
(1965) 03 MAD CK 0043
In the Madras High Court

State of Madras

APPELLANT

Vs

V. Guruviah Naidu and Another

RESPONDENT

Date of Decision : 25-03-1965

Acts Referred:

Madras General Sales Tax Act, 1939 — Section 12(3)(1), 6A

Citation : (1966) ILR (Mad) 1 : (1966) 2 MLJ 329

Hon'ble Judges : P.S. Kailasam, J

Bench : Division Bench

Judgement

P.S. Kailasam, J.—This appeal is preferred against the decision of Veeraswami, J., allowing a writ petition preferred by the respondent and issuing a writ of prohibition against the appellant prohibiting them from proceeding with their proposed revision of sales tax contemplated in their Order B. 4846/61-1, dated 23d June, 1961.

2. The respondent is an unlicensed dealer in hides and skins. For the assessment year 1954-55 he submitted a return for a gross turnover of Rs. 46,14,995-5-1. Out of this amount he claimed a sum of Rs. 45,48,305-2-10 as not liable to tax. The Deputy Commercial Tax Officer by his order, dated 29th February, 1956, assessed the respondent to a taxable amount of Rs. 66,691-2-3, basing his conclusions on the decision in M.A. Noor Mohamed and Co. Vs. The State of Madras and Another, that unlicensed dealers in hides and skins were not liable to tax u/s 6-A of the Madras General Sales Tax Act, 1939. Not satisfied with this order, the respondent preferred an appeal to the Commercial Tax Officer claiming a deduction of the entire amount. The Commercial Tax Officer allowed a further deduction of Rs. 52,220-1-9, and assessed the taxable turnover at Rs. 14,471-0-6 by his order, dated 7th August, 1957. On 12th August, 1960, the Supreme Court in The State of Madras and Another Vs. M.A. Noor Mohammed and Co., reversed the decision in M.A. Noor Mohamed and Co. Vs. The State of Madras and Another, . R. and held that unlicensed dealers in hides and skins were liable to tax u/s 6-A of the Act. The Board of Revenue, on the strength of

the decision of the Supreme Court in *State of Madras v. M.A. Noor Mahamed & Co.* (1961) 1 M.L.J. 51 : (1961) 1 S.C 148 : (1961) 1 A.W.R. (S.C.) 51 : (1961) 1 S.C.J. 301 gave a notice u/s 34 of Madras Act I of 1959 on 23rd June, 1961, to show cause why the turnover for 1954-55 should not be fixed at Rs. 45,52,329-6-1 in accordance with the decision of the Supreme Court. A writ petition was preferred by the respondent for prohibiting the State of Madras from proceeding with the proposed revision of the assessment. The writ petition having been allowed, the State of Madras have preferred the present writ appeal.

3. The only question that arises in this writ appeal is whether the order of the Board of Revenue, seeking to refix the turnover by its notice, dated 23rd June, 1961, is within time. According to the State, under Clause (1) of Sub-section (3) of Section 12 of the Madras General Sales Tax Act (IX of 1939), the Board of Revenue may exercise its power of revision within a period of four years from the date on which the order was communicated to the assessee, as provided u/s 12(4)(b) of the Act. The order referred to in the Sub-section, it is submitted, is the order, dated 7th August, 1957, passed by the Commercial Tax Officer in which, it is contended, the order of the Deputy Commercial Tax Officer, dated 29th February, 1956, became merged in law; whereas, on the side of the assessee, it is contended that the order referred to in the Sub-section is the order of the Deputy Commercial Tax Officer, dated 29th February, 1956 and as the notice is more than four years from that date, the order is barred by time.

4. Though the notice is given u/s 34 of the Madras General Sales Tax Act, 1959, by virtue of the saving clause in Section 61 of the Act, it is conceded that the provisions of the old Act are only applicable. Therefore, the provisions of the Madras General Sales Tax Act (IX of 1939), may be examined.

5. u/s 9, on the submission of a return by the assessee, the assessing authority is empowered to assess the tax on the dealer. An appeal may be preferred against the order of assessment made u/s 9 to the appellate authority within thirty days from the date of receipt of the order of assessment. On hearing the appeal, the appellate authority may pass such order as it thinks fit and the order is final subject to the provisions of Sections 12 to 12-C of the Act. From the decision of the appellate authority the assessee is given a right of appeal to the Appellate Tribunal within sixty days from the date of the receipt of the order. The appellate authority is empowered to pass such order as it thinks fit after giving the parties a reasonable opportunity of being heard. From the decision of the appellate authority a right of revision is conferred on the assessee as well as the Deputy Commissioner within sixty days from the date of the communication of the order.

6. Along with the right of appeal conferred on the assessee, a right of revision is also provided. u/s 12 the Commercial Tax Officer, the Deputy Commissioner and the Board of Revenue are conferred powers of revision. The powers are exercisable suo motu or on application by the assessee. The right of an assessee to apply for a revision u/s 12 is limited, for the right of revision is available only

in cases where there is no appeal or where he has not preferred an appeal. The Commercial Tax Officer, in exercise of his revisional jurisdiction, is empowered to examine the records of any officer subordinate to him for satisfying himself as to the legality or propriety of such order and the regularity of the proceeding and to pass such order as he may think fit. So also the Deputy Commissioner is entitled to examine the legality or propriety of the order and the regularity of the proceeding before the Commercial Tax Officer and pass such order as he may think fit. The Board of Revenue is empowered to examine the legality or propriety of the order or the regularity of the proceeding before the Deputy Commissioner, and to pass such order as it thinks fit. Under Sub-section (4) of Section 12 the power of revision by the Commercial Tax Officer is exercisable within three years from the date on which the order was communicated to the assessee, and the power of the Deputy Commissioner and the Board of Revenue is exercisable within a period of four years from the date on which the order was communicated to the assessee. It may be mentioned that Under Sub-section (7) of Section 12 the revising authority shall not pass any order enhancing any assessment. Unless an opportunity has been given to the assessee to show cause against the proposed enhancement. It will be thus seen that the revising authority exercising the powers suo motu, can give notice to the assessee and enhance the assessment, while exercising powers in dealing with an application by the assessee, can exercise it after giving him an opportunity to show cause against the proposed enhancement.

7. A right of appeal is given u/s 12-A to the assessee from the order of the Deputy Commissioner passed in the exercise of his revisional powers u/s 12(2), and an appeal is also provided to the assessee from an order of the Board of Revenue passed u/s 12(3) to the High Court, within sixty days from the date of communication of the order.

8. The Act provides the assessee a right of appeal to the appellate authority, the Appellate Tribunal, and in certain cases to the High Court. The officers are empowered u/s 12 to exercise powers of revision suo motu or on application by the assessee. An appeal also is provided against the orders passed in revision. In the case of powers of revision, the period of limitation is also clearly specified in the Act. When specific provisions regarding limitation are found in the Act, it may not be justifiable to travel outside the Act. The contention on behalf of the State is that when once the appellate authority, as in this case the Commercial Tax Officer, has fixed the taxable turnover, the order of the authority against which the appeal is preferred is no longer in force and has become merged in the appellate order. It was contended by the learned Additional Government Pleader that after an appeal had been decided, the original order is no longer available as it had become merged in the appellate order and, therefore, the only order that could be revised is the appellate order. It was therefore submitted that the period of limitation of four years prescribed u/s 12(4)(b) can only be from the date of the appellate order. In support of his contention that the order appealed against became merged in the appellate order, the learned Additional Government

Pleader relied on several decisions which may be referred to. In *Kristnama Chariar v. Mangammal* I.L.R.(1902)Mad. 91, it was held that under Article 179 of Schedule II to the Limitation Act, when a portion of a decree had been appealed against and a portion had not been appealed against the period of limitation for an application to execute the portion not appealed against runs from the date of the decree in appeal. Bhashyam Ayyangar, J., observed that

When an appeal is preferred from a decree of a Court of first instance, the suit is continued in the Court of Appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the Court of Appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance. The mere fact that a matter is litigated both in the Court of first instance and again, though only in part, in the Court of Appeal cannot convert or split the suit into two and there can be only one final decree in that suit viz., the decree of the Court of Appeal.

9. In *Nagendranath De v. Sureshchandra De* ILR (1932) Cal. 61 the Privy Council, construing Article 182(2) of the Limitation Act, which provides that where there has been an appeal, the time begins to run from the date of the final decree or order of the appellate Court, held that the period commenced only from the date when the appeal was disposed of. Their Lordships observed that there was no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it. The two decisions relied on were rendered in construing the provisions of the Limitation Act. The article governs the application for the execution of a decree or order of any civil Court, and the starting point of the limitation is given as the date of the final decree or order of the appellate Court. It was held that even if the appeal was only against a part of the decree, the date of the appellate decree alone would furnish the starting point of limitation. The view taken in the two decisions was on the construction of the meaning of the words in the article, and is not helpful in deciding the question on hand.

10. The learned Additional Government Pleader relied on a decision of the Supreme Court reported in *Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.*, for the proposition that the decision of the appellate authority is the operative decision in law, whether it confirms, modifies or reverses the decision of the authority appealed against. In the case cited, the assessee firm was granted registration by the Income Tax Officer. The assessee preferred an appeal against the assessment made against him under the Income Tax Act to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner under the Act was empowered to confirm, reduce, enhance or annul the assessment in the appeal. The Appellate Assistant Commissioner was not empowered to cancel the order of registration made by the Income Tax Officer. The right of appeal is given only to the assessee and no appeal could be filed by the Department against the order of registration of the firm. In the

circumstances, the Supreme Court held that if any order had been deliberately left out from the jurisdiction of the Appellate Assistant Commissioner, it would not be open to the appellate authority to entertain a plea about the correctness, propriety or validity of such an order. It was further held that if the contention was to be accepted, it would virtually give the Department a right of appeal against the order in question and there can be no doubt scheme of the Act was not to give the Department a right of appeal to the Appellate Assistant Commissioner against any orders passed by the Income Tax Officer. The Supreme Court further observed at page 724:

If that be the true position, the order of registration passed by the Income Tax Officer stands outside the jurisdiction of the Appellate Assistant Commissioner and does not strictly form part of the proceedings before the appellate authority. Even after the appeal is decided and in consequence the appellate order is the only order which is valid and enforceable in laws what merges in the appellate order is the Income Tax Officer's order under appeal and not his, order of registration which was not and could never become the subject-matter of an appeal before the appellate authority. The theory's that the order of the Tribunal merges in the order of the appellate authority cannot therefore apply of the order of registration passed by the Income Tax Officer in the present case.

11. This decision, far from supporting the contention of learned Additional Government Pleader, concludes the case against him. It is no doubt an authority for the proposition that as a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement But the above Statement of law is qualified by the observation that what merges in the appellate order under appeal is what was and could be the subject-matter the appeal before the appellate authority and not any matter which was outside the scope of the appeal before the appellate authority. In the present case the appeal that was preferred against the order of the Deputy Commissioner was by the assessee against the assessment made against him. It is admitted that the Sales Tax Department has no right of appeal and the question of the liability of the assessee to tax an unlicensed dealer in hides and skins was not the subject-matter of appeal before the appellate authority. On the authority of the Supreme Court the theory that the order of the Deputy Commercial Tax Officer merged with the order of the appellate authority cannot apply so far as the subject-matter namely the liability of the assessee as an unlicensed dealer in hides and skins was not before it. The learned Additional Government pleader submitted that the order of assessment should be treated as a single one bringing within it the entire assessable turnover and capable of being set aside either by appeal or revision and that there can be only one final order of assessment all through. The learned Additional Government Pleader relying on the decision in *The State of Madras Vs. The Indian Coffee Board*, submitted that as the order is one and indivisible the assessment of the Deputy Commercial Tax Officer as a whole should be deemed

to have been merged in the order of the Commercial Tax Officer. This submission cannot be accepted as it is against the decision of the Supreme Court in *Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.*, . In *The State of Madras Vs. The Indian Coffee Board*, the assessee was assessed on a turnover of Rs. 3,89,38,275 for the year 1949-50. The assessee took the matter on appeal to the Deputy Commercial Tax Officer. The appeal was dismissed on 31st May, 1951. The assessee took a further appeal to the Sales Tax Appellate Tribunal and the Tribunal confirmed the order of assessment on 24th July, 1952. A revision by the assessee to the High Court was also dismissed by the High Court on 14th April, 1954. After the Tribunal dismissed the appeal on 24th July, 1952, and during the pendency of the revision before the High Court the Deputy Commissioner of Commercial Taxes initiated proceedings suo motu u/s 12 of the Act to revise the order of assessment confirmed by the Commercial Tax Officer. According to the Deputy Commissioner a sum of Rs. 33,73,733 was not entitled to exemption. The assessee objected to this assessment by the Deputy Commissioner, but the Deputy Commissioner revised the assessment. Against the said assessment by the Deputy Commissioner the assessee preferred an appeal to the Tribunal. The Tribunal held that as the original assessment had been appealed against to the Tribunal and as the matter was taken Up further to the High Court on revision, the order of the Commercial Tax Officer should be deemed to have been finally merged in the order of the High Court and that the Deputy Commissioner had no power to reopen the assessment in exercise of his revisional jurisdiction. Against the decision of the Appellate Tribunal the State of Madras preferred the revision. This Court observed at page 250:

If the Tribunal had already passed an order on an appeal by the assessee against the order of the Commercial Tax Officer, it should be anomalous to have another appeal on the same subject-matter, viz., the assessment, to the Tribunal, after the Deputy Commissioner has passed an order in exercise of his revisional jurisdiction with reference to the same assessment. Principle and reason suggest that there should be no scope for the Appellate Tribunal adjudicating on the same assessment over again, and that the jurisdiction of the Deputy Commissioner should end when the Appellate Tribunal has passed its order in exercise of its appellate jurisdiction.

12. It may be noticed that the decision was mainly on the ground that the decision of the Appellate Tribunal became final and that there should be no scope for the Appellate Tribunal to adjudicate on the same assessment over again and that the Deputy Commissioner's jurisdiction should end when the Appellate Tribunal, had passed its order. We are in respectful agreement with the view of the Bench for u/s 12-A the decision of the Appellate Tribunal is final. u/s 12-A, Sub-section (9) of the Act subject to the provisions mentioned in the section after the Appellate Tribunal had passed its order there could be no scope for its passing another order over the same assessment or for an inferior authority modifying the order by exercising its revisional jurisdiction. The Bench observed:

The existence of such a power would show that the whole order of the Commercial Tax Officer forms the subject-matter of the appeal. When, therefore, the Appellate Tribunal passes an order u/s 12-A (4), the order of the Commercial Tax Officer would be superseded by that of the Tribunal.

13. From the above observation it was contended that the order of the Appellate Authority superseded the order of the Deputy Commercial Tax Officer and, therefore, the only order that was available for revision was that of the Commercial Tax Officer. We are unable to draw any such inference from the passage quoted above. Further it will have to be noted that the scope and effect of Section 12-A of the Act was not under consideration by the Bench in that case. The decision reported in Commissioner of Income Tax, Bombay North Vs. Tejaji Farasram, was next referred to by the learned Additional Government Pleader. Chagla, C.J., while dealing with an assessment order confirmed by the Appellate Assistant Commissioner of Income Tax held that the order of the Income Tax Officer merged in the order of the Appellate Assistant Commissioner. In the case cited the Income Tax Officer passed an order assessing the capital gains of the assessee at Rs. 25,000. The assessee preferred an appeal to the Appellate Assistant Commissioner who confirmed the order and dismissed the appeal by the assessee. The Commissioner of Income Tax revised the order of assessment by enhancing it to Rs. 10,00,000. The Bombay High Court held that by enhancing the assessment to Rs. 10,00,000, the Commissioner Was not revising the order of the Income Tax Officer, but was revising the order of the Appellate Assistant Commissioner who had confirmed the order of the Income Tax Officer and dismissed the appeal of the assessee. It was observed that once an appeal was preferred from the order of the Income Tax Officer and an order was passed in that appeal the order of the Income Tax Officer became merged in the order of the Appellate Assistant Commissioner and when the Commissioner enhanced the assessment he was not revising the order of the Income Tax Officer but revising only the order of the Appellate Assistant Commissioner. It was admitted that the Appellate Assistant Commissioner had very wide jurisdiction, and when once an appeal was preferred by the assessee, the power of the Appellate Assistant Commissioner was not confined to only those questions which had been raised by the assessee. In the case before the Bombay High Court the power of the appellate authority to pass an order sought to be made by the revising authority was not in dispute, while, in the case before us, it is admitted that the right of appeal was available only to the assessee and that the appellate authority could never have passed the order which the revising authority purported to make. The theory of merger referred to by the Bombay High Court should be read subject to the qualification laid down by the Supreme Court in Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., a Bench of this Court held that the general rule that an order of an inferior Tribunal appealed against and confirmed by a superior Tribunal gets merged in the final order on appeal is not of universal application. The assessee, Madurai Mills Co., Ltd., returned a turnover of Rs. 15,27,61,883-8-4 for the year 1950-51. The Deputy Commercial Tax Officer

assessed the turnover at Rs. 15,44,09,109-3-11. The assessee preferred an appeal to the Commercial Tax Officer. The Commercial Tax Officer excluded a sum of Rs. 1,44,294-14-4. In pursuance of the order of the Commercial Tax Officer a revised assessment was made. Then the assessee preferred a revision petition to the Deputy Commissioner of Commercial Taxes, in which the only objection he raised was that he should not have been assessed to tax on a sum of Rs. 6,57,971-4-9 which he had collected as tax. The assessee did not raise any objection against the order of assessment by the Deputy Commercial Tax Officer or the Commercial Tax Officer in regard to any other matter. The Deputy Commissioner dismissed the revision petition on 21st August, 1954. The Board of Revenue issued a notice on 4th August, 1958, calling upon the assessee to show cause why the assessment should not be revised to include in the net turnover the sum of Rs. 7,74,62,706-1-6 as that amount was wrongly excluded by the assessing authority. It was contended by the State that u/s 12(4)(b) of the Act, the order of the Commercial Tax Officer, dated 28th November, 1952, became merged in the order of the Deputy Commissioner of Commercial Taxes, dated 21st August, 1954, and as the Board of Revenue sought to revise the order within four years on 4th August, 1958, it should be held that the order was within time. It was contended on behalf of the assessee that the order sought to be revised was only that of the Deputy Commercial Tax Officer of 28th "November, 1952, and was, therefore, out of time. The Bench, after considering the various provisions of the Act, held that there was a clear demarcation regarding the scope and ambit of the revisional powers exercisable suo motu by the authorities and on application by the assessee. It observed that the subject-matter of a revision proceeding started suo motu was always the question of enhancement, while the subject-matter in a revision moved by the assessee was always the question whether he was entitled to any relief by way of reducing the assessment. Even where both sets of revision proceedings were conducted together in a common enquiry or successively the subject-matter remained quite distinct and separate. In the case before us, it is unnecessary to consider the question whether the subject-matter in revision was the same or distinct and separate, for the order sought to be revised was passed by the appellate authority in exercise of its powers u/s 11 of the Act. Dealing with the language of Section 12 it was held that there was hardly any scope for invoking the principle of merger of the order of the assessing authority in the order of the revising authority. It was held that the exercise of revisional power could be with reference to portions of orders of assessment, and where portions of the order alone were before the revising authority, the dismissal of the revision petition did not tantamount to a confirmation by the revising authority of other portions of the orders of assessment, which were not before that authority and the subject-matter of the decision of the revising authority moved by an assessee was in no way affected by the potential power of that authority to take action suo motu if it thought fit. It was further observed that the existence of such a dormant power could not operate to bring about an enlargement of the scope of the actual decision in the matter.

15. Without expressing any opinion as to the nature of the revisional powers u/s 12 of the Act, we are clearly of the opinion that the theory of merger is not applicable, in this case as the order of the inferior Tribunal cannot merge in the appellate order when the order could not form the subject-matter of appeal.

16 The decision in *Madura Mills Co., Ltd. v. State of Madras* (1963) 1 M.L.J. 73 : ILR (1962) Mad. 489 was referred to and relied on by a recent decision of a Bench of this Court in *Jainulabdeen Sahib v. State of Madras* (1964) 15 S.T.C. 413. On a consideration of the entire case-law placed before us, we have no hesitation in holding that the theory of merger is not applicable in this case and Board of Revenue could have exercised its powers of revision only within four years from the date of the order of the Deputy Commercial Tax Officer. The Act has made elaborate provisions, providing for appeals and revisions and specifying the time within which such reliefs should be asked for. When the Act itself has made specific provisions providing for limitation, there is no justification for travelling outside the Act for fixing the period of limitation. The general principle that the order appealed against merges in the appellate order and the appellate order is the only effective and enforceable order is not unqualified in its application. It can have no application in a case where the question could not form part of the proceedings before the appellate authority and in which the appellate authority could not have passed an order sought to be made by the revising authority. In the present case the Commercial Tax Officer, exercising his appellate powers, could not have assessed the assessee as unlicensed dealer u/s 6-A, for the assessee only had a right of appeal and the Department had no right to ask for the enhancement of the assessment. To permit the revising authority to enhance the assessment which the appellate authority could not have done, is not in consonance with the scheme of the Act. The power of revision conferred u/s 12 is restricted and can only be exercised by the authority for satisfying itself of the legality or propriety of the order and the regularity of the proceedings before the inferior Tribunal. While purporting to satisfy itself about the legality or propriety of the order, the revising authority cannot pass an order which the appellate authority could not have legally passed.

17. In the result, we see no reason to interfere with the order of Veeraswami, J. The appeal fails and is dismissed with costs.