

Before M. M. Punchhi, J.

RIKHI RAM BANARSI DASS,—*Petitioner.*

versus

THE STATE OF HARYANA AND ANOTHER,—*Respondents.*

Civil Writ Petition No. 316 of 1977
December 10, 1984.

Punjab General Sales Tax Act (XI of 1948) (as applicable to the State of Haryana)—Sections 10, 39 and 40—Assessing Authority creating an additional demand and imposing penalty for non-payment of tax—Assessee successfully challenging in appeal the order imposing penalty—Appellate Order upheld in appeal by the Tribunal—Commissioner under section 40 seeking to revise the appellate order—Doctrine of merger—Whether applicable—Commissioner—Whether has jurisdiction to revise the appellate order.

Held, that it is plain from the language of section 39(2) of the Punjab General Sales-Tax Act, 1948 that an appellate order is further appealable to the Tribunal. It is equally plain from sub-section (4) of section 39 of the Act that every order passed by the Tribunal on appeal under sub-section (2) shall subject to the provisions of section 42 be final. The wide powers of the Tribunal are spelled out in sub-section (6) of section 39 and this power is absolute in terms, subject to the order being just and proper. The power includes enhancing the amount of tax or penalty or interest or all. The inclusive nature of the power no way tends to diminish it, but is rather illustrative of its magnitude. It is to be so in the fitness of things. When the appellate Order goes in further appeal to the Tribunal and necessarily at the instance of the assessee, the Tribunal has power to pass such order thereon as it deems to be just and proper inclusive of orders which may tend to go against the assessee. Since for one reason or the other, it did not do so, that would not tell on the finality of the order of the Tribunal under sub-section (4) of section 39. There is a purpose in the manifest legislative intent for that order to be finalised in the presence of simultaneous power of revision being conferred on the Commissioner. The Commissioner's power of revision extends to the calling for the record of any case pending before, or disposed of by any assessing authority or appellate authority other than the Tribunal. Circumventing the power of the Commissioner under section 40 of the Act, in order to keep away the orders of proceedings of the Tribunal from its purview, and making the order of the Tribunal final explicitly, makes the intent of the Legislature plain that the Tribunal's orders had not to be tinkered with by

Rikhi Ram Banarsi Dass v. The State of Haryana and another
(M. M. Punchhi, J.)

the Commissioner; for what is prohibited to be done directly cannot be allowed to be done indirectly on the ostensible plea that the order of the Tribunal is left uninterfered with but the appellate order alone is being sought to be revised. Permitting such course, would be a fraud on the statute: a course totally impermissible. In the scheme of things and the language employed in the aforesaid provisions, the doctrine of merger surfaces out to take cover and give a protective umbrella to the order of the Tribunal as also to that of the appellate order when having passed through the appellate mill before the Tribunal. Thus, for these reasons it appears plain that the Commissioner had no jurisdiction to revise the appellate order howsoever erroneous the latter order may be and howsoever justified the Commissioner may be on merits of the case.

(Para 3).

Writ petition under Articles 226/227 of the Constitution of India praying that :—

- (a) *Section 40 of Haryana Act may be declared unconstitutional in so far as it is given retrospective effect ;*
- (b) *order Annexure P-3 may be quashed by issuing a writ of certiorari, being illegal and without jurisdiction;*
- (c) *the demand created by Annexure P-3 and recovery may be stayed till the decision of this writ petition.*
- (d) *such other interim and/or final relief may be granted to the petitioner as may appear to your Lordships to be just, fit and proper in the circumstances of the case;*
- (e) *the records of the case may be ordered to be summoned.*
- (f) *the filing of the certified copies of Annexures "P-1 to P-3" be dispensed with;*
- (g) *the costs of this petition may also be awarded to the petitioner against the respondents.*

C.M. No. 1578 of 1984.

Application under section 151 C.P.C. praying that the record may be summoned for hearing of the case on the date to be fixed.

R. C. Dogra Advocate, for the Petitioner.

Muneshwar Puri, Advocate, for A.G. Haryana.

JUDGMENT

M. M. Punchhi, J. (Oral)—

(1) The Commissioner in purported exercise of powers under section 40 of the Haryana General Sales Tax Act, 1973 (for short, the Act) revised an appellate order of the Deputy Excise and Taxation Commissioner (Appeals) at a time when the later order had stood the scrutiny of the Sales-Tax Tribunal in second appeal. The point of law which crops up for consideration in this behalf is whether the doctrine of merger would come into play and leave the appellate order of the Deputy Excise and Taxation Commissioner (Appeals) immune from challenge under section 40 of the Act or is the Commissioner unfettered to exercise jurisdiction in order to satisfy himself as to the legality or propriety of the order of the Deputy Excise and Taxation Commissioner (Appeals)?

(2) Briefly stated, the petitioner is a partnership concern which carried on the business of Commission Agency at Kalanwali, Tehsil and District Sirsa. For the assessment year 1967-68, the Assessing Authority while framing assessment created an additional demand of over Rs. 36,000 and sequently imposed penalty for non-payment of tax to the tune of Rs. 5,000 under section 10(6) of the Punjab General Sales Tax Act, 1948 (as applicable to the State of Haryana). That order is Annexure P-1 to the petition. The petitioner successfully appealed and *vide* order Annexure P-2 the penalty was quashed. The petitioner took the matter further in second appeal before the Tribunal on the quantum side and the order was maintained. After such an event, the Commissioner on his own motion under section 40 of the Act, issued a show cause notice to the petitioner to appear before him on 21st May, 1976 manifesting his intention that he wished to revise the order of the Deputy Excise and Taxation Commissioner (Appeals) (Annexure P-2). Despite opposition of the petitioner, the order was revised inasmuch as an error was found therein, for the Deputy Excise and Taxation Commissioner (Appeals) not having imposed penalty under section 10(7). On that premises penalty to the tune of Rs. 5,000 was imposed on the petitioner by the Commissioner under section 10(7) of the Punjab General Sales Tax Act, 1948 (as applicable to the State of Haryana). The petitioner approached directly this Court by means of the present writ petition, challenging the constitutionality of section 40 of the Act as also the order Annexure P-3. Challenge to section 40 of the Act

Rikhi Ram Banarsi Dass v. The State of Haryana and another
(M. M. Punchhi, J.)

being no longer available in view of the question being settled against the petitioner by this Court, the petitioner has now confined his attack to the order on a variety of grounds, but for the purpose of disposal of this petition only one need be dealt with to give relief to the petitioner.

(3) It is plain from the language of section 39(2) of the Act that an appellate order of the Deputy Excise and Taxation Commissioner (Appeals) is further appealable to the Tribunal. It is equally plain from sub-section (4) of section 39 of the Act that every order passed by the Tribunal on appeal under sub-section (2) shall, subject to the provisions of section 42, be final. The wide powers of the Tribunal are spelled out in sub-section (6) of section 39, in the words extracted below:—

“.....an appellate authority may pass such order on appeal as it deems to be just and proper, including an order enhancing the amount of tax or penalty or interest or all, or an order staying the recovey of the tax assessed or penalty imposed or interest charged or all, under this Act;”

The power is absolute in terms, subject to the order being just and proper. The power includes enhancing the amount of tax or penalty or interest or all. The inclusive nature of the power no way tends to diminish it, but is rather illustrative of its magnitude. It is to be so in the fitness of things. When the appellate order of the Deputy Excise and Taxation Commissioner goes in further appeal to the Tribunal and necessarily at the instance of the assessee, the Tribunal has power to pass such order thereon as it deems to be just and proper inclusive of orders which may tend to go against the assessee. Had the Tribunal noticed any error in the order of the Deputy Excise and Taxation Commissioner for his failure to impose penalty on the assessee under section 10(7), the Tribunal was still within its rights to impose such penalty. Since for one reason or the other, it did not do so, that would not tell on the finality of the order of the Tribunal under sub-section (4) of section 39. There is a purpose in the manifest legislative intent for that order to be finalised in the presence of simultaneous power of revision being conferred on the Commissioner. The Commissioner's power of revision extends to the calling for the record of any case pending before, or disposed of by, any assessing authority or appellate authority, *other than the Tribunal*. Circumventing the power

of the Commissioner under section 40 of the Act, in order to keep away the orders of proceedings of the Tribunal from its purview, and making the order of the Tribunal final explicitly, makes the intent of the Legislature plain that the Tribunal's orders had not to be tinkered with by the Commissioner; for what is prohibited to be done directly cannot be allowed to be done indirectly on the ostensible plea that the order of the Tribunal is left uninterfered with but the order of the Deputy Excise and Taxation Commissioner alone is being sought to be revised. Permitting such course, as it appears to me, would be a fraud on the statute: a course totally impermissible. In the scheme of things and the language employed in the aforesaid provisions, the doctrine of merger surfaces out to take cover and give a protective umbrella to the order of the Tribunal as also to that of the Deputy Excise and Taxation Commissioner when having passed through the appellate mill before the Tribunal. Thus, for these reasons it appears plain to me that the Commissioner had no jurisdiction to revise the order of the Deputy Excise and Taxation Commissioner howsoever erroneous the latter order may be and howsoever justified the Commissioner may be on merits of the case.

(4) The question posed at the outset is answered thus in the positive i.e., in favour of the petitioner and against the Revenue. Thus, the impugned order of the Commissioner being without jurisdiction needs be and is hereby quashed without adverting to the other points raised by the learned counsel for the petitioner. This petition accordingly succeeds but without any order as to costs. C.M. No. 1578 of 1984 has become infructuous and is dismissed as such.

N.K.S.

Before M. M. Punchhi, J.

YATINDER CHAND

Petitioner.

versus

Respondents.

THE STATE OF PUNJAB AND ANOTHER

Civil Writ Petition No. 3782 of 1977

December 14, 1984

*Punjab Land Reforms Act (X of 1973)—Sections 2(15), 8 and
10—Punjab Land Revenue Act (XVII of 1887)—Section 3(2)—Area*