A STATE OF ORISSA AND ORS.

v.

M/S. KRISHNA STORES

JANUARY 21, 1997

B [A.M. AHMADI, CJ. AND SUJATA V. MANOHAR, J.]

Sales Tax :

Orissa Sales Tax Act, 1947/Orissa Sales Tax Rules, 1947, Sections 23 (4), 12 (4), 12 (8)/Rules 80, 49—Bar in Rule 80 in exercise of the suo moto power of revision by the Commissioner—Held: Not applicable to an order summarily rejecting the appeal under Rule 49 for non-rectification of defects—Proper opportunity of hearing before passing the order of revision was given to the assessee as he was served with a notice, appeared through his counsel and submitted written submission which was considered, before passing the order—Administrative Law—Natural justice—Opportunity of hearing .

The respondent firm was assessed for the assessment year 1969-70 under Section 12 (4) of the Orissa Sales Tax Act, 1949. Consequent to seizure of its account books it was reassessed for that year under Section 12 (8) . It was also assessed for the assessment year 1970-71 under Section 12 (4). It filed appeals in respect of both the assessment years. The appeals were defective in as much as the requisite court fees were not paid and the grounds of appeals were not mentioned. Since, despite reminders and notices the respondent did not rectify the defects, the appeals were summarily rejected under Rule 49 of the Orissa Sales Tax Rules. Subsequently Commissioner, Sales Tax issued notices under Rule 80 of the Orissa Sales Tax Rules for proposed revision of the assessment Orders for the said two years on the ground that a large amount of turnover had escaped assessment. Ultimately, the Commissioner revised the assessment orders for both the assessment years and enhanced the amount of chargeable tax. On appeal the High Court quashed both revisional orders.

The present appeals were filed by the Revenue against the Order of the High Court. The respondent contended that in view of the rejection of the appeals, the power of *suo moto* revision under Rule 80 could not have been exercised by the Commissioner, and that it was not given an oppor-

tunity of hearing. A

Allowing the appeals, this Court

HELD: 1.1. An order rejecting the appeals under Rule 49 of the Orissa Sales Tax Rules does not preclude the Commissioner from exercising power under Section 23 (4) of the Orissa Sales Tax Act read with Rule B 80. An order rejecting the appeal on the ground that it is not in the specified form or that all the requirements of the form are not fully complied with cannot be considered to be an appellate order within the meaning of Rule 80 of the Orissa Sales Tax Rules. Rule 49 (1) clearly provides that such summary rejection can take place after giving the C appellant an opportunity to rectify the defects. This is not a rejection or dismissal of appeal after hearing the appellant on merits. Hence such an order would not qualify as an appellate order under Rule 80. [441-G-H]

1.2. The purpose of a revision by the Commissioner *suo moto* is to ensure that the assessee is correctly assessed relating to his tax liability. D If there is an appellate authority which has considered the assessment Order, then the Commissioner cannot *suo moto* revise the order. When, however, an appeal is not accepted for consideration at all because of defects there is no question of the department being required to follow the procedure laid down for challenging such an order. Rule 80, when it refers E to the Commissioner exercising a *suo moto* power of revision in respect of orders other than appellate orders, clearly contemplates an appellate order which has considered the Original assessment order on merit in some form or the other. [441-G-H; 442-A-B]

1.3. In the context of Section 23 (4) of the Orissa Sales Tax Act where F the words -" any order other than an appellate order" are absent, the prohibition against revising an appellate order in Rule 80 should be taken to apply only to an appellate order in its full sense i.e. an order which is passed after considering any issue arising in the appeal. It would not cover an order of rejection under Rule 49 (1), when the appeal is not entertained G at the threshold for consideration. [444-H; 445-A]

CIT v. *Amrit Lal Bhogilal & Co.*, (1958) 34 ITR 130; *Goier Bros. (P) Ltd.* v. *Ratan Lal Singh*, [1975] 1 SCR 394; *Sheoda Singh* v. *Daryao Kanwar*, AIR (1966) SC 1332 and *State of Madras* v. *Madurai Mills Co. Ltd.*, AIR (1967) SC 681, referred to. H

2. A reasonable opportunity was given to the respondent before the Commissioner had passed his order. From the facts as set out, it is apparent that the respondent was served with a notice of proposed revision on 21.3.1975. The reasons for such revision were communicated to the respondent on 2.5.1975. The respondent had filed written submissions to the Commissioner which were considered at the hearing of the case. After furnishing the grounds of revision, the hearing of the case was fixed on 7.5.1975. There is nothing on record to show that the respondent wanted more time or had asked for more time. The respondent appeared through his Advocate on 7.5.1975 and submitted his written arguments. Thereafter the Commissioner has passed a detailed order on 26.5.1975. Looking to these facts it cannot be said that a reasonable opportunity of hearing was not given to the respondent. [445-B-D]

Krishna Stores v. *C.S.T.*, **(1979) 43 STC 64 (Orissa), reversed.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 643-644 of 1978.

From the Judgment and Order dated 28.4.77 of the Orissa High Court in O.J.C. No. 1680-81 of 1975.

Raj Kumar Mehta for the Appellants.

R.K. Maheshwari for the Respondent.

The Judgment of the Court was delivered by

MRS. SUJATA V. MANOHAR, J. The respondent is a partnership firm carrying on business as agents of Hindustan Lever Ltd., Indian Oil Corporation and various other corporations. The respondent carries on whole-sale business in the products of these companies and has its registered office at Kantabanji District Bolangir in the State of Orissa. For the assessment year 1969-70 the respondent was assessed under Section 12(4) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as the said Act) by order dated 23.9.1970. Thereafter on 26.11.1970, the vigilance Unit of the Sales Tax Department seized the books of account and other documents of the respondent. On the basis of the report which was submitted by the Vigilance Unit the assessment for assessment year 1969-70 was reopened. The respondent was reassessed under Section 12(8) of the said Act under an order dated 27.5.1972. By another order of the same

date, namely 27.5.1972, an assessment order for assessment year 1970-71 was also passed under Section 12(4) of the said Act. The respondent filed appeals in respect of both these orders. The appeals were defective. The requisite court fees were not paid and the memo of appeal did not contain grounds of appeal. The respondent was called upon to remove these defects by the office of the Sales Tax Department. But despite reminders and notices, the respondent did not remove these defects; with the result that the appeals were summarily rejected under Rule 49 of the Orissa Sales Tax Rules.

By notices dated 15th of March, 1975 issued under Rule 80 of the Orissa Sales Tax Rules, the Commissioner of Sales Tax in exercise of his powers under Section 23(4) of the said Act proposed revising the assessment orders dated 27.5.1972 for assessment years 1969-70 and 1970-71. The Commissioner proposed a *suo motu* revision of the said orders because in his opinion the respondent had been under-assessed and a large amount of turn- over had escaped assessment. These notices were served on the respondent on 21.3.1975. Pursuant to the said notices, the respondent appeared before the Commissioner of Sales Tax. After taking several adjournments the respondent requested the Commissioner of Sales Tax for reasons for issuing the notice of *suo motu* revision. The reasons were thereupon communicated to the respondent on 2.5.1975. Hearing of the case was fixed on 7.5.1975. The respondent made his submissions in writing before the Commissioner of Sales Tax. These submissions were considered by the Commissioner of Sales Tax. The respondent, however, did not explain the accounts or the entries appearing in the seized documents. By a detailed order dated 26.5.1975, the Commissioner of Sales Tax, after considering the submissions made by the respondent, revised the assessment orders and demanded excess taxes to the tune of Rs. 1,12,620 for the assessment year 1969-70 and Rs. 79,710 for the assessment year 1970-71.

The respondent filed writ petitions before the High Court of Orissa being O.J.C. Nos. 1680 and 1681 of 1975 challenging the said orders of the Commissioner of Sales Tax. The challenge was two-fold. The respondent challenged the jurisdiction of the Commissioner of Sales Tax under Section 23(4) of the said Act read with Rule 80 of the Orissa Sales Tax Rules to revise the assessment. The respondent also submitted that it had not been given a reasonable opportunity of hearing before the Commissioner of Sales Tax. Both these contentions were upheld by the High Court which

A quashed the impugned orders dated 26.5.1975. The present appeals are from the judgment and order of the High Court dated 28.4.1977.

Section 23(4) of the said Act is as follows :

B Section 23(4)(a) : Subject to such rules as may be made and for reasons to be recorded in writing the Commissioner, may, upon application by a dealer or on his motion revise any order made under this Act or the rules made thereunder by any person other than the Tribunal or Additional Tribunal as the case may be, appointed under sub-section (3) of Section 3 to assist him :

C

Provided that the Commissioner shall not entertain any such application for revision if the dealer filing the same having a remedy by way of appeal under sub-section (1), or sub-section (3) did not avail of such remedy or the application is not filed within the prescribed period."

D

Rule 80 of the Orissa Sales Tax Rules is as follows :

"80. The Commissioner may of his own motion, at any time within three years from the date of passing of any order by the Assistant Sales Tax Officer or by the Sales Tax Officer and within E two years from the date of passing of any order other than an appellate order by the Additional Commissioner, Deputy Commissioner or the Assistant Commissioner, as the case may be, call for the record of the proceedings in which such order was passed and revise any such order."

F

The respondent has contended that the Commissioner has no power to *suo motu* revise the orders dated 27.5.1972 of the Sales Tax Officer because in the present case appeals were preferred by the respondent from the said orders of the Sales Tax Officer before the Assistant Commissioner of Sales Tax. These appeals were rejected on account of the respondent's G failure to cure various defects. It is the contention of the respondent that under Rule 80 a *suo motu* power of revision by the Commissioner cannot be exercised in respect of an appellate order. Since in the present case the orders of the Sales Tax Officer have merged in the orders passed in the two appeals the power of revision cannot be exercised by the Commissioner H under Rule 80.

We have, therefore, to consider whether in the present case the Commissioner is seeking to revise any appellate order passed by the Assistant Commissioner of Sales Tax within the meaning of Rule 80. The notices which have been issued by the Commissioner under Rule 80 seek to revise the assessment orders passed by the Sales Tax Officer, Undoubtedly, the respondent preferred two appeals from these assessment orders before the Assistant Commissioner of Sales Tax. These appeals, however, were rejected under Rule 49 of the Orissa Sales Tax Rules. Rule 49 which deals with summary rejection of appeal is as follows :

"49. Summary Rejection of Appeal :

(1) If the memorandum of appeal is not in the specified form or if all the requirements of the form are not fully complied with, the appellate authority may reject the appeal summarily, after giving the appellant such opportunity as it may think fit to rectify the defects.

(2) The appeal may also be summarily rejected on other grounds which shall be reduced to writing by the appellate authority :

Provided that before an order rejecting an appeal is passed the appellant shall be given a reasonable opportunity of being heard."

In the present case the appeals have been rejected under Rule 49(1). This is clearly a rejection at the initial stage of filing of an appeal which is defective. Such rejection is before the appeal is taken up for consideration by the appellate authority. An order rejecting the appeal on the ground that it is not in the specified form or that all the requirements of the form are not fully complied with cannot be considered an appellate order within the meaning of Rule 80. Rule 49(1) clearly provides that such summary rejection can take place after giving the appellant an opportunity to rectify the defects. This is not a rejection or dismissal of an appeal after hearing the appellant on merit. Such an order would not qualify as an appellate order under rule 80. The purpose of a revision by the Commissioner *suo motu* is to ensure that the assessee is correctly assessed relating to his tax liability. If there is an appellate authority which has considered the assessment order then the Commissioner cannot *suo motu* revise the order. The department would then have to follow the procedure laid down for challenging the appellate order. When, however, an appeal is not accepted for

A consideration at all because of defects there is no question of the department being required to follow that procedure laid down for challenging such an order. Rule 80, when it refers to the Commissioner exercising a *suo motu* power of revision in respect of orders other than appellate orders, clearly contemplates an appellate order which has considered the original assessment order on merit in some form or the other. An order rejecting an appeal at the stage of filing cannot be considered as an appellate order in the context of Rule 80.

Our attention has been drawn by learned advocate of the respondent to somewhat similar provisions of Section 263 of the Income Tax Act of C 1961, and cases relating to it. We will refer only to a few of those cases. Under that section the Commissioner has the power to *suo motu* revise any order passed by the Income-tax Officer if it is erroneous in so far as it is prejudicial to the interests of the revenue.

D In cases where the appellate authority had passed an order disposing of the assessee's appeal against the assessment order of the Income-tax Officer but had not dealt with all the points arising from the Income-Tax Officer's order, a question arose whether the Commissioner could exercise his power of revision in respect of those points which were not considered in the appeal. Prior to the amendment of Section 263 in 1988, there was a E conflict of opinion among different High Courts on this question. Some High Courts were of the view that even if all the points arising from an Income-tax Officer's order were not considered in appeal, or even if in appeal the order of the Income-tax Officer was confirmed, the order of the Income-tax Officer merged in the appellate order and, therefore, the F Commissioner could not exercise his power of revision in respect of any point arising out of the Income-tax Officer's order once an appellate order had been passed. Some other High Courts, however, held that the power of revision could not be exercised only in respect of those points which were urged and decided in the appeal. In respect of points not so urged or decided in appeal, the power of revision could be exercised by the G Commissioner. It is not necessary to examine this question here.

This issue is now taken care of by an amendment made in 1988 in Section 263 of the Income-tax Act. Explanation (c) to Section 263(1) after amendment provides that where any order referred to in this sub-section H and passed by the assessing officer had been the subject-matter of any

appeal filed on or before or after the first day of June 1988, powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Prior to this amendment, however, in the case of *Commissioner of Income-Tax, Bombay* v. *Amritlal Bhogilal & Co.*, (1958) 34 ITR 130 this Court was required to consider a composite order passed by the Income-tax Officer granting registration to a firm under Section 26A of the Indian Income-Tax Act, 1922 along with an order of assessment of the firm. The firm had filed an appeal against the order of assessment which had been decided by the Appellate Assistant Commissioner. The court was required to consider whether the order of the Income-tax Officer registering the firm can be revised by the Commissioner under Section 33B if he considers that as erroneous and prejudicial to the revenue. This Court held that he could. The order of registration was a separate non-appealable order. While so holding, this Court said that if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law if the appellate authority modifies or sets aside the decision of the tribunal. It is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirmed the decision of the tribunal. As a result of the confirmation or affirmation 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. The respondent strongly relies on these observations. However, in that case the court was not required to consider whether the power of revision could be exercised in a case where the appeal was rejected at the threshold without any application of mind by the appellate authority on the issue arising therein.

In the case of *State of Madras* v. *Madurai Mills Co. Ltd.*, AIR (1967) SC 681 this Court, however, observed that the doctrine of merger was not a doctrine of rigid and universal application. The application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provision conferring the appellate or revisional jurisdiction. Basically, therefore, unless the appellate authority has applied its mind to the original order or any issue arising in appeal while passing the appellate order, one should be careful in applying the

A doctrine of merger to the appellate order.

The respondent strongly relied upon a decision of this Court in *Goier Brothers Pvt. Ltd.* v. *Ratan Lal Singh*, [1975] 1 SCR 394. In that case a decree for possession in favour of the plaintiff was passed by the Munsif's court. It was confirmed in appeal and the second appeal was dismissed by
B the High Court. The court said that the judgment of an inferior court if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superceded by the judgment of the superior court. In other words the judgment of the inferior court loses its identity by its merger within the judgment of the superior court. This
C was clearly a case where at each stage the appeal was decided on merit. It has no relevance here. The other case relied upon by the respondent is of *Sheodan Singh* v. *Daryao Kunwar*, AIR (1966) SC 1332. In that case the trial court had decided two suits having common issues on merit. There were two appeals therefrom. One of them was dismissed on the ground of
D limitation and the other on account of default in printing. With the result that the Trial Court's decision stood confirmed. This Court said that the decisions of the appeal court will be *res judicata* as the appeal court must be deemed to have heard and finally decided the matter. The entire controversy before the court related to the application of the doctrine of *res judicata*.

E

The power to revise in a taxing statute, however, will have to be examined in the context of the statute. We have to consider whether an order rejecting the appeals under Rule 49(1) precludes the Commissioner from exercising power under Section 23(4) read with Rule 80. Under
F Section 23(4) the Commissioner can, *inter alia*, on his own motion revise any order made under this Act or the Rules by any person other than a tribunal or an additional tribunal. Therefore, under this sub-section the Commissioner is not expressly prevented from revising an appellate order if made by any person other than the tribunal or an additional tribunal. Under Rule 80, however, the Commissioner may, of his own motion revise
G any order passed by the Assistant Sales Tax Officer or the Sales Tax Officer within three years. The Commissioner can also *suo motu* revise within two years any order *other than an appellate order* passed by the Additional Commissioner, the Deputy Commissioner or the Assistant Commissioner. In the context of Section 23(4) where the words "any order other than an
H appellate order" are absent, the prohibition against revising an appellate

order in Rule 80 should be taken as applying only to an appellate order in its full sense i.e. an order which is passed after considering any issue arising in appeal. It would not cover an order of rejection under Rule 49(1), when the appeal is not entertained at the threshold for consideration. A

It is next contended that the respondent was not given an opportunity to be heard by the Commissioner. From the facts as set out, it is apparent that the respondent was served with a notice of proposed revision on 21.3.1975. The reasons for such revision were communicated to the respondent on 2.5.1975. The respondent had furnished written submissions to the Commissioner which were considered at the hearing of the case. After furnishing the grounds of revision the hearing of the case was fixed on 7.5.1975. There is nothing on record to show that the respondent wanted more time or had asked for more time. The respondent appeared through his advocate on 7.5.1975 and submitted his written arguments. Thereafter the Commissioner has passed a detailed order on 26.5.1975. Looking to these facts it cannot be said that a reasonable opportunity of hearing was not given to the respondent. B C D

In the premises the appeals are allowed and the impugned judgment and order of the High Court is set aside. There will, however, be no order as to costs.

H.K. Appeals are allowed E