account, in applying the pro rata method, the purchases of machinery made by the applicants; and the Tribunal was equally in error in upholding this part of the Assistant Commissioner's order. There is force in this contention of Mr. Patel. The formula or method laid down in *Berar Oil Industries*" case [1975] 36 STC 473 applies, as pointed out in that decision, where, either by reason of the circumstances of the case or because separate accounts have not been kept by the assessee, it is not possible for an assessee to prove that the goods purchased by them against certificates in form 15 have been utilised in the manner specified in the declarations made in the said certificates. The *Berar Oil Industries*" case [1975] 36 STC 473 related to the purchase of raw materials only. Here we have two types of purchases made by the applicants : (1) purchase of raw materials and (2) purchase of machinery for the purpose of manufacturing goods for sale. It is not the case of the department that the applicants had not kept separate accounts in respect of the two types of purchases made by them. What the Assistant Commissioner, however, did was to read the judgment in *Berar Oil Industries*" case [1975] 36 STC 473 as referring to all kinds of purchases irrespective of whether these were purchases in respect of which it was impossible for the assessee to prove that he had complied with the declarations given by him in certificates in form 15 or not. In so doing the Assistant Commissioner misunderstood the ratio of that case and equally so did the Tribunal. The contravention of the certificates given by the applicants must, therefore, be worked out by applying the pro rata method to the total purchases of raw materials only without adding to them the purchases of machinery. The contravention of the certificates in form 15 would, therefore, be only in respect of goods of the value of Rs. 3,52,597 as held by the Sales Tax Officer and not Rs. 7,69,246 as held by the Assistant Commissioner and the Tribunal.

14. In view of the judgment in *Berar Oil Industries*" case [1975] 36 STC 473, the Commissioner of Sales Tax has issued certain circulars to give administrative

relief to assessees. Mr. Jetly, learned counsel for the respondent, has stated that in respect of the goods purchases by the applicants and held by us to have been utilised in contravention of the certificates in form 15, the applicants would be given relief in terms of the circular dated 21st June, 1978, issued by the Commissioner of Sales Tax. In view of this, Mr. Patel has not addressed to us any further arguments on question No. (3) or any arguments on question No. (4).

15. Question No. (1) relates to the powers of the Assistant Commissioner to enhance the quantum of purchases which had become exigible to purchase tax u/s 14 of the Act and question No. (2) relates to his jurisdiction to enhance the rate of purchase tax on such purchases. So far as the quantum of purchases taxable u/s 14 is concerned, we have held on the facts and circumstances of the case, that the Assistant Commissioner had erred in law in misunderstanding the judgment of this High Court in Berar Oil Industries" case [1975] 36 STC 473. The Tribunal has, however, held that the Assistant Commissioner had jurisdiction to so enhance the quantum of purchases as also to enhance the rate of purchase tax, and it has, therefore, become necessary for us to decide these questions. Further, even on the basis of our own judgment with respect to the quantum of purchases taxable u/s 14, the question of the Assistant Commissioner's power to levy purchase tax at a higher rate would still arise. We will, therefore, now proceed to consider these two questions.

16. On behalf of the applicants it was submitted that under the old sub-section (6) of section 55 the appellate authority had no power to increase the quantum of the taxable turnover or to levy tax at a higher rate because the result of it would be to enhance the assessment. It was further submitted that the only power of the appellate authority under the old sub-section (6) was either to accept or reject the grounds upon which the appeal was filed. According to the applicants, by the new sub-section (6) a wider jurisdiction and greater powers have been conferred upon the appellate authority. It was submitted that the right to appeal is a right which becomes vested in a party when the proceedings commence or the lis starts and that in the case of an assessment the lis commences when a return is filed and if thereafter any change is made in the law the amended law cannot apply either to the procedure to be followed in determining the appeal or the powers to be exercised by the appellate authority in deciding the appeal and the appeal must be decided in accordance with law as it stood at the date of the commencement of the proceedings. The very same arguments were also advanced with respect to increasing the rate of tax on the turnover of purchases held to be exigible to purchase tax u/s 14. On behalf of the respondent it was contended that the new sub-section (6) was substituted merely to specify elaborately the powers already possessed by the appellate authority under the old sub-section (6), and therefore, there was no question of any wider jurisdiction or greater powers being conferred upon the appellate authority by the new sub-section (6). In the alternative, it was contended that an appeal has to be decided according to the substantive and procedural laws in force at the time when it reaches hearing.

17. On these rival submissions the first question that falls for consideration is whether the new sub-section (6) of section 55 has made any change in the law because if it has not, and its effect is merely to enumerate specifically the powers already possessed by the appellate authority under the old sub-section (6), the other questions argued before us do not arise. On behalf of the applicants reliance was placed upon the Statement of Objects and Reasons to the L.A. Bill No. 42 of 1970 published in the Maharashtra Government Gazette, Part V, dated 7th January, 1971, at page 413, and later enacted as the Bombay Sales Tax (Amendment) Act, 1971, by which the new sub-section (6) was sought to be substituted for the old. Clause 8 of the said Bill sought to substitute the new sub-section (6) for the old one. This clause was passed without any amendment. The object and reasons for this amendment appended to the said Bill were as follows :

"Section 55 does not empower the appellate authority to enhance the tax in the course of disposal of the appeal. A provision is made to confer the necessary powers on the appellate authority on the lines of section 251 of the Income Tax Act, 1961."

18. It was submitted by Mr. Patel, learned Advocate for the applicants, that the Statement of Objects and Reasons thus clearly shows that what the legislature intended to do was to enhance the power of the appellate authority. It is, however, not possible to construe either the old sub-section (6) or the new sub-section (6) in the light of the Statement of Objects and Reasons, for it is now well-settled that the Statement of Objects and Reasons is not admissible for construing a section or for controlling the actual words used therein. It can only be used for the limited purpose of understanding the background and the antecedent state of affairs leading up to the legislation : see *The Central Bank of India Vs. Their Workmen*, and *State of West Bengal Vs. Union of India*, We must, therefore, leave the Statement of Objects and Reasons out of consideration while construing the true scope and effect of the old and the new sub-sections.

19. Reliance was next placed on behalf of the applicants upon certain decisions under the old Indian Income Tax Act, 1922. Section 31 of that Act provided for the powers of the Appellate Assistant Commissioner while hearing an appeal. Sub-section (3) of that section is relevant. The material part of that sub-section was as follows :

"31. (3) In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, -

(a) confirm, reduce, enhance or annul the assessment, or

(b) set aside the assessment and direct the Income Tax Officer to make a fresh assessment after making such further inquiry as the Income Tax Officer thinks fit or the Appellate Commissioner may direct, and the Income Tax Officer shall thereupon proceed to make such fresh assessment, and determine where necessary the amount of tax payable on the basis of such fresh assessment,

.....

Provided that the Appellate Assistant Commissioner shall not enhance an assessment or a penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement"

20. It may be useful at this stage to reproduce also section 251 of the present Income Tax Act, 1961, which specifies the powers of the Appellate Assistant Commissioner and the Commissioner (Appeals) while disposing of an appeal. The said section 251 provides as follows :

"251. Powers of the Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals). - (1) In disposing of an appeal, the Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals) shall have the following powers -

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment; or he may set aside the assessment and refer the case back to the Income Tax Officer for making a fresh assessment in accordance with the directions given by the Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals) and after making such further inquiry as may be necessary, and the Income Tax Officer 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, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation. - In disposing of an appeal, the Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Appellate Assistant Commissioner or, as the case may be, the Commissioner (Appeals) by the appellant."

21. It will be noticed that there was no provision in section 31(3) of the old Income Tax Act corresponding to the explanation to section 251(2) of the new Income Tax Act. Section 33 of the old Income Tax Act provided for appeals against orders of the Appellate Assistant Commissioner to the Appellate Tribunal. Sub-section (1) of section 33 of the old Income Tax Act specifically conferred such right upon an assessee. Sub-section (2) of section 33 provided that the Commissioner of Income Tax might, if he objected to any order passed by an

Appellate Assistant Commissioner u/s 31, direct the Income Tax Officer to appeal to the Appellate Tribunal against such order. Sub-section (4) of section 33 of the old Income Tax Act provided as follows :

"The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner."

22. Section 253 of the new Income Tax Act also provides for an appeal both by the assessee as also by the department against an order of an Appellate Assistant Commissioner or a Commissioner (Appeals). Section 254(1) of the new Income Tax Act provides that "The Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit". It will thus be seen that both under the old Income Tax Act as also under the new Income Tax Act the assessee as also the department had a right to appeal to the Appellate Tribunal against the orders of the Appellate Assistant Commissioner. The words used both under the old as also under the new Income Tax Act with reference to the powers of the Income Tax Appellate Tribunal are : "may pass such orders thereon as it thinks fit". The words used in the old sub-section (6) of section 55 with reference to the powers of the appellate authority under the Act while disposing of an appeal were "may pass such order on appeal as it deems just and proper". The expression "pass such orders thereon as it thinks fit" occurring in section 33(4) of the old Income Tax Act has fallen for consideration in a number of cases, and Mr. Patel, learned Advocate for the applicants, has relied upon these decisions and has submitted that the interpretation placed upon the said words in those decisions equally applies to the words used in the old sub-section (6) of section 55 of the Act. The first case relied upon by Mr. Patel was a decision of a Division Bench of this High Court in THE MOTOR UNION INSURANCE CO., LTD. Vs. COMMISSIONER OF Income Tax, BOMBAY, . In that case, the court considered the scheme of the Indian Income Tax Act, 1922, and pointed out that the right of appeal against an order made by the Appellate Assistant Commissioner was given both to an assessee as also to the department. It then proceeded to hold as follows (at pages 282-283) :

"On behalf of the Commissioner it is urged that section 33(4) does not circumscribe the powers of the Tribunal, and leaves the Tribunal at large to raise any question it pleases and decide the same. In our opinion, this argument is unsound. 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 or cross-objection. 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. Apart from that, the section, in our opinion, does not permit the course adopted by the Tribunal in this case. u/s 31, when the legislature thought of giving power to the

Appellate Assistant Commissioner to enhance the assessment, it has in terms enacted that. In our opinion, that fact is against the contention that the words of section 33(4) are wide enough to include a power of enhancement, without an appeal by the Commissioner. The word "thereon" used in section 33(4) only means "on the appeal", which must mean on the grounds raised in the appeal. Read in that way, the sub-section only gives power to the Appellate Tribunal to give its decision and pass orders in respect of all grounds urged (which must be on behalf of the appellant) in respect of the decision appealed against. In deciding those grounds it can pass appropriate orders. But, in our opinion, it is not open to the Tribunal itself to raise a ground or permit the party, who was not appealed to raise a ground, which will work adversely to the appellant."

23. The above decision was followed and its ratio reiterated by another Division Bench of this High Court in *Puranmal Radhakishan and Company Vs. Commissioner of Income Tax, Bombay*, and in *New India Life Assurance Co. Ltd. Vs. Commissioner of Income Tax, Excess Profits Tax, Bombay City*, . The question fell for consideration of the Supreme Court in the case of *Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others*, . In that case, one of the questions which arose in the assessment of the assessee-company for the assessment years 1950-51 to 1952-53 was the proper written down value of buildings, machinery, etc., of the assessee-company for calculating the depreciation allowance u/s 10(2)(vi) of the old Income Tax Act. The Tribunal held that only that part of the depreciation which entered into the computation of the taxable income of the assessee under the old Income Tax Act for the assessment years prior to 1950-51 could be treated as depreciation actually allowed and not the total depreciation which went into the computation of the total world income. The Tribunal, however, permitted the department to raise the contention that the Income Tax Officer had not considered the provisions of paragraph 2 of the Taxation Laws (Part B States) (Removal of Difficulties) Order, 1950, and remanded the matter back to the Income Tax Officer to ascertain whether any depreciation was allowed under the Income Industrial Tax Rules and if he was of the opinion that those Rules related to Income Tax or super-tax or any law relating to tax on profits of business, to take into consideration such depreciation actually allowed under those Rules also for the purpose of computing the written down value. It was contended before the Supreme Court that the Tribunal ought not to have allowed the department to raise the said contention for the first time before it and ought not to have remanded the case. The Supreme Court held that the Tribunal had jurisdiction to entertain this contention and to remand the case. It observed (at page 237) as follows :

"The word "thereon", of course, restricts the jurisdiction of the Tribunal to the subject-matter of the appeal. The words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by section 31 of the Act. Consequently, the Tribunal has authority under this section to direct the Appellate Assistant Commissioner or the Income Tax Officer to hold a further

enquiry and dispose of the case on the basis of such enquiry."

24. In *J.K. Bankers Vs. Commissioner of Income Tax and Another*, a Division Bench of the Allahabad High Court, after referring to the above Supreme Court case and the Bombay case of *New India Life Assurance Co. Ltd. Vs. Commissioner of Income Tax, Excess Profits Tax, Bombay City*, held that the word "thereon" restricted the jurisdiction of the Tribunal to the subject-matter of the appeal and that the subject-matter of the appeal is stated in the original grounds of appeal and such additional grounds as might be raised by leave of the Tribunal and that it is not open to the Tribunal to adjudicate or give a finding on a question which is not in dispute and which does not form the subject-matter of the appeal and that the Tribunal, therefore, cannot enhance an assessment on an appeal by the assessee. It further held that it is not open to the Tribunal to give a finding adverse to the assessee, which does not arise from any question raised in the appeal nor is it open to it to raise any grounds which would work adversely to the assessee and pass an order which makes his position worse than it was under the order appealed against.

25. The language of the new sub-section (6) of section 55 of the Act corresponds with the language used in describing the powers of the Appellate Assistant Commissioner of Income Tax u/s 31(3) of the old Income Tax Act and u/s 251 of the new Income Tax Act with the omission of the explanation to sub-section (2) of section 251 which confers power upon the Appellate Assistant Commissioner and the Commissioner (Appeals) to consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Appellate Assistant Commissioner, or the Commissioner (Appeals), as the case may be, by the appellant. It would, therefore, be useful to contrast the decisions which have interpreted this statutory provision with the above decisions which have interpreted the said section 33(4) which describes the power of the Income Tax Appellate Tribunal in disposing of an appeal. In *Narrondas Manordass, Bombay Vs. Commissioner of Income Tax, Central, Bombay*, the Bombay High Court held that the powers conferred upon the Appellate Assistant Commissioner by section 31(3) of the old Income Tax Act were much wider than the powers of an ordinary court of appeal, and once an assessment came before the Appellate Assistant Commissioner, his competence was not restricted to examining those aspects of the assessment which were complained of by the assessee but ranged over the whole assessment, and it was open to him to correct the Income Tax Officer not only with regard to a matter raised by the assessee in the appeal but also with regard to a matter which had been considered by the Income Tax Officer and determined in the course of the assessment. This decision was approved by the Supreme Court in *The Commissioner of Income Tax Vs. Mcmillan and Co.*, . *Narrondas Manordass, Bombay Vs. Commissioner of Income Tax, Central, Bombay*, and *The Commissioner of Income Tax Vs. Mcmillan and Co.*, were both u/s 31 of the old Income Tax Act, which did not contain any provision corresponding to the explanation to sub-section (2) of section 251 of the new

Income Tax Act. It would thus appear that even u/s 31(3) of the old Income Tax Act, though there was no provision such as the one contained in the explanation to section 251(2) of the new Income Tax Act, the Appellate Assistance Commissioner had the power to decide a matter which had not been raised by the assessee in appeal before him but which had been considered by the Income Tax Officer and determined in the course of the assessment.

26. The position which, therefore, emerges on the aforesaid authorities is that the Income Tax Appellate Tribunal, though it may exercise the widest power in deciding an appeal, is confined to the subject-matter of the appeal, that is, to the questions raised before it by the party which has approached it, whether such party be the assessee or the Commissioner; and that in an appeal by the assessee it is open to the department to raise a contention for the first time so long as that contention relates to the question which falls for determination in the said appeal arising out of those questions with respect to which the appeal has been preferred and that the Tribunal has also the power to remand the matter for the purpose of further enquiry. However wide its power, the Tribunal's jurisdiction is none the less confined only to the subject-matter of the appeal, namely, those parts of the assessment to which the appellant - whether it be the assessee or the department - has objected and which call for determination by the Tribunal. It cannot go into a question which does not actually fall for determination by it in that appeal. On the other hand, the Appellate Assistant Commissioner can go into all matters, whether they are raised before him by the assessee or not, provided the subject-matter is considered and determined in the course of the assessment.

27. The old sub-section (6) of section 55 of the Act uses the phrase "pass such orders on appeal as it deems just and proper" while the relevant provisions in the old as also the new Income Tax Acts with reference to the powers of the Appellate Tribunal use the words "pass such orders thereon as it thinks fit". We do not see any substantial difference in the meaning of these two expressions. The word "thereon" in section 33(4) of the old Income Tax Act and in section 254(1) of the new Income Tax Act can only mean "on appeal" and the decisions, which we have referred to earlier, are abundantly clear. The old sub-section (6) of section 55 of the Act expressly uses the word "one appeal". Therefore, under the old sub-section (6) whatever powers that the appellate authority was entitled to exercise could have been exercised by it only with respect to the actual subject-matter of the appeal, namely, the questions raised before it by the appellant or in other words those parts of the assessment with which the assessee was aggrieved, and it could not suo motu go into any matter adverse to the assessee and not having any connection with any of the points arising for determination in that appeal. In *Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others*, the Supreme Court held that the words "pass such orders as the Tribunal thinks fit" include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by section 31 of the old Income Tax Act though the

exercise of such powers is restricted by the word "thereon" to the subject-matter of the appeal. This interpretation put by the Supreme Court on section 33(4) of the old Income Tax Act would apply equally to the old sub-section (6) of section 55 of the Act.

28. While interpreting the old sub-section (6) of section 55 of the Act one salient point of distinction between the scheme of the Income Tax Act and of the Act with which we are concerned should be borne in mind. Under the Income Tax Act against an order passed in appeal by the Appellate Assistant Commissioner both the assessee as also the department can approach the Appellate Tribunal in appeal. There is no such provision under the Act. The scheme of section 55 of the Act makes it clear that the appeal can only be by the assessee and not by the department, whether it be a first appeal or a second appeal. Thus, unlike under the Income Tax Act, under the Bombay Sales Tax Act, the department, if aggrieved by an original order, has no remedy by way of an appeal. The only remedy for the Commissioner is to exercise his suo motu power of revision u/s 57 of the Act, within the time prescribed by that section. The question which arises is, "whether when an appeal is filed, the only remedy for the Commissioner is to exercise his power of suo motu revision or whether he can, while deciding the appeal, also correct a wrong part of the order passed by a subordinate officer?" Whether he could do so or not would depend upon whether what is sought to be done is an integral part of the questions which arise for determination in the appeal and is not something wholly outside its scope and unconnected with it. If it is only with respect to a matter wholly unconnected with the actual subject-matter of the appeal, then, the only remedy open to the department would be for the Commissioner to exercise his suo motu power of revision. If, however, while deciding an appeal he takes into account the contention with respect to one of the points raised in the appeal which is against the assessee, he would be entitled to do so. The question is whether by doing so he can put the assessee in a worse position than he was before he approached the appellate authority. In this connection we may usefully refer to a decision of the Madras High Court in *Kalam Somasundaram Chettiar and Sons v. State of Madras* [1955] 6 STC 304 . The facts in that case were that under the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, where a dealer manufactured groundnut oil and cakes from the groundnut or kernel purchased by him and was registered as a manufacturer of groundnut oil, he was entitled to a deduction equal to the value of the groundnut or kernel purchased and converted by him into oil provided the amount for which the oil was sold was included in his turnover. The assessee in that case claimed a deduction in respect of groundnuts purchased by them. The assessee, however, exported outside the State of Madras the groundnut oil manufactured by them from the groundnuts so purchased and they claimed that in addition to the deduction which they got under the said Rules, they were also entitled to an exemption of tax in respect of the groundnut oil sold by them by way of export outside the State by reason of article 286(1)(a) of the Constitution of India. The assessing

authority allowed the deduction under the said Rules but refused to grant to them the exemption claimed under article 286(1)(a) of the Constitution. The appeal filed by the assesseees to the Commercial Tax Officer was dismissed. The assesseees then approached the Sales Tax Appellate Tribunal. The Appellate Tribunal took the view that the assesseees would not be entitled to both deduction under the said Rules as also to an exemption under article 286(1)(a) of the Constitution and that the claim of the assesseees to an exemption under article 286(1)(a) was paramount and the lower authorities had erred in not excluding from the turnover of the assesseees the sales made by them outside the State. The result of this decision of the Tribunal was that the assesseees were entitled to an exemption in respect of their outside State sales but the deductions given to them in respect of their purchase of groundnuts was held to be wrongly given. This decision of the Tribunal altered the basis of the assessment and as a result thereof, in respect of the turnover outside the State, the purchase price of the relative groundnuts could not be deducted but had to be included in the turnover of the assesseees. The Tribunal thereupon directed the assessing authority to effect the assessment in accordance with the principles laid down by it. The assesseees then went in revision to the Madras High Court. It was the contention of the assesseees that both the lower authorities had held that they were entitled to the deduction and the only question before the Tribunal was whether they were entitled to an exemption or not, and if the Tribunal came to the conclusion that they were entitled to an exemption in respect of their outside State sales by reason of the provisions of article 286(1)(a) of the Constitution, the Tribunal was bound to grant to them such exemption but could not disturb the findings of the lower authorities that they were entitled to deduction and the Tribunal was, therefore, not entitled to hold that under the relevant provisions of the Madras General Sales Tax Act and Rules both the deduction and the exemption could not be granted at the same time. In support of their contention the decision of the Bombay High Court in the case of THE MOTOR UNION INSURANCE CO., LTD. Vs. COMMISSIONER OF Income Tax, BOMBAY., referred to by us earlier and of the other High Courts which had taken the same view were relied upon. After discussing those authorities the Madras High Court took the view that those cases were decided with reference to the context and in the light of the provisions of the Income Tax Act which conferred a right of appeal on the provisions of the Income Tax Act which conferred a right of appeal on the department equally with the assessee, while under the Madras General Sales Tax Act there was no right of appeal conferred upon the department. The right of appeal was open only to the assessee. The High Court summed up its conclusions as follows (at page 316-317) :

"(1) The Appellate Tribunal have no authority to add a new item to the turnover and include therein what was not before the assessing authority for that would be a matter not assessed but omitted from the assessment.

(2) As the Appellate Tribunal are not the assessing authorities and have merely to determine facts giving rise to the tax liability and the law in relation thereto,

they are obviously empowered to allow an appeal and remand it for the assessment being computed in accordance with the facts, as found, and the law as laid down by them and this reassessment has to be done by the assessing authorities.

(3) Where the basis of an assessment is challenged by an assessee and this is accepted by the Tribunal and the matter is remitted to the assessing authorities, there has to be a reassessment in conformity with their order. In the normal cases this would result in the decrease of the tax liability of the appellant. The second proviso to sub-section (5) enables the refund to be obtained by the assessee as a consequence of the reassessment in accordance with the orders of the Appellate Tribunal."

29. In view of the fact that under the Act also the department has no right of appeal to the Tribunal, in our opinion, it would be within the jurisdiction of the Tribunal to decide a point arising in appeal before it, though such decision might result in increasing the taxable turnover or the rate of tax. Even under the old sub-section (6) the only restriction on the power of the Tribunal was that the Tribunal could not of its own accord disturb those parts of the assessment order or of the order appealed against, which did not expressly or by necessary implication arise for determination before it. If a part of the assessment order was not complained of in appeal, that is to say, was not the subject-matter of the appeal, the appellate authority would have no jurisdiction to pass an order with reference thereto under the old sub-section (6) of section 55. For instance, had an assessee appealed against the rejection of his claim with regard to certain export sales made by him on the ground that they were not liable to be taxed under article 286(1)(b) of the Constitution, while deciding that question the appellate authority would have no jurisdiction under the old sub-section (6) of section 55 to go into the question whether a transaction which had been accepted by the Sales Tax Officer as a works contracts was not a works contract but a sale. Similarly, if the question before the appellate authority was whether certain deductions were to be allowed in respect of sales of particular goods made by an assessee, the appellate authority would have no jurisdiction to hold that in respect of sales of entirely different goods having no relation to the subject-matter of the appeal, the rate of tax should be higher than what the Sales Tax Officer had levied. The reason is that such a determination would have no relation with the subject-matter of the appeal. In view of the similarity in the language of the new sub-section (6) and of section 31(3) of the old Income Tax Act, and in view of the decision of the Supreme Court in *Hukumchand Mills Ltd. Vs. Commissioner of Income Tax, Central Bombay and Others*, it must be held that the powers conferred upon the Tribunal by the new sub-section (6) of section 55 are wider than those under the old sub-section (6) and under the new sub-section (6) the appellate authority can decide a question though it has not been raised before it by the appellant so long as it was before the Sales Tax Officer and was the subject-matter of assessment, the exercise of such power being subject to the conditions laid down in the proviso to the new sub-section (6),

namely, that the appellant should have a reasonable opportunity of showing cause against an order by which an assessment or a penalty is proposed to be enhanced or the amount of drawback, set-off or refund is proposed to be reduced.

30. Mr. Jetly, learned counsel for the department, submitted that even under the old sub-section (6) of section 55 the appellate authority had the power to determine points which did not arise in the appeal. In support of this submission Mr. Jetly relied upon a decision of a Full Bench of the Madras High Court in *State of Tamil Nadu v. Arulmurugan and Company* [1982] 51 STC 381 . Relying upon this decision Mr. Jetly submitted that the power of the appellate authority even under the old sub-section (6) was no different, and not less wide, than the power of the assessing authority to make the assessment in the first instance. What Mr. Jetly's argument overlooks is that part of the decision was based upon the provisions of sections 31 and 36 of the Tamil Nadu General Sales Tax Act, 1959. The relevant passage in the said judgment is as follows :

"The jurisdiction of an appellate authority under the Tamil Nadu General Sales Tax Act, 1959, includes the power to confirm, reduce, enhance or annul, the assessment. It also includes the power to set aside the assessment with a direction to the assessing authority to make a fresh assessment, and also to pass any other order which the appellate authority may think fit. These powers, which are of the widest amplitude, are expressly conferred both on the Appellate Assistant Commissioner and on the Appellate Tribunal, vide sections 31 and 36 of the Tamil Nadu General Sales Tax Act, 1959. The provisions show clearly that the power of the appellate authority concerning an assessment under appeal is no different, and not less wide, than the power of the assessing authority to make the assessment in the first instance."

31. This part of the decision, therefore, turns upon the language of section 31 and 36 of the Tamil Nadu General Sales Tax Act, 1959, and can have no relevance for interpreting the old sub-section (6) of our section 55 which is couched in entirely different language. For the reasons set out above, we are unable to accept the contention of the department that the new sub-section (6) of section 55 of the Act merely enumerates the power already possessed by the appellate authority under the old sub-section (6) of section 55 of the Act. Under the new sub-section (6) of section 55 of the Act the appellate authority became clothed with wider power and jurisdiction than it had been under the old sub-section (6).

31. The next question that arises for determination is whether an appeal filed in respect of an assessment order passed before the coming into force of the Bombay Sales Tax (Amendment) Act, 1971 (Maharashtra Act No. 42 of 1971), is to be decided according to the old sub-section (6) or the new sub-section (6). It is clear from what we have stated earlier that the change made by the said Amendment Act is not a change in procedure but a change in the powers and jurisdiction of the appellate authority. The said Amendment Act did not have

retrospective effect and therefore the new sub-section (6) came into operation only with effect from 1st December, 1971. It is also pertinent to bear in mind that the applicants' appeal before the Assistant Commissioner was filed prior to that date. Mr. Patel on behalf of the applicants submitted that the applicants' right to have the appeal decided according to the provisions of old sub-section (6) of section 55 of the Act became vested in the applicants when the lis commenced and such lis commenced when the returns in respect of the assessment order were filed. In support of the above submission Mr. Patel relied upon a decision of the Supreme Court in *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, . The question which arose in that case was whether an appeal lay as a matter of right to the Supreme Court. Prior to the coming into force of the Constitution of India, if the sum or matter at issue was of the value of not less than Rs. 10,000 and the judgment of the High Court in appeal did not confirm the decree appealed against, an appeal lay to the Federal Court. By the Constitution of India the valuation was increased to Rs. 20,000. The appeal in the case before the Supreme Court was from a decree in a suit instituted prior to the coming into force of the Constitution of India. The suit was decreed after the Constitution came into force. In appeal the High Court of Andhra Pradesh reversed the decree of the trial court. An application for leave to appeal to the Supreme Court was rejected by the High Court on the ground that though the value of the property in suit exceeded Rs. 10,000, it was less than Rs. 20,000. The appellant applied for leave to appeal to the Supreme Court. The appellant contended that as from the date of the institution of the suit he had acquired a vested right to appeal to the Federal Court, since replaced by the Supreme Court. The appellant's contention was accepted by the Supreme Court and leave to appeal was granted. The Supreme Court held that the right of appeal was not a mere matter of procedure but was a substantive right and the institution of the suit carried with it the implication that all rights of appeal then in force were preserved to the parties thereto till the rest of the carrier of the suit. Further, it held that the right of appeal was a vested right and such a right to enter the superior court accrued to the litigant and existed on and from the date the lis commenced and such right was governed by the law prevailing at the date of the institution of the suit and could be taken away only by a subsequent enactment if it so provided expressly or by necessary intendment and not otherwise. In our opinion, this case does not touch the point which we have to decide. The applicants' right of appeal is not taken away or sought to be taken away by the new sub-section (6) of section 55, but what has happened is that their right to have the appeal decided in a particular manner is sought to be affected and has been affected. The appellate forum still exists and the applicant's appeal could still be heard and was heard. The only question which arises is whether while deciding the appellant's appeal the appellate authority could exercise wider power than it could have done prior to the coming into force of the new sub-section (6) of section 55. Mr. Patel also relied upon another decision of the Supreme Court in *Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh* [1953] 4 STC 114 (SC). That was a case under the Central Provinces and Berar

Sales Tax Act, 1947. Under the proviso to section 22(1) of that Act as it stood prior to its amendment by the Central Provinces and Berar Sales Tax (Second Amendment) Act, 1949, an aggrieved assessee was entitled to appeal provided he paid such amount of tax as he might admit to be due from him. Under the said proviso as amended, the appeal had to be accompanied by satisfactory proof of payment of the tax in respect of which the appeal had been preferred. The assessment proceedings of the assessee-company were initiated prior to the amendment of the section but the order of assessment was made after the amendment. The assessee contended that as the amendment had not been made retrospective its right of appeal under the original section 22(1) remained unaffected and that as it did not admit anything to be due, it was not liable to deposit any sum along with its appeal to the Sales Tax Commissioner. The Commissioner rejected the appeal on the ground that it had not been accompanied by any proof of payment of the tax assessed as required under the amended proviso. The Board of Revenue and the High Court declined to direct the Commissioner to admit the appeal. The Supreme Court held that the imposition of the restriction by the amendment of the said section 22(1) could not affect the assessee's right of appeal from a decision in proceedings which had commenced prior to such amendment and which right of appeal was free from such restriction under the said section as it stood at the time of the commencement of the proceedings, and therefore, the assessee's appeal ought not to have been rejected on the ground that it was not accompanied by satisfactory proof of payment of the tax assessed. The Supreme Court further held that the new requirements in the proviso to section 22(1) could not be said merely to regulate the exercise of the assessee's pre-existing right but in truth whittled down the right itself and could not be regarded as a mere rule of procedure. In our view, this decision too is not quite to the point because the question involved in it was of the right of filing an appeal. Imposition of the condition that the amount of tax assessed should be deposited as a pre-condition of filing an appeal was one which restricted the right to prefer an appeal, and in cases where an assessee would be unable to make such a deposit denied to him that right. In the present case, the applicant's appeal had already been filed and was pending and there was no impediment placed by the new sub-section (6) of section 55 to the hearing of that appeal by the appellate authority.

32. The authority which now requires to be considered is the decision of the Supreme Court in *Moti Ram Vs. Suraj Bhan and Others*, . That was a case under the East Punjab Urban Rent Restriction Act, 1949. Prior to the amendment of section 15 of that Act by Act 29 of 1956 the decision of the District Court against an order of the Rent Controller was final u/s 15 of the said Act. By the amending Act 29 of 1956 the finality of the appellate decision was taken away and the decision of the District Court was made subject to the revisional power of the High Court. The amendment to section 15 had already come into force prior to the decision in appeal of the District Court. The point before the Supreme Court was whether the revision application before the High Court against the appellate

decree of the District Court was maintainable. The Supreme Court held that the finality of the appellate decision u/s 15 before its amendment by Act 29 of 1956 could not be invoked before the appellate decision was actually recorded and that where, therefore, the amending section had come into force at the time when the appellate authority decided the matter and when the appellate order was actually passed, the appellant could not claim the finality under the earlier provision and the revision petition against the appellate order under the amended section 15 was maintainable. This case was considered and distinguished by a Bench of seven Judges of the Supreme Court in *Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another*, . That was a case under the Bombay Rents Hotels and Lodging House Rates Control Act, 1947, as applicable to the State of Gujarat. u/s 29 of the said Act only one appeal was provided for from the decision of the court of the first instance. The respondents in that case had filed a suit for ejectment against the appellant. Their claim for ejectment was dismissed. In appeal the decree of the trial court was confirmed. As no further appeal lay against the appellate decree the respondents filed a revision application before the High Court of Gujarat u/s 115 of the Code of Civil Procedure, 1908. While the revision petition was pending before the High Court the Rent Act was amended by Gujarat Act 18 of 1965 by which the power to approach the High Court in revision was expressly conferred in terms much wider than that contained in section 115 of the Code of Civil Procedure, 1908, and such wider powers included the power to reopen questions which, till then, were to be deemed finally decided. The High Court in exercise of such power reversed the order of the appellate court and decreed the respondents' suit. The Supreme Court held that the amended section 29(2) was not intended to be retrospective in operation, and that it conferred jurisdiction upon the High Court to call for the record of a case for the purpose of satisfying itself that the decision in appeal was according to law, which jurisdiction the High Court did not possess prior to the date of the amending Act, and that in deciding the said revisional application the High Court had exceeded its jurisdiction by exercising the wider power conferred by the amending Act. The Supreme Court distinguished its earlier decision in *Moti Ram Vs. Suraj Bhan and Others*, on the ground that in that case the decision of the appellate authority, which was brought before the High Court in the exercise of its revisional jurisdiction under the amended section 15 of the East Punjab Urban Rent Restriction Act, was delivered after the amending Act had come into force, and therefore, on the date on which the appellate order was made it had not acquired finality, for it was subject to an order which might be passed in revisional application which might be filed before the High Court under the amended section.

33. In the present case, the applicants' appeal was filed before the amendment of sub-section (6) of section 55 had come into force. On the date when they filed an appeal the applicants had acquired the right to have their appeal heard according to the provisions of sub-section (6) of section 55 as it then stood. They had not filed their appeal after the amended sub-section (6) had come into force,

and therefore, their appeal was required to be decided according to the provisions of the old sub-section (6) of section 55 of the Act and not according to the provisions of the new sub-section (6) of section 55 of the Act.

34. The only question which now remains for determination is whether the order of the Appellate Commissioner can be said to have been one which he was competent to pass under the unamended sub-section (6) of section 55. The answer to this question depends upon whether the order of the Assistant Commissioner related to the actual subject-matter of the appeal, namely, the points arising for determination in the appeal, or was on a point unrelated to the subject-matter of the appeal. The contention of the applicants as taken in the grounds of appeal was that there was no infraction by them of the certificates in form 15 given by them and, therefore, they were not liable to purchase tax u/s 14 of the Act. The point argued at the hearing as reproduced in the order of the Assistant Commissioner was that levy of purchase tax u/s 14 for contravention of form 15 for branch transfers was not justified. Thus, what the applicants were disputing was the manner of application of the pro rata method. According to them, only the actual sales made by them were to be taken into account for working out the percentage for determining the quantum of contravention of certificates in form 15 and not by also taking into account the quantity of manufactured goods transferred by them to their branches outside the State of Maharashtra. Thus, what was disputed before the Assistant Commissioner was working out of the percentage of contravention of certificates in form 15. It was the method of working out this percentage which was in dispute and the Assistant Commissioner had, according to his right, to determine how the percentage should be worked out. He did so by holding that not only the goods transferred to the applicants' branches outside the State were to be taken into account but also the machinery purchased by the applicants against certificates in form 15. This was thus a working out of the percentage which was the issue in appeal. That in arriving at his decision the Assistant Commissioner was wrong and had misunderstood and misapplied our decision in the case of Berar Oil Industries [1975] 36 STC 473, referred to earlier, is beside the point. He had jurisdiction under the unamended sub-section (6) of section 55 to decide the method of working out the percentage and the fact that the method adopted by him was wrong touched the merits of the case and did not affect the exercise of his power. Further, the sole question was whether the applicants were not liable to pay any purchase tax u/s 14 of the Act. The Sales Tax Officer had held that the applicants were liable to pay the purchase tax on purchases of the value of Rs. 3,52,597 at the rate of 3 per cent. What the Assistant Commissioner held was that by reason of the method of working out the percentage applied by him the applicants were liable to pay the purchase tax u/s 14 on purchases of the value of Rs. 7,69,246 at the rate of 5 per cent.

35. Mr. Patel, on behalf of the applicants, contended that the dispute was about liability to pay the purchase tax and not as to the rate of purchase tax. The question of liability to pay the purchases tax u/s 14 would by necessary

implication also involve the question as to the rate at which such purchase tax was to be paid. Apart from that, in modifying in appeal the order of the Sales Tax Officer, the Assistant Commissioner must necessarily work out the amount of the tax payable by the assessee. That can only be done by applying the relevant rate of tax to the taxable turnover. It is well-settled that if at the time of decision of an appeal a law is retrospectively amended, the appellate court must apply the amended law. The proposition is obvious as self-evident, but if authorities are to be referred to, we need cite only three decisions of the Supreme Court in support of this proposition, namely, Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras, , The State of Uttar Pradesh and Others Vs. Modi Industries Limited, and The State of Uttar Pradesh and Others Vs. Raja Syed Mohammad Saadat Ali Khan,

36. For the above reasons it must, therefore, be held that the order of the Assistant Commissioner in appeal was one under the unamended sub-section (6) of section 55.

37. In the result we answer the questions referred to us as follows :

Questions No. (1) : In view of the questions arising for determination in the appeal filed by the applicants, the Assistant Commissioner had the power to enhance the quantum of purchases, though he was wrong in law in enhancing it from Rs. 3,52,597 to Rs. 7,69,246.

Question No. (2) : In view of the question arising for decision in the appeal filed by the applicants, the Assistant Commissioner possessed jurisdiction to enhance the rate of purchase tax from 3 per cent to 5 per cent by reason of the retrospective operation of sub-section (2A) of section 14 of the Bombay Sales Tax Act, 1959, as substituted with retrospective effect by the Bombay Sales Tax (Amendment and Validating Provisions) Act, 1973 (Maharashtra Act No. 13 of 1973).

Questions Nos. (3) and (4) : The contravention of certificates in form 15 given by the applicants was in respect of purchases of the value of Rs. 3,52,597 and not Rs. 7,69,246. We do not give any further elaborate answer to question No. (3) and also do not answer question No. (4) in view of the statement made by Mr. Jetly on behalf of the department that the Commissioner of Sales Tax will give to the applicants relief by way of administrative measures under the Commissioner's circular dated 21st June, 1978.

38. There will be no order as to costs of this reference.

39. The applicants will be entitled to a refund of the fee of Rs. 100 paid by them.