**(2009) 09 J&K CK 0013**

**In the Jammu And Kashmir High Court**

**Case No :** Others Writ Petition (OWP) No. 1051 Of 2009, CMP No. 1357 Of 2009

Larsen & Toubro Ltd. APPELLANT

Vs

State of J&K & Ors. RESPONDENT

**Date of Decision :** 30-09-2009

**Acts Referred:**

Jammu and Kashmir Value Added Tax Act, 2005 — Section 40, 72

**Citation :** (2009) JKJ 305 Supp

**Hon'ble Judges :** Muzaffar Hussain Attar, J

**Bench :** Single Bench

**Advocate :** Veenu Gupta, Sunil Sethi,Sr, Advocates appearing for the Parties

## Judgement

1. The Assessing Authority, Commercial Taxes Circle UdhampurI passed order dated 30th of May, 2009, whereby it raised a tax demand of Rs.

5,99,08,560.09, which included interest on the tax as well. A demand notice was issued to the petitioner on 30.5.2009, asking it to pay an amount

of Rs. 5,99,08,560.09 within a period of 30 days from the receipt of said notice of demand.

2. Petitioner being aggrieved of the said order, challenged the same by filing the statutory appeal under Section 72 of the Jammu and Kashmir

Value Added Tax Act, 2005 before respondent no.3 (the appellate authority under the Act). Along with the appeal a stay application was also

filed.

3. The grievance of the petitioner is that, though the appeal was received but no action has been taken by the appellate authority thereon and no

orders on the appeal have been passed. It is for the alleged nonconsideration of the statutory appeal and the stay application of the petitioner that this writ petition has been filed seeking quashing of the order dated May 30, 2009 and the recovery notice dated 12.09.2009. Further directions

are sought to respondent no.3 to consider and pass appropriate orders in the appeal and stay application filed before him by the petitioner.

Petitioner has also prayed for issuance of command to the respondent no.4 to defer the recovery proceedings initiated against the

petitionercompany.

4. Heard learned counsel for the petitioner.

5. Section 72 falls in Chapter XI of the Jammu and Kashmir Value Added Tax Act, 2005, which chapter deals with appeals and revision. This

section, for facility of reference, is reproduced as under:

72. Appeal

(1) A dealer or any other assessee objecting to any order passed by the Assessing Authority or any other officer authorized under section 66 or

section 67, other than an Additional Commissioner or a Deputy Commissioner Commercial Taxes, may within thirty days from the date on which

he is served with the order, appeal to the Appellate Authority or if the order is made by the Additional Commissioner or the Deputy

Commissioner, to the Commissioner:

Provided that no appeal shall be entertained by the said authority against an order of assessment unless it is stated that:

(a) where all the returns for a year have been filed, the amount of tax due under the Act on the turnover of sales or purchases, as the case may be,

admitted by the appellant in the returns filed by him or at any stage in any proceeding under the Act, whichever is higher, has been paid;

(b) where some of the returns for a year have not been filed or no return has been filed for such year, the amount of tax due under the Act,

admitted by the appellant in the returns, if any, filed by him under the Act or 20% of the tax assessed has been paid; or

(c) in case the appeal is against the imposition of penalty, 5% of the penalty levied has been paid:

Provided also that the Appellate Authority may, for reasons to be recorded in writing, stay the recovery of the demand disputed in appeal, except

the amount of tax and penalty payable under first proviso.

 

6. Learned counsel for the petitioner submitted that though petitioner availed the appropriate statutory remedy against the order dated May

30,2009, but the Appellate Authority has not considered the appeal and the stay application till date and it is in this backdrop that recovery notice

dated 12.09.2009 has been issued. Learned counsel further submitted that when a statutory appeal is filed, it shall be deemed that the recovery

proceedings automatically defer. In support of his contention, learned counsel referred to and relied upon decisions of the Madras High Court

delivered in C. Kuppuraj v. Deputy Commercial Tax Officer, Estee Hubs & Drives v. Assistant Commissioner (CT), Zone VII, Madras, and a

decision of the Rajasthan High Court in Shree Cement Ltd. V. Union of India and ors.

7. Taxes are being exacted for public good. Persons, who are levied with tax in accordance with the statutes, are duty bound to pay the same. A

person, who is aggrieved of the order of levy of tax and imposition of fine/ interest, can challenge the said order, if the statute confers a right for

filing an appeal on such aggrieved person. Once remedy of statutory appeal is provided than the appeal can be filed by the aggrieved person on the

terms and conditions contained in the provisions of the statute.

8. In the present case, the petitioner being aggrieved by order passed under Section 40 of the Jammu and Kashmir Value Added Tax Act, 2005

and the recovery notice issued in sequel thereto, filed an appeal under Section 72 of the Jammu and Kashmir Value Added Tax Act, 2005.

9. Perusal of Section 72 supra provides that no appeal shall be entertained by the appellate authority against an order of assessment unless it is

satisfied that all the returns of the year have been filed and the amount admitted in the returns filed has been paid; if some of the returns for the year

have not been filed or no returns have been filed, the amount of tax due under the Act, admitted by the appellant in the returns, if any, filed by him

under the Act or 20% of the tax assessed has been paid, or in case, the appeal is against the imposition of penalty, 5% of the penalty levied has

been paid. The Appellate Authority is duty bound to satisfy itself that the conditions imposed by Section 72 of the Act are complied with by the

aggrieved person.

10. Be that as it may, the grievance of the petitioner is that though appeal has

 

been received but some has not been considered by the Appellate

Authority.

11. When the jurisdiction of the Appellate Authority is invoked in accordance with the mandate of the statute, it is duty bound to consider the

matter and pass appropriate orders one way or the other, in accordance with the provisions of the relevant statute. The Appellate Authority in the

present case is duty bound to consider the appeal of the petitioner if same satisfies the requirements as laid down in Section 72 of the Act. Merely

filing of an appeal would not, in all cases under law, tantamount to presentation of appeal unless the statutory requirements contained in first

proviso to Section 72 of the Act are complied with.

12. The Appellate Authority is under statutory mandate not to entertain an appeal unless the statutory requirements are found to be complied with

by the appellant. The Appellate Authority in the present case has to pass the orders one way or the other in terms of the statute, as such, a

direction can be issued to the Appellate Authority to pass appropriate orders in accordance with law either to entertain or to reject the appeal.

13. Submission of learned counsel for the petitioner that till the appeal is considered by the Appellate Authority, the recovery proceedings shall

automatically defer, is liable to be rejected because there is no provision contained in the Jammu and Kashmir Value Added Tax Act, 2005, which

provides that mere filing of an appeal would automatically defer the recovery proceedings. This Court will not direct statutory authority to do an act

not permitted by the relevant statute. The contention of learned counsel for the petitioner is, accordingly, rejected.

14. I have an advantage to peruse the judgments cited by learned counsel for the petitioner. The judgments relied upon by the learned counsel for

the petitioner do not lay down any law to the effect that as and when an appeal is filed, whether it is entertained or not, the recovery proceedings

shall defer.

15. Even otherwise also, directing statutory authority to defer recovery proceedings may, in some cases, tantamount to rewriting the statute itself

and may also amount to usurping the powers of Appellate Authority.

16. The prayer made by the petitioner seeking quashment of the order of the Assessing Authority, being subject matter of the statutory appeal, this

Court, at this stage, cannot take cognizance of the same and it will not be appropriate also to comment on the merits of the order impugned in this

petition. It is for the Appellate Authority to consider and return findings on the legality or otherwise of the order passed by the Assessing Authority.

The recovery notice having been issued in sequel to the order passed by the Assessing Authority, on same reasoning, cannot be interfered with at

this stage in this petition.

17. This petition is, accordingly, disposed of with the observations that Appellate Authority shall consider the appeal filed by the petitioner strictly

in accordance with the mandate of the Jammu and Kashmir Value Added Tax Act, 2005, within a period of one week from the date a copy of this

order is served upon it and will pass appropriate orders thereon in accordance with the statute.

18. CMP No. 1357/2009 shall also stands disposed of.

 