

(2001) 05 DEL CK 0158
In the Delhi High Court
Case No : C.W.P. No. 171 of 1998

Shashi Mangla

APPELLANT

Vs

Commissioner Sales Tax and Another

RESPONDENT

Date of Decision : 29-05-2001

Acts Referred:

Delhi Sales Tax Act, 1975 — Section 43, 60
Delhi Sales Tax Rules, 1975 — Rule 2, 36, 36(1)

Citation : (2003) 131 STC 283

Hon'ble Judges : Dr. Arijit Pasayat, C.J.; D.K. Jain, J

Bench : Division Bench

Advocate : R.K. Mangla, general power of attorney holder in perso, for the Appellant; H.C. Bhatia, for the Respondent

Judgement

Arijit Pasayat, C.J.—Challenge in the present writ petition is ,to the order passed by the Appellate Tribunal, Sales Tax, Delhi (in short, "the Tribunal") holding that a consolidated appeal filed by the appellant is not maintainable.

Dispute relates to the assessment year 1992-93.

2. A brief reference to the factual aspects would suffice :

The petitioner, a dealer registered under the Delhi Sales Tax Act, 1975 (in short, "the Act") and the Central Sales Tax Act, 1956 (in short, "the Central Act"), was assessed to extra demand of tax. Appeals were filed before the prescribed first appellate authority along with applications for dispensing with the requirement of pre-deposit of the disputed demand. The Deputy Commissioner (Appeals-II) (in short, "the Deputy Commissioner") by one consolidated order directed payment of Rs. 20,500 under the Act and a sum of Rs. 1,300 under the Central Act as against extra demands raised ex parte amounting to Rs. 2,04,151 under the Act and Rs. 13,322 under the Central Act for the relevant assessment year as a condition precedent for entertainment of the appeals. Only one appeal was filed by the petitioner before the Tribunal which was numbered as Appeal No. 38/

STT/97. The Tribunal held that two appeals were required to be filed as the dispute related to different statutes. It was also noticed that the memorandum of appeal was not in the prescribed format and was not signed by the appellant, but by the power of attorney, which also made the appeal non-maintainable. The appeal was, Therefore, rejected allowing the appellant to file fresh appeals separately along with an application for condensation of delay, which was to be considered on merits in accordance with law.

3. The petitioner's stand in essence is that all the three grounds, on which the appeal was not entertained, are not tenable. According to learned counsel for the Revenue, the appeal was incompetent on each of the ground and, Therefore, Tribunal's conclusions are in order.

4. We shall first take up issues whether power of attorney holder could sign the memorandum of appeal and whether the appeal was in the prescribed format. Tribunal has referred to order 41, Rule 1 of the Civil Procedure Code, 1908 (in short "the CPC") and held that every appeal has to be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to such officer as is appointed in that behalf. Reference was made to Rule 3 of order 41 to indicate that where the memorandum of appeal is not drawn up in the manner prescribed, it may be rejected or be returned to the appellant for the purpose of being amended then and there. Referring to Sub-section (4) of Section 43 of the Act and Rule 26 of the Delhi Sales Tax Rules, 1975 (in short, "the Rules"), it was held that the requirement was not fulfilled. Additionally, the appeal was not presented in the requisite format, i.e., form ST-30.

5. Section 43 deals with appeals and reads as follows :--

"Section 43. Appeals.--(1) Any person aggrieved by any order, not being an order mentioned in Section 44 passed under this Act or the Rules made there under, may appeal to the prescribed authority :

Provided that where an order, not being an order mentioned in Section 44 or made u/s 47 is passed by the Commissioner, the person aggrieved may appeal there from to the Appellate Tribunal.

(2) The Commissioner or any person aggrieved by an order passed in appeal by the prescribed authority may appeal to the Appellate Tribunal against such order.

(3) Subject to the provisions of Section 62, no appeal shall be entertained unless it is filed within sixty days from the date of service of the order appealed against.

(4) Every appeal filed under this section shall be in the prescribed form and shall be verified in the prescribed manner and in the case of an appeal to the Appellate Tribunal filed by any person other than the Commissioner, shall be accompanied by a fee of fifty rupees.

(5) No appeal against an order of assessment with or without penalty or against an order imposing the penalty shall be entertained by an appellate authority

unless such appeal is accompanied by a satisfactory proof of the payment of tax with or without penalty or, as the case may be, of the payment of the penalty in respect of which the appeal has been preferred :

Provided that the appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order-

(a) without payment of the tax and penalty, if any, or as the case may be, of the penalty, on the appellant furnishing in the prescribed manner security for such amount as it may direct, or

(b) on proof of payment of such smaller sum, with or without security for such amount of tax or penalty which remains unpaid, as it may direct :

Provided further that no appeal shall be entertained by the appellate authority unless it is satisfied that such amount of tax as the appellant may admit to be due from him has been paid.

(6) The appellate authority may, after giving the appellant an opportunity of being heard-

(a) confirm, reduce, enhance, or annul the assessment (including any penalty imposed), or

(b) set aside the assessment (including any penalty imposed) and direct the assessing authority to make a fresh assessment after such further inquiry as may be directed, or

(c) pass such order as it may think fit.

(7) Save as provided in Section 45, an order passed by Appellate Tribunal on appeal shall be final."

Sub-section (4) deals with filing of the appeal under the prescribed format and verification in the prescribed manner. Rule 36 deals with filing of appeal. The said rule is of great significance for the present case. Same reads as follows :

"Rule 36. Filing of appeal.--(1) Every appeal shall be presented in the form of a memorandum of appeal which shall be-

(a) in form ST-30 when the appeal is against an order of assessment,

(b) written on a standard watermarked judicial paper when the appeal is against any other order.

2. Every memorandum of appeal shall contain a clear statement of facts, precise grounds of appeal and the relief claimed.

3. A memorandum shall be accompanied by a spare copy thereof and two copies of the order appealed from, unless the omission to furnish copy of such order is explained to the satisfaction of the appellate authority.

4. Where an appeal is made after the expiry of the period specified in Sub-section (3) of Section 43, it shall be accompanied by a petition duly verified setting forth the facts showing sufficient cause for not preferring the appeal within the said period.

5. Every appeal where fresh evidence is sought to be produced, shall be accompanied by a memorandum of evidence sought to be produced, stating clearly the reasons why such evidence was not adduced before the authority against whose order the appeal is being preferred.

6. Where the appeal is made without payment in full of the tax with or without penalty or, as the case may be, the payment of penalty in respect of which appeal is being preferred, the memorandum of appeal shall be accompanied by a petition duly verified stating the facts on which the appellant relies to satisfy the appellate authority to entertain his appeal without such payment or on payment of such lesser amount as remains unpaid.

7. The memorandum of appeal shall be signed by the appellant or his agent and shall be presented by him or his agent to the appellate authority or be sent to the said authority by registered post."

6. For the purpose of the present petition, Sub-rule (1) and Sub-rule (7) are relevant. As is prescribed in Sub-rule (1), the appeal has to be in the form of memorandum of appeal and it has to be in form ST-30 when the appeal is against an order of assessment. Where the appeal is against any other order, it is to be written on a standard watermarked judicial paper. Undisputedly, the appeal before the Tribunal did not relate to an order of assessment, but related to the question whether the appellant was required to pre-deposit the entire extra demand before his appeal could be entertained. Therefore, the appeal was not required to be filed in form ST-30. The conclusions of the Tribunal to the contrary are indefensible. So far as the signing of the memorandum of appeal is concerned, as is provided in Sub-rule (7), it can be signed by the appellant or his agent. The expression "agent" is defined in Rule 2(b) which reads as follows :--

" "agent" means a person authorised u/s 60 to appear on behalf of a dealer or other person in any proceedings under the Act or these Rules."

Section 60 deals with appearance before any authority in any proceedings. Sub-section (1) of the said provision reads as follows :

"A person who is entitled or required to attend before any authority in connection with any proceedings may attend by a person authorized by him in writing in this behalf, being a relative or a person regularly employed by him."

In the instant case, the person, who had signed memorandum of appeal, is the power of attorney holder. A copy of the power of attorney was also filed before the Tribunal. As the undisputed position shows Smt. Shashi Mangla is the proprietress of M/s. Ravi Trading Co., the registered dealer. The general power of attorney holder is the husband of the proprietress. In that view of the matter, the

Tribunal's conclusion that it was not properly presented in the absence of appellant's signature is not in order.

7. It was highlighted by learned counsel for Revenue that regulation 3 of the Delhi Sales Tax Regulations, 1979 (in short, "the Regulations") dealing with procedure for filing of appeals and applications stipulates that an appeal or an application to the Tribunal shall be signed by the appellant or the applicant, as the case may be, and shall be presented by him in person or by his authorised representative. This, according to him, made signing by the appellant mandatory. This plea is without any substance, because the regulations cannot be at variance with the prescription in the Rules. As noted above, the Rules permit signature by an agent. To that extent, the regulations are inconsistent with the Rules and the latter has to prevail.

8. The petitioner's further stand was that in view of a Full Bench judgment of this Court in Kusum Ansal Vs. Commissioner of Income Tax, , the filing of one appeal was in order as a consolidated order had been passed by the Deputy Commissioner dealing with the applications filed for dispensation of pre-deposit. Learned counsel for Revenue, on the other hand, submitted that filing of two appeals was mandatory. It is to be noted that in Kusum Ansal Vs. Commissioner of Income Tax, it was observed as follows :

"When common questions of law arise out of a single order passed by the Appellate Tribunal whether in respect of different assessment years or different parties, one application for reference u/s 256(1) or 256(2) of the Income Tax Act, 1961, would be maintainable."

It was further noted that by the reference, which is made to the High Court, the Appellate Tribunal seeks its opinion on question of law, which arises from its order passed u/s 254. The jurisdiction, which is exercised by the High Court is neither appellate nor revisional. The High Court exercises advisory jurisdiction and that is why Section 259(1) provides that the case, which has been referred shall be decided according to the opinion of the Judges of the High Court. It was noted that one order can be passed by the Tribunal even though it may be dealing with different assessment years and possibly different assessed ; nevertheless it was observed that one application for reference is maintainable. It has to be noted that in the said judgment reference was made to K.G. Khosla and Co. (P) Ltd. v. Deputy Commissioner of Commercial Taxes [1966] 17 STC 473. In the said judgment, the apex Court held that where the dispute relates to different statutes, separate appeals are to be filed. That being the position, in the instant case, two appeals were required to be filed. The Tribunal was, Therefore, justified in its conclusion that two separate appeals were required to be filed. To that extent, the Tribunal's order cannot be faulted. We, Therefore, direct that in case a separate additional appeal in respect of one of the statutes is filed within three weeks from today, the same shall be entertained and the appeal, which has already been held to be non-maintainable and rejected, shall be restored, so that both the appeals can be heard on merits, if otherwise free from defects. We

make it clear that we have not expressed any opinion on the merits of the case.