

PETITIONER:
COMMISSIONER OF SALES TAX ORISSA & ANR.

Vs.

RESPONDENT:
M/S. HALARI STORE ETC.

DATE OF JUDGMENT: 26/09/1997

BENCH:
S.P. BHARUCHA, V.N. KHARE

ACT:

HEADNOTE:

JUDGMENT:
THE 26TH DAY OF SEPTEMBER, 1997

Present:

Hon'ble Mr. Justice S.P. Bharucha

Hon'ble Mr. Justice V.N. Khare

A.B.Diwan, Sr. adv., and P.N. Misra, Adv. with him for the appellants

Raju Ramachandran, Sr.Adv., Sanjeev Das, Rajesh, P.K. Mullick and Gaurab Banerjee, Advts. with him for the Respondents

J U D G M E N T

The following Judgment of the Court was delivered:

J U D G M E N T

V.N. KHARE, J.

Leave granted in all the matters.

These appeals by special leave, raise the question "whether the Commissioner of Sales Tax, suo motu can revise under clause (a) of Sub-section (4) of Section 23 of the Orissa Sales Tax Act (in short "the Act") read with rule 80 of the Orissa Sales Tax Rules (in short "the Rules"), an appellate order passed by the Assistant Commissioner of Sales Tax."

The respondent herein is a registered dealer under the Act and running a wholesale business in purchase and sale of beetle nuts at malgodown, Cuttack. In pursuance to the notices issued under Section 12(4) of the Act, the respondent appeared before the concerned Sales Tax Officer and produced the books of accounts for the relevant assessment years for verification. The Sales Tax officer rejected the books of accounts produced by the respondent-dealer and completed the assessments to the best of his judgment. Feeling aggrieved by the same, the respondent-dealer preferred appeals before the first appellate authority, namely, the Assistant Commissioner of Sales Tax, Cuttack, under Section 23(1) of the Act. The appellate authority by its orders allowed the appeals in part for the assessment year 1992-93 and in full for the assessment year 1993-94. Thereafter, the Additional Commissioner of Sales Tax, exercising his suo motu revisional power conferred under Section 23(4)(a) of the Act read with rule 80 of the Rules, issued notices dated 9.6.1995 to the respondent-

dealer to show cause as to why should the appellate orders passed by the Assistant Commissioner of Sales Tax be not revised, the same being erroneous and prejudicial to the interest of the Revenue. It is at this stage, the respondent-dealer challenged the said notices by means of writ petitions under Article 226 and 227 of the Constitution of India before the High Court of Office. The contention of the respondent dealer before the High Court was that the Commissioner of Sales Tax has no jurisdiction to issue the impugned notices. The High Court quashed the impugned notices and allowed the Original Jurisdiction Cases No. 4496 and 4497 of 1995. want of jurisdiction in Additional Commissioner of Sales Tax in issuing the impugned notices to the respondent dealer was found by the High Court on two grounds. Firstly, the appellate order passed by the Assistant Commissioner of Sales Tax was not an order within the meaning of expression "order made under this Act" occurring in clause (a) of sub-section (4) of Section (4) (a) of Section 23 places a limitation on the exercise of revisional power by the Commissioner when it concerns an appellate order.

Before we advert to the reasonings given by the High Court in allowing the writ petition, it is appropriate to notice the decision of this Court in the case of State of Orissa and others vs. Krishna Stores, [1997(3) SCC 246], wherein this court was called upon to interpret clause (a) of the subject matter for consideration before us, and unamended rule 80 of the Rules. In that case a dealer successfully challenged the notice issued to him under Section 23(4)(a) of the Act read with unamended rule 80 of the Rules before the High Court of Orissa on the ground that issue of notice to revise an appellate order is without jurisdiction. This Court while interpreting Section 23(4)(a) of the Act was of the view that, in the context of Section 23(4) where the words "other than an appellate order" are absent, there is no limitation on the power of the Commissioner exercising suo motu power as to revise an appellate order. This Court held thus:-

"under 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 is not expressly prevented from revising an appellate order if made by any person other than the tribunal or an additional tribunal".

In that case, the unamended rule 80 also fell for consideration. The unamended rule 80 as it stood then, is extracted below:-

"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 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."

(emphasis supplied)

Interpreting the unamended rule 80, this Court observed that the Commissioner is empowered to revise any order other than an appellate order passed by the Additional Commissioner, Deputy Commissioner or the Assistant Commissioner. The said view of this Court was on account of the language used in the unamended rule to which expressly prohibited the revision of an appellate order. However, this Court upheld the exercise of suo motu power of revision by the Commissioner on the ground that the appeal filed by the dealer was rejected at the threshold due to certain defects in the appeal.

Subsequently, rule 80 which was the subject matter of interpretation in the case of State of Orissa v. Krishna Stores (supra) was amended, and the amended rule 80 is reproduced below:-

"80, Revision by the Commissioner suo motu.

The Commissioner may on his own motion at any time within three years from the date of passing of any order by the Sales Tax Officer or within two years from the date of passing of any order by the Additional Commissioner, Special Additional Commissioner or Assistant Commissioner, as the case may be, call for records of the proceedings in which such order was passed and if he considers that any order passed therein is erroneous in so far as revenue he may after giving the dealer an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary revise any such order :

Provided that the Commissioner shall not revise any order under this rule-

(1) where an appeal against the order is pending before the appellate authority under S. 23, or
(2) where time-limit for filling an appeal under S. 23 has not expired."

In view of deletion of words "other than an appellate order" in the amended rule, there is no manner of doubt that under Section 23(4)(a), read with amended rule 80, the Commissioner has suo motu power to revise an appellate order. The decision in the case of State of Orissa vs. Krishna Stores (supra) read with amended rule 80, substantially resolves the controversy as regards the Commissioner exercising suo motu power of revision as to revise under Section 23(4) (a) of the Act read with rule 80 of the Rules, an appellate order.

Adverting to the first reasoning given by the High Court that the appellate order does not fall within the meaning of the expression "order made under the Act" occurring in clause (a) of sub-section (4) of Section 23 of

the Act, it is necessary to set out the provisions of the Act which are extracted below:

"23. Appeals and revision.

(2) Within thirty days from the date of receipt of the copy of-

(a) an order of assessment with or without penalty under S. 12, 12-A or 12-B; or

(b) an order directing payment of interest under sub.S. (4-a) of S. 12; or

(c) an order imposing penalty under sub-S.(3) of S.9-B or under sub-S. (3) of S. 11,

any dealer or person, as the case may be, may, in the prescribed manner appeal to the prescribed authority against such order:

Provided that no appeal shall be entertained by the said authority unless he is satisfied that such amount of tax as the appellant may admit to be due from him has been paid;

Provided further that the prescribed authority may admit the appeal after the period herein before specified if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(2) Subject to such rules as may be made or procedure as may be prescribed, the appellate authority, in disposing of any appeal under sub.S(1), may-

(a) confirm, reduce, enhance or annul the assessment or the penalty or interest, if any; or

(b) set aside the assessment or the penalty or interest, if any, and direct the assessing authority to pass a fresh order after such further enquiry as may be directed.

(3) (a) Any dealer, or as the case may be, the State Government, dissatisfied with an appellate order made under sub.S.(2) may within sixty days from the date of receipt of such order prefer an appeal in the prescribed manner to the Tribunal against such order :

Provided that an appeal under this clause may be admitted after the aforesaid period of limitation, if the Tribunal is satisfied that the appellant had sufficient cause for not preferring the appeal within such period.

(b) The dealer, or the State Government as the case may be on receipt of notice that an appeal has been preferred under C1.(a) may notwithstanding that the said dealer or the State Government may

not have appealed against such order or any part thereof, within sixty days of the service of the notice file a memorandum of cross objections and such memorandum shall be disposed of by the Tribunal as if it were an appeal presented within time under C1.(a). (c) While disposing of an appeal under this sub-section the Tribunal shall have the same powers subject to the same conditions as are enumerated in sub-S.(2) and any order passed under this sub-section shall, except as otherwise provided in S. 24, be final.

(4) (a) Subject to such rules as may be made and for reasons to be Commissioner may, upon application by a dealer or person or on his own motion revise any order made under this Act or the rules made thereunder by any person other than the Tribunal appointed under sub-S.

(3) of S. 3 to assist him:

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

Explanation. Any provision contained elsewhere in this Act which provides for determination of any specific matter shall not debar the Commissioner from determining such matter in exercise of the powers conferred upon him under this sub-section.

A perusal of the aforesaid provisions shows that Section 23 of the Act deals with appeals and revision. Sub-section (i) thereof provides that any dealer or person may prefer an appeal against the order of assessment or an order directing payment of interest or an order imposing penalty. Sub-section (2) of Section 23 deals with power of appellate authority in disposing of appeals preferred under sub-section (1). Sub-section (3)(a) deals with second appeal which enables any dealer or State Government, as the case may be, to prefer appeal to the State Sales Tax Tribunal against the appellate order. Section 23(4)(a) deals with the revisional power of the Commissioner of Sales Tax, which may be either suo motu or at the instance of a dealer or person against any order passed under the Act. The question, therefore, which requires consideration is whether an appellate order passed under sub-section (2) of Section 23 of the Act comes within the ambit of the expression "any order made under the Act" occurring in Section 23(4)(a) of the Act. The language used in Section 23(4)(a) is plain, simple and there is no ambiguity in it. A plain reading of Section 23(4)(a) shows that the expression "any order made under the Act" is of a wide connotation and it includes an assessment order as well as an appellate order passed under

the Act. This construction placed on the said expression neither runs contrary to the scheme envisaged in Section 23 of the Act nor it leads to any undesirable consequences, as observed by the High Court. We are, therefore, of the opinion that under Section 23(4)(a) of the Act, the Commissioner on his own motion can revise any order, including an appellate order made under the Act or the Rules by a person other than the tribunal or additional tribunal.

So far as the second reasoning given by the High Court that the proviso to clause (a) of sub-section (4) of Section 23 of the Act places limitation on the Commissioner's suo motu revisional powers to revise an appellate order is concerned, a reading of the aforesaid proviso would show that the limitation on the revisional power of the Commissioner comes is only where a dealer or person filing the revision having a remedy by way of appeal under sub-section (3) of Section 23 of the Act, did not avail of such remedy. However, it does not curtail the suo motu revisional power of the Commissioner of Sales Tax to revise an appellate order passed under the act. The proviso to Section 23(4)(a) contemplates that the Commissioner shall not exercise any revisional jurisdiction at the instance of a dealer or person when he has a remedy by way of an appeal under sub-section (3) of Section 23 of the act. Thus, the Commissioner is not required to entertain an application under Section 23(4)(a) of the Act if the dealer or person instead of filing an appeal before the appellate authority has invoked revisional jurisdiction of the Commissioner. But, the same is not the position where the Commissioner decides to exercise his suo motu revisional power to revise an appellate order. Significantly, the words "on his own motion" occurring in the enactment are conspicuously absent in the proviso. Normally, a proviso is enacted to carve out something special out of the general enactment or to qualify what is in the enactment. By enacting the proviso the legislature has excluded the revisional jurisdiction of the Commissioner Sales Tax to revise an appellate order if invoked at the instance of a dealer or person when such dealer or person has a remedy by way of an appeal. As noticed earlier, the limitation on the suo motu power of the Commissioner as to revise an appellate order has not been expressly provided in the proviso. In absence of any expressed provisions, no limitation on suo motu power of the Commissioner to revise an appellate order can be implied. We, accordingly hold that the provisions of proviso to sub-section (4)(a) of Section 23 of the act do not prohibit the Commissioner to exercise suo motu revisional power to revise an appellate order.

For the foregoing reasons, we are satisfied that the High Court fell in error in quashing the impugned notices and allowing the writ petition of the respondent herein. We accordingly set aside the order and judgment of the High Court dated 12.2.1996 in O.J.C.. Nos. 4496 & 4497/95 and allow the appeals. There shall be no order as to costs.

In view of the decision in Civil Appeal Nos.....of 1997 (arising out of S.L.P.(C) No. 23581 and 23972/1996) are also allowed, with no order as to costs.