objections to the execution were filed. Thus, the proceedings indicate that with impunity the judgment-debtors have been able to thwart the attempt of the decree-holder to execute the order which was passed on the solemn assurance given by the parties. May or may not be the parties were aware of the tenancy legislation. They may not be able to foresee what will be the future amendments in the legislation. In a welfare State, the State has to guarantee equality before law to all its citizens and it must ensure that equality exists not on paper but in practice. Suitable amendment must be made in the legislation excluding the tenancy with regard to running business and/or solemn agreements arrived at between the parties, even where by mutual consent they override some provision of the statute.

(6) For the reasons recorded above, this revision petition is allowed. The order under challenge is set aside.

(7) During the course of arguments, it was brought to my notice that the judgment debtors remained in possession after the expiry of the period mentioned in the order of the Court and they did not pay any rent or mesne profits. If that is so, the learned Executing Court will assess the mesne profits and direct the judgment debtors to pay the same to the decree-holder within a reasonable time. I am sure, the Executing Court will execute the decree expeditiously and without further delay.

R. N. R.

Before : Sukhdev Singh Kang, J. S. Sekhon, JJ.

STATE OF HARYANA,—*Appellant.*

versus

M/S. FRICK INDIA LTD., FARIDABAD,—*Respondent.*

General Sales Tax Reference No. 27 *of* 1983.

3rd August, 1989.

Haryana General Sales Tax Act, 1973—*Ss.* 40 *and* 42—*Jurisdiction to remand—Scope of—Appellate authority not competent to direct re-examination of merits on matters raised in appeal by the assessee on the ground that they were not properly examined by the assessing authority.*

Held, that the appellate authority while deciding an appeal filed by a party cannot take up issues of merit which have not been raised by the appellant. The respondent in the appeal cannot invite the appellate authority to take up points or issues on merit which are not raised, pleaded or urged by the appellant. If dissatisfied by any decision or findings of the assessing authority the department can prefer an appeal or revision against that order.

(Para 7).

Held, that if on an appeal filed by the assessee, the Tribunal could not enhance the tax in accordance with the provisions of Section 39 of the Haryana General Sales Tax Act, 1963, the Deputy Excise and Taxation Commissioner also could not, on the appeal of the assessee-appellant and in the absence of any appeal or revision by the department, set aside the orders of the committee relating exemptions granted and remand the case for fresh decision. Hence, it has to be held that the appellate authority was not competent to go into the matters which were not raised in appeal and direct the examination of fresh issues by the assessing authority on the appeal filed by the assessee.

(Paras 8 and 9)

Reference made by Haryana General Sales Tax for opinion of the following question of law to the High Court of Punjab and Haryana at Chandigarh arising out of the order dated 24th *December*, 1979 *of the Member, Sales Tax Tribunal Haryana in S.T.A.* No. 193 *of* 1976-77 *pertaining to the assessment year* 1968-69.

Question

"Whether the appellate authority is competent to go into these matters which are not raised in appeal and direct the examination of the fresh issues by the assessing authority which the appellate authority consider that have not been properly examined by the assessing authority at the time of the consideration of appeal, without having recourse to the provisions of section 40 *of the Act."*

S. K. Sood, D.A. Haryana, *for the Appellant.*

S. C. Sibal, Advocate, *for the Respondent.*

JUDGMENT

S. S. Kang, J.

(1) Sales Tax Tribunal, Haryana has, on the application of the Commissioner, referred the following question for our opinion

under Section 42 of the Haryana General Sales Tax Act, 1973 (the 'Act' for short):

> "Whether the appellate authority is competent to go into the matters which are not raised in appeal and direct the examination of the fresh issues by the assessing authority which the appellate authority consider have not been properly examined, at the time of the consideration of the appeal, without having recourse to the provision of section 40 of the Act ?"

(2) The facts giving rise to this question may briefly be recounted:

M/s Frick India Limited, Faridabad, the assessee, respondent in this case, is a registered dealer under the Punjab General Sales Tax Act, 1948 as applicable to the State of Haryana at the material time and the Central Sales Tax Act, 1956. The assessing authority,—*vide* its order dated 20th January, 1976 framed assessment for the year 1968-69. It declined to adjust a sum of Rs. 95,729.38 on account of credit notes; rejected 'C' Forms involving tax of Rs. 32,333,25 and also added a tax of Rs. 3,495.18 on account of insurance charges though the respondent had claimed that they were not assessable to tax. The assessee went up in appeal under Section 39 of the Act read with Section 9(2) of the Central Sales Tax Act, 1956. The respondent urged before the Deputy Excise and Taxation Commissioner that the assessing authority had erred in not adjusting Rs. 95,729.38 on account of credit notes; in rejecting and not admitting 'C' Forms involving tax of Rs. 32,333.35 and in imposing a tax of Rs. 3,495.18 on insurance charges which were not taxable. No other point was urged before appellate authority on behalf of the respondent. It may be mentioned here that the assessing authority had allowed deductions from the taxable turnover to the assessee for certain amounts which were claimed to be sales in the course of exports out of the territory of India. The department had not filed any appeal or revision against this order of the assessing authority.

(3) The appellate authority dealt with the points raised in the appeal and did not agree with the contentions of the respondent-assessee He held that the claim for adjustment of credit notes was not tenable; 'C' Forms were not submitted before the assessing

authority and the insurance charges were part and parcel of the price of goods. Consequently, he held that there was no force in the appeal and rejected the same. However, in para 5 of his order he held that the transfer of goods allowed for Delhi by the assessing authority was not in order as neither the stock register of Delhi had been produced before the assessing authority nor it was established that any godown was maintained by the appellant at Delhi. He also held that the asessing authority had admitted the claim regarding exports out of territory of India to the tune of Rs. 4,70,997.30 though there was no evidence in the form of bills of lading or even shipping documents. He observed that the assessing authority had not examined the case properly and it required a fresh examination for each item of deductions claimed and allowed by the assessing authority. Consequently, he set aside the assessment regarding the deductions permitted by the assessing authority and remanded the case to that extent for a fresh decision. Aggrieved by this order, the respondent filed an appeal before the Sales Tax Tribunal, Haryana. It was urged before him on behalf of the appellant assessee that the assessing authority had not taken into account 'C' Forms submitted to it on the plea that they were mutilated and there were over-writings thereon; no opportunity was given to submit 'C' Forms and appellant was not given adjustment for credit notes and insurance charges. Lastly, it was argued that the Deputy Excise and Taxation Commissioner had remanded the case to the assessing authority for examination of points already settled by the assessing authority regarding which the appellant had not made any grievance. The first three contentions did not find favour with the learned Tribunal and they were turned down. However, the learned Tribunal was impressed by the last argument and held that the Deputy Excise and Taxation Commissioner had acted illegally in taking up issues in the appeal filed by the assessee which were not raised by it. The scheme of the Act was that the appellate authority had to pass, on an appeal, such orders as it may deem fit. However, it did not authorise the appellate authority to raise *suo-moto* issues which had not been taken up in the grounds of appeal under Section 39. He held that the order of remand was illegal and quashed the same.

(4) Excise and Taxation Commissioner, Haryana filed an application under Section 42(1) of the Act for reference. It is on this application that the question extracted in the opening part of the judgment has come to be referred for opinion of this Court. It

will be appropriate to read the relevant provisions of Section 39 and 40 of the Act which provide for appeal and revision :

"39. *Appeal* (1) An appeal from every original order, including an order under section 40, passed under this Act or the rules made thereunder shall lie,—

(a) if the order is made by an assessing authority, officer incharge of a check-post or barrier or an officer below the rank of a Deputy Excise and Taxation Commissioner, to the Deputy Excise and Taxation Commissioner or such other officer as the State Government may, by notification, appoint;

(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner or such other officer as the State Government, may, by notification appoint;

(c) if the order is made by the Commissioner, to the Tribunal;

(6) Subject to regulations made by the Tribunal under sub-section (10) of section 4 and subject to such rules of procedure as may be prescribed in relation to an appellate authority other than the Tribunal, 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 recovery of the tax assessed or penalty imposed or interest charged or all, under this Act :

Provided that no order staying the recovery of the tax assessed, or the penalty imposed, or the interest due or all shall be passed unless the appellant furnishes a bank guarantee or adequate security to the satisfaction of the appellate authority."

"40. *Revision.*—(1) The Commissioner may on his own motion, call for the record of any case pending before, or disposed of by, any assessing authority or appellate

authority, other than the Tribunal, for the purposes satisfying himself as to the legality or propriety of any proceedings or of any order made therein and may pass such order in relation thereto as he may think fit:

Provided that no order, shall be revised after the expiry of the period of eight years from the date of the order.

Provided further that the aforesaid limitation of period shall not apply where the order in a similar case is revised as a result of the decision of the Tribunal or any Court of law.

(2) The State Government may, by notification, confer on any officer, the powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect of such areas as may be specified in the notification.

(3) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard."

(5) No regulations or rules having a bearing on the question falling for determination as envisaged by sub-section (6) of section 39 have been framed.

(6) It is manifest that Section 39 *ibid* confers a right on a party aggrieved by any order passed under the Act or the Rules made thereunder to file an appeal. When the order is made by the asessing authority, the appeal lies to the Deputy Excise and Taxation Commissioner; when the order is made by Deputy Excise and Taxation Commissioner, to the Commissioner and if the order is made by the Commissioner, to the Tribunal.

(7) It is also clear from the language of section 39 and has indeed been conceded by the learned counsel for the parties that both the assessee and the department can file appeals against the orders by which they are aggrieved. On an appeal filed, the appellate authority has been invested with powers to pass such orders as it may deem to be just and proper including an order enhancing the amount of tax or penalty or interest or all. Section 39 has been drafted on the pattern of various sections in

different statutes conferring powers of appeal. In substance, it conforms to Section 96 of the Code of Civil Procedure. Wide powers have been given to the appellate authority to examine the impugned orders and to judge and determine their legality and propriety. Any party aggrieved by any order passed by an authority exercising jurisdiction under the Act or the Rules, may file an appeal against that order raising its grievances and pleas challenging the legality and propriety of the order. Whatever pleas are raised by a party in its appeal, are examined by the appellate authority and a decision is rendered thereon affirming by varying, amending or rescinding the impugned orders or remanding the case for fresh decision. This jurisdiction, however, can be invoked only on appeal filed by a party. The Deputy Excise and Taxation Commissioner in contradistinction of the Commissioner has not been invested with powers to act on his own motion. Only when an appeal is filed, the appellate authority adjudicates upon the specific issues raised in the grounds of appeal or those which are urged before it, at the time of hearing. The respondent is also given an opportunity of hearing and replying to the points raised and urged by the appellant. However, the appellate authority, while deciding an appeal filed by a party cannot take up issues of merit which have not been raised by the appellant. The respondent in the appeal cannot invite the appellate authority to take up points or issues on merit which are not raised, pleaded or urged by the appellant. If dissatisfied by any decision or findings of the assessing authority the department can prefer an appeal or revision against that order. It is a well settled principle of law that in case a party to a decision does not file an appeal or revision against an order, it is taken to have accepted that order or acquiesced thereon. Such a party can, at best, support the orders impugned in the appeal by the opposite party on the grounds mentioned in the order or even on the basis of the materials available on the file but it cannot challenge a finding in the impugned order which may have gone in favour of the appellant and against it in the appeal filed by the opposite side. It is not necessary to dilate upon this point on principle because it stands concluded by a binding precedent of the final Court in a recent decision in *The State of Kerala* v. *Vijaya Stores*, (1). In that case, the assessing authority rejected the accounts submitted by the assessee on the basis of the materials gathered from a rough note book detected and seized by the Inspecting Officer from the head office of the assessee at Cochin;

(1) (1978) 42 S.T.C. 418.

it was found that about 50 per cent of the transactions recorded in that rough note book were not entered in the regular books maintained by the assessee; the assessing authority made an addition of 10 per cent to the admitted turnover relating to the Cochin shop and framed the assessment. On appeal preferred by the assessee, the Appellate Assistant Commissioner did not accept the plea raised by the assessee that the accounts books had been wrongly rejected. However, the second contention of the assessee that the addition of 10 per cent to the taxable turnover was excessive, prevailed and this addition was reduced to 5 per cent. Still feeling dissatisfied, the assessee filed an appeal which was disposed of by the Tribunal. The only challenge of the assessee was directed against the addition of 5 per cent to the taxable turnover. The Revenue had not filed any appeal or cross-objections. The Appellate Tribunal came to the conclusion that the assessing authority and the Appellate Assistant Commissioner had no reason to make addition at any figure less than Rs. 80,218.22 as was seen from the detected rough note book. The Tribunal, invoking the powers under Section 39(4) of the Kerala General Sales Tax Act, 1963, (hereinafter referred to as the 1963 Act), issued notice to the assessee to show cause against proposed enhancemnt of the turnover and after hearing the objections of the assessee, directed an addition of a sum of Rs. 80,218.22 to the taxable turnover. The assessee filed a revision petition before the High Court and contended that the Tribunal had no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the department. This plea prevailed and the High Court allowed the revision petition and set aside the impugned order of the Tribunal and remanded the case for hearing the appeal of the assessee afresh in accordance with law. The State of Kerala went up in appeal. The appeal was dismissed, findings of the High Court were affirmed. Their Loirdships of the apex Court observed as under :—

> "The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it, and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-section 4(a)(i) above. In other words, in the absence of an appeal or cross-objections by the department against the Appellate Assistant Commissioner's order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment. Further,

to accept the construction placed by the counsel for the appellant on sub-section 4(a)(i) would be really rendering sub-section (2) of section 39 otiose, for if in an appeal preferred by the assessee against the Appellate Assistant Commissioner's order the Tribunal would have the power to enhance the assessment, a provision for cross-objections by the department was really unnecessary. Having regard to the entire scheme of section 39, therefore, it is clear that on a true and proper construction of sub-section 4(a)(i) of section 39 the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the department."

(8) The language of Section 39 of The 1963 Act is almost *pari materia* with the provision of Section 39 of the Act. If on an appeal filed by the assessee, the Tribunal could not enhance the tax in accordance with the provisions of Section 39 of 1963 Act, the Deputy Excise and Taxation Commissioner also could not, on the appeal of the assessee-appellant, and in the absence of any appeal or revision by the department, set aside the orders of the assessing authority relating to exemptions granted and remand the case for fresh decision thereof.

(9) In the result, we hold that the appellate authority was not competent to go into the matters which were not raised in appeal and direct the examination of fresh issues by the assessing authority on the appeal filed by the assessee. It is not necessary for us to construe the provisions of Section 40 of the Act and to define the scope of the revisional jurisdiction of the Commissioner in these proceedings. The answer to the question referred is in the negative. No costs.

R.N.R.

Before : Sukhdev Singh Kang & Jai Singh Sekhon, JJ.

M/S. MEHTA GROUP OF INDUSTRIES BAHADURGARH,—*Applicant.*

versus

THE STATE OF HARYANA,—*Respondent.*

General Sales Tax Reference No. 6 of 1983.

22nd August, 1989.

Central Sales Tax Act, 1956—*Ss.* 3-*A,* 9—*Haryana General Sales Tax Act,* 1973—*S.* 42—*Reference of question of law—Movement of*