
(1997) 05 MP CK 0039
In the Madhya Pradesh High Court
Case No : M.P. No. 1859 of 1984

M.P. Electricity Board

APPELLANT

Vs

Additional Assistant Commissioner of Sales Tax and Others

RESPONDENT

Date of Decision : 05-05-1997

Acts Referred:

Madhya Pradesh General Sales Tax Act, 1958 — Section 38, 38(3), 39

Citation : (1998) 2 MPLJ 209

Hon'ble Judges : A.K. Mathur, C.J.; Dipak Misra, J.; D.M. Dharmadhikari, J

Bench : Full Bench

Advocate : B.L. Nema, for the Appellant; R.S. Jha, Dy. A.G., for the Respondent

Judgement

A.K. Mathur, C.J.

This is a reference made by the learned Single Judge of this Court and the following questions of law have been referred for answer of this Court which reads as under :-

"(1) A revision would lie after the appeal is dismissed for non-compliance of Section 38(3) of the M. P. General Sales Tax Act?

(2) Whether the merits of the assessment and penalty imposed is still open before the revisional authority?

For convenient answer of both the aforesaid questions, the facts given in Misc. Petition No. 1859/84, M. P. Electricity Board v. Additional Assistant Commissioner, Sales Tax are taken into consideration.

The petitioner carries on business of manufacture and sale of electrical energy and is a dealer registered under the M. P. General Sales Tax Act, 1958. The petitioner was required to file returns in respect of the turn over for each quarter under the Scheme of the said Act. The return was to be filed quarterly along with the tax with the evidence of tax paid i.e. challan of depositing the money. The petitioner filed a consolidated return for all the periods i.e. one return and

deposited the tax. The petitioner was assessed to sales tax and was imposed penalty for late filing of the returns u/s 17(3) of the Act.

Aggrieved against this order, the petitioner preferred an appeal against imposition of penalty and the petitioner was required to deposit tax u/s 38 of the Act. The petitioner deposited 10% of the assessed tax, according to petitioner, it is covered by Section 38(3)(a) of the Act. The Appellate Authority rejected the contentions and dismissed the appeal holding that the same was incompetent as the amount of tax deposited required to be 1/3rd u/s 38(3)(b)(i) of the Act.

Against the said dismissal of the appeal, a revision was filed by the assessee before the Commissioner u/s 39 of the Act, and the same was dismissed by the Commissioner.

Aggrieved against the order of revision, a writ petition was filed by the petitioner that notwithstanding the fact that the revisional authority has affirmed the order of the Appellate Authority, but still the revisional Authority should have examined the case on merit. In this connection, the learned counsel for the petitioner relied on the decision of this Court reported in *Purushottam Das Mathuradas and Co. Pvt. Ltd. v. Commissioner of Sales Tax* (1968) M 940 LJ 940 ; (1969) 23 STC 319, wherein it was held that the revisional authority can examine the case on merits. As against this, a reference was made by the Revenue on the decision of a Division Bench of this Court in the case of *Gulshan Rai Johar v. Commissioner of Sales Tax* (1988) MPLJ 19 : 1988 (71) STC 258. The learned counsel for the petitioner/assessee also relied on the decision of the Hon. Supreme Court given in the case of *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, arising out of income tax. However, the learned Single Judge of this Court finding two conflicting decisions, has referred the aforesaid questions for answer of this Court.

We have heard the learned counsel for the parties and perused the records.

So far as the first question is concerned regarding maintainability of the revision is concerned, there cannot be any two opinion. Section 39 of the Act confers a revisional power on the Commissioner which says that the Commissioner either on his own motion or on an application can call for the record of the proceeding in which any order was passed and he can pass an order after such enquiry as he considers necessary and subject to the provisions of this Act, not being an order prejudicial to the dealer or person as he thinks fit. It is further provided that the Commissioner shall not revise any order under this Sub-section, where an appeal against the order is pending before any authority specified in Sub-section (1) of Section 38 or where, if such appeal lies, the time within which it may be filed has not expired; or where a second appeal against the order has been filed. Therefore, a restriction on exercise of revisional power of the Commissioner is that he shall not entertain the appeal where matter is pending before any authority under Sub-section (1) of Section 38 or where such appeal lies and the time for filing the same has not expired, secondly, there is a proviso which also

lays down that no revision shall lie against an order determining the liability of a dealer to pay tax or against a notice issued under this Act for assessment except after an assessment order is passed and lastly, against an order passed u/s 16-A or 45-A. Therefore, these are restrictions under which a revision cannot be entertained by the Commissioner but except these restrictions, a revision is maintainable against the order of any authority below the Commissioner. However, there is also one more condition which contained in Sub-Section (2) of Section 38 wherein the proviso says that the dealer has an option instead of filing a second appeal under this Sub-section, he can file a revision to the Commissioner under Sub-section (1) of Section 39 and where the dealer or person exercises such option, he shall be precluded from filing a second appeal. Therefore, the petitioner/assessee has an option either to file a revision or to file a second appeal and if he chooses to have a remedy of revision then filing of second appeal is precluded. Therefore, so far as the revision against the order under Sub-section (3) of Section 38 is concerned, the same is maintainable with restriction mentioned above.

Now coming to the second question where the basic controversy lies when the appeal is preferred u/s 38 and it is not followed with the deposit of tax as u/s 38(3)(a) or u/s 38(3)(b) where one or more of the returns for the period to which the order appealed against relates have not been filed and tax has not been paid or where such return or returns have been filed but tax has not been paid 1/3rd of such balance or such part thereof as bears the same proportion to the total balance due as the period for which the returns have not been submitted bears to the period for which the assessment has been made not exceeding seventy-five per cent of such balance whichever is more, than in either of the situations, the appeal shall not be treated as maintainable. In case, the appeal is not maintainable then there is no question of entering into the merit of the case. As the deposit of tax as mentioned in Section 38(3)(a) and (b) has not been complied with then such an appeal becomes incompetent and when appeal becomes incompetent then there is no question of examining the same on merit. In case, the appeal is dismissed being incompetent and the revision is filed before the revisional authority then the scope of the revisional authority is limited, i.e. he is only to examine whether the order dismissing the appeal being incompetent is proper or not. The question of entering into merit will not arise if the appeal happens to be not properly constituted. If the appeal is not properly constituted then there is no question of going into merit. The Division Bench of this Court in the case of Gulshan Rai Johar (*supra*) has observed :

"There are two stages of an appeal contemplated by Section 38 of the M. P. General Sales Tax Act, 1958. The first stage of admission of the appeal and the second is that of hearing. The stage of hearing of an appeal arises only after it has been admitted. Therefore, if an appeal is not to be admitted for failure to deposit the tax as required u/s 38(3) of the Act, the hearing contemplated at that stage would be in regard to the matter of deposit of tax only. The merits of the appeal do not come up for consideration at that stage. Consequently, if an

appeal has not been admitted on the ground of non-payment of tax, the plea which can be raised in second appeal is in regard to the validity of the order of the first appellate authority in not admitting the appeal. However, if a first appeal has been dismissed in default at the stage of final hearing, it would be taken that the various pleas raised by the appellate have been repelled. Consequently, if the first appellate authority has passed an order dismissing an appeal in default at the time of final hearing, the scope of enquiry in the second appeal preferred against such dismissal would cover the merits of the case.

Where the appeal filed by the applicant to the Appellate Assistant Commissioner was rejected summarily by him on the ground of non-deposit of tax as required u/s 38(3) of the M. P. General Sales Tax Act, 1958, and the Tribunal was of the view that there was no illegality in the Appellate Assistant Commissioner's dismissal of the appeal;

Held, (i) that the Tribunal was justified in upholding the appellate Assistant Commissioner's order; and

(ii) that since, the appeal was not admitted at all the Tribunal was justified in rejecting the contention that the case be heard on merits."

The Division Bench decision of this Court in *Gulshan Rai* (supra) took the view that in case the appeal having been admitted and dismissed in default then of course it can be examined on the merit, but the appeal has been dismissed on account of being held incompetent then it is not open for the Commissioner to examine it on merit. In the case of *Purushottam Das Mathuradas and Co.* (supra), it was a case of dismissing the appeal in default. When the appeal was dismissed in default then it was observed that it can challenge the order on merits also. This has also been observed in the case of *Gulshan Rai* (supra) that if the appeal is dismissed in default at the final hearing then it would be presumed that various pleas raised by the appellant have been repelled and consequently, the scope of enquiry in second appeal preferred against the said dismissal would cover the merit of the case. In *Purushottam Das Mathuradas* (supra), as an appeal was filed before the Board of Revenue against the order passed u/s 22(1) of the Central Provinces and Berar Sales Tax Act, 1947, the learned Member of the Board dismissed the appeal inter alia holding that the dismissal of appeal on default of appearance of the appellant was justified and it did not require any interference in appeal and he declined to go into the merits of the case. This was a case in which an appeal was dismissed in default and it was not a case that the appeal was dismissed being incompetent, as in the present case. Therefore, this decision cannot be said directly conflicting with that decision. The case being dismissed in default of the appearance of the parties or a lawyer stand on different footings than an appeal which is incompetent. Therefore, the Lordships have made distinction in *Gulshan Rai Johar*'s case (supra). There are two stages - one admission of the appeal and second final disposal. The appeal can only be admitted if it is competent. In case, it is incompetent then it cannot be admitted that it is dismissed at the admission

stage. Both these decisions are not directly conflicting with each other.

The learned counsel has also invited our attention to the case under Income Tax Act reported in *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, . There also, the appeal was dismissed as barred by time and no sufficient cause was found for condoning the delay. Therefore, in that context, their Lordships observed that a preliminary issues u/s 30(2) or (3) can be raised for consideration at the time of hearing of the appeal and jurisdiction of the appellate Assistant Commissioner is not limited to hear the appeal on merits on the assessment only. Therefore, this case also stands on different footings.

However, so far as present case is concerned, as mentioned above, if the condition precedent for depositing the tax is not made then the appeal becomes incompetent and if the appeal is incompetent then revisional authority can examine whether order passed by lower authority is correct or not. If it is concluded that the order of lower authority is not validly passed then it can set aside the order and remand the case back to the authorities to decide the appeal on merits. But it cannot go into the merit of the assessment order as the first question regarding maintainability of the appeal has to be decided because of condition precedent for deposit of tax. Hence the second question is answered accordingly.

With above observations, both the petitions (M. P. No. 1859/84 and 2207/84) are disposed of accordingly. The amount of security, if any, shall be refunded to the petitioner. No order as to costs.