

Before S.J. Vazifdar, C.J. & Anupinder Singh Grewal, J.

THE STATE OF HARYANA —Petitioner

versus

M/S LIMTOFIT PVT.LTD. AND ANOTHER—Respondents

CWP No. 6175 of 2010

May 8, 2017

Constitution of India, 1950, Articles-226, 227 – Haryana General Sales Tax Act, 1973, Section 39 (2), 39 (7) and 40 (2) – Right to Appeal against Revisional Order does not take away right of Appeal – Penalty imposed against Respondent U/s 37 (6) of Act – Appeal preferred by Respondent U/s 39 (1) (a) of Act allowed – Order challenged in Appeal by Petitioner disposed of on ground of maintainability – Review Application U/s 41 also dismissed – Held, Section 39 (2) does not confer right of Appeal only in favour of assessee – Further, mere existence of power of revision U/s 40 does not imply that there is no right of Appeal – Right of Appeal U/s 39 (7) against order passed in Revision U/s 40 (2) does not take away the right of Appeal U/s 39 (2) – Petition allowed.

Held that, The question that falls for our consideration is whether the State of Haryana is entitled to file an appeal under Section 39(2). In our view, it is. Section 39(2) does not confer the right of appeal only in favour of the assessee. It does not limit the right of appeal to any particular person or party. There is nothing in the scheme of the Act that persuades us to read a limitation to this effect into sub-section (2) of section 39. If the Legislature intended restricting the right of appeal to assessee, it would have provided so expressly. We do not even read such an intendment into sub-section (2) of section 39.

(Para 5)

Held that, the mere existence of a power of revision under section 40 does not imply that there is no right of appeal. Further, merely because there is a right of appeal under section 39(7) against an order passed in revision under section 40(2), it does not follow that the State does not have a right of appeal under section 39(2). As we mentioned earlier, the power of revision is separate and distinct from the right to appeal. It follows, therefore, that the right to appeal against a revisional order does not take away the right of appeal which is otherwise conferred by the Act.

(Para 7)

Mamta Singla Talwar, DAG, Haryana,
for the petitioner

K.L. Goyal, Senior Advocate with
Sandeep Goyal, Advocate ,
for the respondents

S.J. VAZIFDAR, CHIEF JUSTICE (ORAL)

(1) The petitioners have challenged the order of the Tribunal dated 12.08.2005 dismissing their appeal under section 39(2) of the Haryana General Sales Tax Act, 1973, as being not maintainable and an order dated 30.11.2007 dismissing their application for a review thereof.

(2) In view of the limited question involved, it is not necessary to set out the facts in detail. It is sufficient to note only a few facts.

The Assistant Excise and Taxation Officer-cum-Assessing Authority (AETO), Panchkula, by an order dated 30.12.1998, imposed a penalty of Rs. 65,500/- under section 37(6) of the Act. The order was passed on account of the petitioner's vehicle having allegedly been found to have been unloaded in the respondents / assessee's premises without the requisite documents. The documents were found in the name of another party. It was accordingly held that the goods were at the respondent s/assessee's premises without the necessary documents and the consignment was, therefore, treated as being without the necessary documents.

(3) The respondent s/assessee's filed an appeal against this order before the Joint Excise & Taxation Commissioner (JETC) under Section 39(1) (a) of the Act which was all owed by an order dated 30.05.200 0. The order of the AETO was quashed and set aside.

The petitioner filed an appeal against the order of the JETC which was disposed of by the impugned order dated 12.08.2005. It was held that the appeal was not maintainable.

The petitioner filed an application for review under section 41 of the Act against the order dated 12.08.2005. This application was also dismissed by the impugned order dated 30.11.2007.

(4) Sections 39 and 40 of the Act read as under: -

“CHAPTER –VII

APPEAL, REVISION, REVIEW AND REFUND

SECTION - 39**[APPEAL]**

(1) An appeal from every original order, including an order under Section 40, passed under this Act or the rules made there under 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, or any other officer not below the rank of a 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.

(2) An order passed in appeal by the Deputy Excise and Taxation Commissioner or the officer appointed by the State Government under Clause (a) of Sub-section (1) or by the Commissioner or the officer appointed by the State Government under Clause (b) of that sub-section shall be further appealable to the Tribunal.

(3) The appellate authority shall not for the first time, receive in evidence on behalf of any dealer in any appeal, any account, register, record or document unless for reasons to be recorded in writing, he considers, that such account register, record or documents is genuine and that the failure to produce the same before the authority below was for reasons beyond the control of the dealer.

(4) Every order passed by the Tribunal on appeal under Sub-section (2) shall, subject to the provisions of Section 42 , be final.

(5) No appeal shall be entertained unless it is filed within sixty days from the date of the order appealed against and the appellate authority is satisfied, that the amount of tax

assessed and the penalty and interest, if any, recoverable from the person has been paid;

Provided that the said authority if satisfied that the person is unable to pay the whole of the amount of tax assessed, or the penalty imposed, or the interest due, he may, if the amount of tax and interest admitted by the appellant to be due has been paid, for reasons to be recorded in writing, entertain the appeal and may stay the recovery of the balance amount subject to the furnishing of a bank guarantee or adequate security in the prescribed manner to the satisfaction of the appellate authority.

Provided further that in the case of an appeal against any order which has to be communicated by the appropriate authority to the appellant, the period of sixty days shall commence from the date of receipt of the copy of the order by the appellant and in the case of an appeal against any order made under this Act, the time spent in obtaining the certified copy of the order shall be excluded in computing the period of sixty days.

(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 under this Act.

(7) An assessing authority may challenge in appeal before the Tribunal, the order of the officer on whom the State Government has conferred the powers of the Commissioner under Sub-section(2) of Section 40, within one year from the date of the order appealed against .

(See rule 55 to 58 & 61) .

SECTION 40

[REVISION]

(1) The Commissioner may on his own motion call for the record of any case pending before, or disposed of by, any officer appointed under sub-section (1) of section 3 of the Act to assist him or any assessing authority or appellate authority,

other than the Tribunal, for the purpose of satisfying himself as to the legality or to the 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 so revised after the expiry of a period of five 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:

Provided further that the assessee or any other person shall have no right to invoke the revisional powers under this sub-section .

2. The State Government may by notification, confer on any other 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. (See rule 60) .”

(5) The question that falls for our consideration is whether the State of Haryana is entitled to file an appeal under section 39(2) . In our view, it is. Section 39(2) does not confer the right of appeal only in favour of the assessee. It does not limit the right of appeal to any particular person or party. There is nothing in the scheme of the Act that persuades us to read a limitation to this effect into sub-section (2) of section 39. If the Legislature intended restricting the right of appeal to assesseees, it would have provided so expressly. We do not even read such an intendment into sub-section (2) of section 39.

(6) The Tribunal in both the impugned orders came to conclusion that the appeal was not maintainable by reading section 39 (7) with section 40. In the main order dated 12.08.2005, it was held that the AETC could act to revise the order o f the JETC under section 40(1) .It was observed that the Legislature did not provide for an appeal at the instance of the State against an order which could be corrected in revision by the revisional authority under section 40(1). By the order on the review application, the Tribunal stated that it was concerned only with whether there was any irregularity or impropriety or mistake apparent on the face of the main order passed by the Tribunal. It was observed that it was clear from a reading of the provisions of the Act

that it was only under section 39(7) that the State has the power to file an appeal against the orders of the revisional authority and since the order appealed against was not passed by the revisional authority the State has no right to file an appeal against the order of the JETC.

(7) We are unable to agree with the line of reasoning adopted in both the orders of the Tribunal. Section 40(1) confers upon the Commissioner the power of revision. The Commissioner is entitled on his own to call for the record of any case pending before or disposed of by the officers mentioned there in or by any assessing authority or appellate authority other than the Tribunal. That, however, is a separate and independent power from the right of appeal conferred by section 39(2). The mere existence of a power of revision under section 40 does not imply that there is no right of appeal. Further, merely because there is a right of appeal under section 39(7) against an order passed in revision under section 40(2), it does not follow that the State does not have a right of appeal under section 39(2). As we mentioned earlier, the power of revision is separate and distinct from the right to appeal. It follows, therefore, that the right to appeal against a revisional order does not take away the right of appeal which is otherwise conferred by the Act.

(8) In the circumstances, the petition is allowed. The impugned orders of the Tribunal are set aside. The appeal before the Tribunal shall stand restored to file and shall be disposed of on merits.

Dr. Sumati Jund