had been run by another person as a lessee for him makes not the least difference. He makes profits or gains just the same and he makes the same from and in consequence of running of the business asset. Hence income derived by an assessee from the lease of a factory becomes income from business and assessable under section 10 Income-tax Act."

This decision clearly indicates that there can be a partnership to carry on business of leasing property or commercial assets. As regards rental income, the question whether such income is assessable under section 10 or section 12 of the Act is a matter which, as already pointed out, we are not called upon to pronounce and in any case that is a matter which has to be determined on the facts and in the circumstances of each individual case.

(7) For the reasons recorded above we return the answer to the question referred for our opinion in the affirmative. The assessees will have their costs which are assessed at Rs. 200.

B. R. TULI, J:—I agree:

N. K. S.

CIVIL MISCELLANEOUS.

Before Harbans Singh, C.J. and Prem Chand Jain, J.

M/S WOOD WORKER AND PACKING CASE WORKS,—*Petitioner.*

versus

THE STATE OF PUNJAB ETC.,—*Respondents.*

Civil Writ No. 2722 of 1968.

October 7, 1970.

Punjab General Sales Tax Act (XLVI of 1948)—Sections 20(6) and 22—Punjab General Sales Tax Rules (1949)—Rule 59(2)—Power to dismiss an appeal in default—Whether ultra vires *section 20(6)—Appellate authority—Whether obliged to decide every appeal on merits irrespective of the non-appearance of the appellant or his counsel.*

Held, that the vires of rule 59(2) of Punjab General Sales Tax Rules, 1949 depends upon the true scope of sub-section (6) of Section 20 of Punjab

General Sales Tax Act, 1948. The expression "pass such order on appeal as it deems to be just and proper" used in this sub-section clearly implies that the decision has to be given on merits. An order dismissing an appeal in default can by no stretch of imagination be considered to be either just or proper or having been passed on appeal. The words "on appeal" clearly indicate that the Tribunal has to give a decision on the points raised in the appeal. An order passed on appeal can be deemed to be just and proper only when the Tribunal has gone into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. Moreover, if any such power is attributed to the Tribunal then the provisions of section 22 of the Act would be rendered nugatory because there being no decision on merits, no application requiring the Tribunal to refer to the High Court any question of law would lie. Hence the appellate authority has no power under the Act to dismiss an appeal in default. It must dispose of the appeal on merits irrespective of the fact whether the appellant or his counsel appears on the date of hearing or not. Rule 59(2) of the Rules, in so far as it authorises dismissal of appeals for default is inconsistent and repugnant to and hence *ultra vires* section 20(6) of the Act. (Para 10).

Case referred by Hon'ble Mr. Justice Prem Chand Jain on 27th November, 1968 to a larger Bench for decision of an important question of Law involved in the case. The Division Bench consisting of the Hon'ble the Chief Justice Mr. Harbans Singh and the Hon'ble Mr. Justice Prem Chand Jain, finally decided the case on 7th October, 1970.

Petition under Articles 226 and 227 of the Constitution of India praying that a writ in the nature of Certiorari, Mandamus, or any other appropriate writ, order or direction be issued quashing the order of the Sales Tax Tribunal, dated 6th of August, 1968 (Annexure 'B') and declaring sub rule (2) of Rule 59 ultra vires of the Act and the Rules and directing Respondent No. 2 to decide the appeal of the petitioners on merits.

R. N. NARULA, ADVOCATE, for the petitioner.

S. S. KANG, ADVOCATE FOR ADVOCATE-GENERAL, PUNJAB, for the respondents.

JUDGMENT

Judgment of this Court was delivered by:—

P. C. JAIN, J.—Messrs. Wood Workers and Packing Case Works, Moga, district Ferozepore, through Karnail Singh, one of the partners, have filed this petition under Articles 226 and 227 of the Constitution of India for the issuance of an appropriate writ, order of direction, quashing the orders of the Presiding Officer, Sales Tax Tribunal,

Punjab, respondent No. 2, dated 8th April, 1968 and 6th August, 1968 (copies Annexures 'A' and 'B' respectively).

(2) Briefly the facts of this petition may be stated thus :—

(3) Karnail Singh, through whom this petition has been filed, along with Lal Singh, Mohan Lal and Harbans Singh formed a partnership in the name and style of Messrs. Wood Workers and Packing Case Works, Moga, on the 7th June, 1963, for the purpose of carrying out the contract which they had entered with Messrs. Food Specialities, Moga. The firm was to supply 800 wooden pallets and it was agreed that the firm Messrs. Food Specialities would pay Rs. 43 per pallet. The terms of the payment were that Rs. 5,000 would be paid after delivery of first hundred pallets, Rs. 5,000 after delivery of 200 pallets and the balance on completion of the order.

(4) It is further stated that on the second supply, the Assessing Authority, Ferozepore, issued a notice to the petitioners that they were supplying and selling goods without obtaining the registration number under the Punjab General Sales Tax Act, 1948 (hereinafter referred to as the Act) and that no return whatsoever had been filed by them. In pursuance of the notice, the petitioners appeared before the Assessing Authority who, after considering the entire matter, arrived at a conclusion that the petitioners were dealers and as the taxable quantum had exceeded the limit prescribed by the Act, the firm was compulsorily registerable under section 7 of the Act and was also liable to pay sales tax under section 4 of the Act. Accordingly, the petitioners were made liable to pay tax at 6 per cent on the remaining sum of Rs. 24,400 and, besides this a penalty of Rs. 150 was also imposed for failure to get registered. Feeling aggrieved from the decision of the Assessing Authority, the petitioners filed an appeal under section 20 of the Act before the Deputy Excise and Taxation Commissioner (Appeals); Punjab. which was allowed only to the extent that the penalty was reduced to Rs. 75 while in all other respects the order of Assessing Authority was upheld. Still dissatisfied, the petitioners filed a revision petition under section 21 of the Act before the Excise and Taxation Commissioner, Patiala, which was transferred to the Sales Tax Tribunal, respondent No. 2, on the formation of the Tribunal under section 9 of the Punjab General Sales Tax (Amendment) Ordinance,

1967, and that the said revision was treated as second appeal No. 565 of 1967-68 by the Tribunal. A notice of this appeal was issued to the petitioners on the 19th March, 1968, requiring them to appear for hearing on the 9th April, 1968. On 7th April, 1968, the petitioners' counsel expressed his inability to conduct the case on the 8th April, 1968, before the Tribunal and, accordingly, sent a telegram praying for an adjournment. It is alleged that instead of granting the adjournment, the appeal was dismissed by the Tribunal in default on the 8th April, 1968 (copy Annexure 'A' to the petition). On coming to know of the order dismissing the appeal in default, the petitioners filed an application for its restoration and that application was dismissed on the 6th August, 1968 (copy Annexure 'B' to the petition). It is the legality of these orders of the Tribunal which has been challenged by the petitioners.

(5) This petition came up for hearing before me on November 27, 1968. Considering that the point involved in the petition is of considerable importance, I thought it proper to refer the matter to a larger Bench and it is in this manner that this petition has come up for hearing before us.

(6) The only question that falls for determination in this petition is whether section 20 of the Act contemplates any order of dismissal in default or it necessarily requires that the appellate authority is bound to dispose of every appeal once it is filed, on merits.

(7) It was contended by Mr. R. N. Narula, learned counsel for the petitioners, that the appellate authority has no power to dismiss an appeal in default and the rule 59(2) in so far as it empowers the appellate authority to dismiss an appeal in default is repugnant to section 20(6) of the Act and that, in spite of the non-appearance of the appellant or its counsel on the date of the hearing of the appeal, the appellate authority is duty bound to dispose of the appeal on merits. Support was sought by the learned counsel from the words "pass such order an appeal as it deems to be just and proper" occurring in sub-section 6 of section 20.

(8) After giving our thoughtful consideration to the entire matter, we are of the view that there is considerable force in the contentions of the learned counsel for the petitioners. At this stage,

it would be appropriate to notice the relevant provisions of the statute which read as under :—

Section "20(1) An appeal from every original order passed under this Act or the rules made thereunder shall lie—

(a) if the order is made by an Assessing Authority to the Deputy Excise and Taxation Commissioner ;

(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner ;

(c) if the order is made by the Commissioner, or any officer exercising the powers of the Commissioner, to a Tribunal.

(2) An order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Commissioner or any officer on whom the powers of the Commissioner are conferred shall be further appealable to a Tribunal.

(3) Every order of a Tribunal and, subject only to such order, the order of the Commissioner, or the order of the Deputy Excise and Taxation Commissioner or of the Assessing Authority if it was not challenged in appeal or revision shall be final.

(4) No appeal shall be entertained unless it is filed within sixty days from the date of communication of the order appealed against, or such longer period as the appellate authority may allow for reasons to be recorded in writing.

(5) No appeal shall be entertained by an appellate authority unless such appeal is accompanied by satisfactory proof of the payment of tax or of the penalty, if any, imposed or of both, as the case may be :

Provided that if such authority is satisfied that the dealer is unable to pay the tax assessed or the penalty, if any imposed or both, he may, for reasons to be recorded in writing, entertain the appeal without the tax or penalty or both having been paid or after part payment of such tax or penalty or both.

(6) Subject to such rules of procedure as may be prescribed, an appellate authority may pass such order on appeal as it deems to be just and proper.

Section 21(1) The Commissioner may on his own motion call for the record of any proceedings which are pending before, or have been disposed of by, any authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or of order made therein and may pass such order in relation thereto as he may think fit.

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

(3) A Tribunal, on application made to it against an order of the Commissioner under sub-section (1) within ninety days from the date of communication of the order, may call for and examine the record of any such case and pass such orders thereon as it thinks just and proper.

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

Section 22(1) "Within 60 days from the passing of an order under section 20 or 21 by the Tribunal affecting any liability of any dealer to pay tax under this Act, such dealer or the Commissioner may, by application in writing accompanied by a fee of one hundred rupees in case the application is made by a dealer, require the Tribunal to refer to the High Court any question of law arising out of such order.

(2) If for reasons to be recorded in writing, the Tribunal refuses to make such reference, the applicant may within 30 days of such refusal either —

(a) withdraw his application (and if he does so, the fee paid shall be refunded); or

(b) apply the High Court against such refusal."

* * * * *
* * * * *

Rule "59(1) (a) If the appellate or revising authority does not reject the appeal or revision summarily, it shall fix a date for its hearing. The appeal or revision shall be decided after notice to the Assessing Authority concerned and after considering any representation that may be made by it either in person or through any of its subordinates, or through an authorised representative of the State Government and after giving an opportunity to the appellant or applicant of being heard in person or by a duly authorised agents. The appellate or revising authority may, before deciding an appeal or revision, itself hold such further enquiry or direct it to be held by the authority against whose decision the appeal or revision has been preferred, as may appear necessary to the said appellate or revising authority.

(b) The authority aforesaid may for sufficient reasons adjourn at any stage the hearing of an appeal or application for revision to a different time on the same day or any other day.

(2) If on the date and at the time fixed for hearing or any other date or at any other time to which the hearing may be adjourned, the appellant or the applicant does not appear before the said authority either in person or through an agent, the said authority may dismiss the appeal or revision or may decide it *ex-parte* as it may think fit :

Provided that within thirty days from the date on which the appeal or application for revision was dismissed or decided *ex-parte* under this sub-rule, the appellant or, as the case may be, the applicant makes an application to the appellate or revising authority for setting aside the order and satisfies it that the intimation of the date of hearing was not duly served on him or that he was prevented by sufficient cause for

appearing when the appeal or as the case may be, application for revision was called on for hearing the said authority shall make an order setting aside the dismissal *ex-parte* decision upon such terms as it thinks fit, and shall appoint a day for proceeding with the appeal or application for revision."

(9) The matter of assessment of tax under the Act is not limited in its effect to the dealer alone. It affects the revenues of the State. As it is a matter of affecting the revenue of the State; the authorities constituted under the Act, including the Tribunal, are clothed with certain statutory duties under the Act and, in discharge of those duties, even to act *suo motu* and revise the assessment. The authorities under the Act are required to see that the assessees are not burdened with an amount of tax not envisaged by the Act or on the fact of the case. They are also enjoined to see that the tax legally leviable under the Act does not escape assessment by any erroneous order of the subordinate authorities. It is with this back ground that we have to judge the correctness of the contentions raised before us by the learned counsel for the petitioners.

(10) The vires of rule 59(2) depends upon the true scope of sub-section 6 of section 20 of the Act. The expression "pass such order on appeal as it deems to be just and proper" clearly implies that the decision has to be given on merits. An order dismissing an appeal in default can by no stretch of imagination be considered to be either just or proper or having been passed on appeal. The words "on appeal" clearly indicate that the Tribunal has to give a decision on the points raised in the appeal. It is clear to our mind that an order passed on appeal can be deemed to be just and proper only when the Tribunal has gone into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. Moreover, if any such power is attributed to the Tribunal then the provisions of section 22 would be rendered nugatory because there being no decision on merits, no application requiring the Tribunal to refer to the High Court any question of law would lie. The question which has been debated before us is not *res integra* and has been the subject matter of judicial pronouncements. A question relating to rule 24 of the Appellate Tribunal Rules, 1946, framed in exercise of the powers of the

Tribunal under section 5A of the Income Tax Act enabling dismissal of an appeal by the Tribunal for default of appearance of the appellants (which is in *pari materia* with the provisions with which we are concerned in this appeal) came up for consideration before their Lordships of the Supreme Court in *Commissioner of Income-Tax, Madras* v. *S. Chenniappa Mudaliar,* (1), and after considering the various decisions on the subject it was observed thus: —

> "The scheme of the provisions of the Act relating to the Appellate Tribunal apparently is that it has to dispose of an appeal by making such orders as it thinks fit on the merits. It follows from the language of section 33(4) and in particular the use of the word 'thereon' that the Tribunal has to go into the correctness or otherwise of the points decided by the departmental authorities in the light of the submissions made by the appellant. This can only be done by giving a decision on the merits on questions of fact and law and not by merely disposing of the appeal on the ground that the party concerned has failed to appear. As observed in *Hukamchand Mills Ltd.* v. *Commissioner of Income-tax,* (2), the word 'thereon' in section 33(4) restricts the jurisdiction of the Tribunal to the subject-matter of the appeal and the words 'pass such orders as the Tribunal thinks fit' include all the powers (except possibly the power of enhancement) which are conferred upon the Appellate Assistant Commissioner by section 31 of the Act. The provisions contained in section 66 about making a reference on questions of law to the High Court will be rendered nugatory if any such power is attributed to the Appellate Tribunal by which it can dismiss an appeal, which has otherwise been properly filed, for default, without making any order thereon in accordance with section 33(4). The position becomes quite simple when it is remembered that the assessee or the Commissioner of Income-tax, if aggrieved by the orders of the Appellate Tribunal, can have resort only to the provisions of section 66. So far as the questions of fact are concerned the decision of the Tribunal is final

(1) (1969) 74 I.T.R. 41.
(2) (1967) 63 I.T.R. 232 (S.C.).

and reference can be sought to the High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order under section 33(4). It follows from all this that the Appellate Tribunal is bound to give a proper decision on questions of fact as well as law which can only be done if the appeal is disposed of on the merits and not dismissed owing to the absence of the appellant."

(11) The view we have taken is also in accord with the view taken by the High Court of Andhra Pradesh in *Oversea Mica Exports, Gudur* v. *Secretary, Sales Tax Appellate Tribunal, A.P., Hyderabad, and another,* (3) and by the High Court of Madras in *K. A. Bari* v. *The State of Tamil Nadu;* (4). In *K. A. Bari's* case, (4) regulation No. 9(1) of the Tamil Nadu Sales Tax Appellate Tribunal Regulations, 1959, permitting the dismissal of appeal in default was held to be inconsistent with section 36(3)(a) (iii) of the Tamil Nadu General Sales Tax Act, 1959, and it was held that Sales Tax Appellate Tribunal had no power to dismiss an appeal for default of appearance of the appellant or his counsel on the date of hearing. To the same effect is the decision in *Oversea Mica Exports, Gudur's case* (3); wherein clause (1) of regulation 9 of the Andhra Pradesh Sales Tax Appellate Tribunal Regulations, 1957 (Memorandum No. 34908-B/S 57-3, Revenue, dated 24th July, 1957) in so far as it empowers the appellate authority to dismiss an appeal for default was held to be repugnant to section 21(4) of the Act and *ultra vires* of the power of the Tribunal under section 3(4) read with section 21(4) of the Act.

(12) Thus, we are of the considered view that an appellate authority has no power under the Act to dismiss an appeal in default; that it must dispose of the appeal on merits irrespective of the fact whether the appellant or his counsel appeared on the date of hearing or not and that rule 59(2) so far as it authorises dismissal of appeals for default is inconsistent and repugnant to section 20(6) of the Act.

(3) (1970) 25 S.T.C. 425.
(4) (1970) 26 S.T.C. 290.

(13) Accordingly we allow this writ petition with costs and quash the impugned orders of the Presiding Officer, Sales Tax Tribunal, Punjab, dated 8th April, 1968 and 6th August, 1968, and send back the case to the Tribunal, respondent No. 2, to decide the appeal of the petitioners in accordance with law. Counsel's fee Rs. 150.

B. S. G.

CIVIL MISCELLANEOUS

Before D. K. Mahajan and Bal Raj Tuli, JJ.

THE COMMISSIONER OF INCOME-TAX, PUNJAB, HARYANA, JAMMU & KASHMIR, HIMACHAL PRADESH & CHANDIGARH, PATIALA,—*Petitioner.*

versus.

M/S DAMYANTI MEHTA & YASH RAJ MEHTA (A.O.P.), SIRHIND,—*Respondent.*

Income Tax Reference No. 10 of 1967.

October 13, 1970.

The Indian Income-Tax Act (XI of 1922)—Sections 33-B(2)(a) and 34(1)(a)—Re-assessment notice issued by an Income-Tax Officer—Assessee filing objections—Income Tax officer after applying his mind to the objections passes the order "proceedings filed"—Such order—Whether an order of re-assessment under section 34—Commissioner of Income-Tax—Whether precluded from revising the order under section 33-B(2)(a).

Held, that in every case it has to be determined on the facts and circumstances thereof as to what do the words 'proceedings filed' or 'proceedings disposed of' or 'filed' or 'disposed of' connote or mean ? In one set of circumstances they may not amount to an order of assessment or re-assessment whereas in other set of circumstances these phrases may amount to an order of assessment or re-assessment. Where an Income-Tax Officer issues a notice under section 34(1)(a) of Income-tax Act 1922, and after applying his mind to the objections raised by the assessee to such notice, passes an order "proceedings filed", the order amounts to an order of re-assessment and the Commissioner of Income-tax is precluded to revise such an order under section 33-B(2)(a) of the Act. (Para 9).