

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.1727 OF 2017

Viacom 18 Media Pvt. Ltd.

... Petitioner

V/s.

The State of Maharashtra and ors.

... Respondents

Mr.Vikram Nankani, senior counsel with Mr.Prithviraj Chaudhuri
i/by Mr.Mihir Deshmukh for the Petitioner.

Mr.V.A.Sonpal, Special counsel with Ms.Jyoti Chavan, AGP for the
Respondent/State.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : DECEMBER 13, 2018.**

P.C.:-

1. Considering the issues involved, we have heard learned
advocates for the parties for the final disposal.

2. The petitioner has challenged an order dated 31st January,
2017 as at Annexure-C to the petition passed by the Joint
Commissioner of Sales Tax (Appeals)-the respondent No.2 herein
in an appeal filed by the petitioner.

3. Brief facts are as under:

The Petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of broadcasting agent earning commission on advertisements and distribution of television channels of MTV Asia LDC and Nickelodeon Asia Holdings Private Limited. The issue at stake is petitioner's transactions of distribution income/subscription charges collected from sub-distributors whether would be taxed under the Maharashtra Value Added Tax Act, 2002 ("MVAT Act" for short). The Assessing Officer passed order of assessment under the MVAT Act and Central Sales Tax Act ("CST" for short) on 5th October, 2015 including the petitioner's distribution income in the turn over and taxed the same according to the prescribed rate. Against such order of assessment, the petitioner preferred appeal before respondent No.2-appellate authority. Before the appellate authority, the petitioner pointed out that under similar circumstances the Deputy Commissioner of Sales Tax (Appeals) under his order dated 27th February, 2007 had accepted the petitioner's contention that the transaction in question did not

invite sales tax. The relevant portion of the order of the Deputy Commissioner reads as under :

“I have gone through the assessment record alongwith grounds of appeal as discussed above and document submitted by the appellant including agreement made between MTV India Ltd. and Various Cable Operators. It is observed that The STO has levied Tax on Rs.69,38,502/- treating it as taxable TO of sale under BST Act @ 4% without mentioning the schedule entry under which tax has been levied. This amount is infact the Distribution income of the appellant from India. This amount infact represent the income received by the appellant towards the subscription charges levied on the viewers, which are in turn collected through local Cable operator. This subscription charges are levied against the Audio & Visual Transmission received by the viewer on his Television set. These are received as “radio waves” on the antenna installed by cable operator: who in turn distribute these signals through cable in his local area.

This fact was confirmed from the copies of agreement between appellant and various cable operators which are brought on record. So it is clear that the said income does not arise out of sale of goods defined in BST Act, 1959.

As per Hon'ble Supreme Court judgment in case of M/s BSNL Ltd. It is decided that goods do not include electromagnetic waves on Radio frequencies.

As appellant's goods are of electromagnetic waves were squarely covered by above referred judgment, hence Sales Tax levied on distribution income on account of transmission of electromagnetic waves is deleted and consequential interest is also deleted regarding

levy of PT at Rs.20,728/-, the appellant has not given any details to context this claim of non levy, hence PIT is confirmed and the Re-assessment order passed by the STO is hereby set aside, hence, the assessment order dt. 30.9.2005 stands.

ORDER

The appeal is allowed. The Re-assessment order is hereby set aside and assessment order dt. 30.09.2005 stands. The STO is directed to grant the refund of Rs.20,000/- paid as part payment as per the provisions of law.”

4. According to the petitioner, since the situation in the present case was identical, the respondent No.2 herein i.e. the appellate authority ought to have followed the earlier order passed by the Deputy Commissioner of Sales Tax. Ignoring such pleas of the petitioner, the appellate authority rejected the petitioner's contention that the transactions were not assessable to VAT/sales tax at all. He, however, gave partial relief on other grounds and disposed of the appeal by the order dated 18th March, 2018. In the context of the petitioner's reliance on the order dated 12th January, 2017 passed by the Deputy Commissioner of Sales Tax; Appellate Authority in the impugned judgment had made following observations:

“The appellant has heavily relied on the order of Deputy Commissioner of Appeals dated

12.1.2007 that distribution income is not liable to VAT. The said order is neither binding nor guiding to a Joint Commissioner. Moreover, this issue was not elaborately examined against various provisions of different laws and facts as has been done now.”

5. This order the petitioner has challenged in the present petition. Appearing for the petitioner, learned counsel Shri Nankani submitted that respondent No.2 was bound by the earlier order passed by the Deputy Commissioner which was in favour of the petitioner, in which it was clearly held that the transactions in question were not exigible to value added tax. He submitted that the appellate authority could not have brushed aside the contention merely stating that there was no elaborate discussion in the earlier order. He pointed out that the order dated 12th January, 2007 passed by the Deputy Commissioner has not been reversed or set aside. He, therefore, submitted that the petitioner may not be relegated to appellate remedy since the same would invite the requirement of mandatory pre-deposit and the alternative remedy therefore cannot be stated to be efficacious since the onerous condition of pre-deposit is imposed in order to

the exercise of the right of appeal.

6. On the other hand, the learned AGP Mr.Sonpal opposed the petition contending that in view of availability of appellate remedy, the petition should not be entertained. He further submitted that question of facts arise which should not be exaggerated in the writ petition. He lastly contended that the appellate authority has given reasons for not following the earlier order which in any case was not binding him. He also pointed out the earlier order of the Deputy Commissioner was passed in view of the provisions contended in Bombay Sales Tax Act, whereas the present order arises under the MVAT Act.

7. Having heard learned counsel for the parties and having perused documents on record, we are not satisfied at all in the manner in which respondent No.2 has rejected the petitioner's contention of an earlier appellate order concluding the issue of taxability of the transaction in question. If the factual aspects or law had undergone any change since the order was passed by the Deputy Commissioner on 12th January, 2007, the same has not

been brought on record nor stated in the impugned order. In absence of difference in relevant facts or applicable legal provisions of development of law at the hands of higher authority or court, the respondent No. 2 could not have taken a decision different from what the Deputy Commissioner in his order dated 12th October, 2007 had done. The principle of administrative and judicial hierarchy and the requirement of following binding proceedings even by Departmental Authority exercising quasi-judicial functions is all too well settled. In case of **Union of India Vs. Kamlakshi Finance Corporation Ltd.**¹ the Supreme Court had observed as under :

“6. Sri Reddy is perhaps right in saying that the officers were not actuated by any malafides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual malafides but with the fact that the officers, in reaching in their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticized this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers

1 1991(55) E.L.T.433(S.C.)

to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. [Section 35-E](#) confers adequate powers on the department in this regard. Under Sub-section (1), where the Central Board of Direct Taxes come across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under Sub-section(2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not

satisfied with this legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under Section.35-E (1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.”

8. This is not to suggest that if the Department thinks that a certain taxable event or taxable transaction is escaping assessment, the Department has no remedy. If the Department is of the opinion that despite earlier order passed by the Deputy

Commissioner, in the present case the transaction should be taxed by virtue of correct interpretation of applicable statutory provisions, it is always open to the Department to take the order of the respondent No.2 which he ought to have passed, into revision or appeal as may be available under the MVAT Act. Surely, the respondent No.2 cannot ignore an earlier order of the appellate authority involving the same assessee and if it also involves identical facts and law.

9. Under the circumstances, impugned appellate order dated 31st January, 2017 is set aside. The proceedings are placed back before the appellate authority for fresh disposal of the appeal in accordance with law after hearing the petitioner and bearing in mind the observations made in this judgment. We make it clear that according to the respondent No.2, there are any significant and material factual or legal differences, for taking independent view, he shall cite his reasons thereof. Petition disposed of accordingly. Appellate order is set aside to this limited extent. In other words, to the extent the order gives partial reliefs to the petitioner, the same is not disturbed.

10. We have not relegated the petitioner to appellate remedy in view of the special facts that the appellate authority has ignored the previous order in favour of the petitioner passed by the another appellate authority without giving satisfactory reasons.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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