

(2014) 03 GUJ CK 0061

In the Gujarat High Court

Case No : Tax Appeal No. 155 of 2014 (Appeal arising out of order of Tribunal in Appeal No. 72 of 2012, dated 12-9-2013)

Dolly Enterprises

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Gujarat Value Added Tax Act, 2003 — Section 73(4)

Citation : (2014) 44 GST 740

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Tushar P. Hemani and Ms. Vaibhavi K. Parikh, Advocate for the Appellant; Jaimin Gandhi, Advocate for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—Heard learned counsel for the parties for final disposal of the appeal on the following substantial question of law:

Whether in an appeal filed by the assessee questioning the decision of the Appellate Authority to demand a portion of tax by way of pre-deposit, the Value Added Tax Tribunal can go into the merits of the order of assessment without deciding the question of pre-deposit?

On the short ground of propriety of the Tribunal in deciding the question on merits when the sole question before the Tribunal in appeal filed was regarding the pre-deposit, we are inclined to quash the order. Our reasons are as follows.

2. The appellant has challenged the judgment of the Value Added Tax Tribunal (hereinafter referred to as "the Tribunal") dated September 12, 2013 in Second Appeal No. 72 of 2012. Such appeal was filed questioning the judgment of the Joint Commissioner of Commercial Tax, Appeals-3, Rajkot, dated November 30, 2011. Such order was passed on an application for waiver of pre-deposit pending an appeal before the said authority. The Appellate Authority insisted that the appellant must deposit the entire amount of the assessed tax by way of pre-

deposit. Since the appellant was unable to do so, the appeal was not entertained.

3. It was this order which the appellant challenged before the Tribunal. The scope of appeal before the Tribunal, thus, was whether the Joint Commissioner of Commercial Tax was justified in insisting that the appellant should deposit 100% of the amount by way of pre-deposit. In the process of hearing the appeal, the Tribunal decided several issues pertaining to validity of the assessment order and allowed the appeal in part. The Tribunal passed the following order:

9. This appeal is partly allowed. Disallowance of Input tax credit is hereby confirmed and accordingly the levy of tax as well as the interest is also confirmed. So far as the levy of penalty is concerned, the matter is remanded back to the assessing officer to examine the whole issue and pass fresh order after giving an opportunity of being heard to the appellant, in light of the directions given hereinabove. If the learned assessing officer comes to the conclusion that the penalty is leviable, he will also look into the grievances raised by the appellant with regard to the calculation of the amount of penalty.

4. It is against this order that the appellant has filed this Tax Appeal. In our opinion, the Tribunal committed serious error in examining the validity of the assessment order in an appeal concerning the question of pre-deposit. The Tribunal was called upon to decide whether the appellant, to maintain its appeal before the Appellate Commissioner, should be asked to deposit the entire amount of tax by way of pre-deposit or only part thereof or none at all. The Tribunal had to answer such question as found appropriate. In our opinion, the Tribunal under no circumstances could have bypassed the first appellate stage and decided the appeal as if it was a second appeal on merits before the Tribunal. Till the issue of appropriate amount to be deposit by way of pre-deposit was sorted out and such amount was deposited by the appellant, the appeal before the Deputy Commissioner was not even properly instituted. In a recent judgment dated January 30, 2014, in somewhat similar background, this Court in the case of Anilkumar v. State of Gujarat [2014] 43 GST 696 : 42 taxmann.com 340 (Guj.) while dealing with Tax Appeal No. 688 of 2013 with Civil Application No. 422 of 2013, observed as under:

3. We are of the opinion that the Tribunal committed serious error in examining the appellant's grievances on the merits of the order of assessment. The order of assessment was passed by the adjudicating authority, which was appealable by way of first appeal before the Appellate Commissioner. Section 73(4) of the Gujarat Value Added Tax Act, 2003, requires that no appeal against the order of assessment shall ordinarily be entertained by the Appellate Commissioner, unless such appeal is accompanied by proof of payment of tax in respect of which the appeal has been preferred. Proviso to section 73(4), however, provides that the appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order (a) without payment of tax, interest, if any or as the case may be, of the penalty, or (b) on proof of payment of such small sum as it may consider necessary or (c) on the appellant furnishing in the

prescribed manner security or such as the appellate authority may direct.

4. In view of section 73(4) of the Act, therefore, such appeal could not have been entertained unless in terms of proviso, the appellate authority for reasons recorded in writing relaxed the requirement of full pre-deposit. In the present case, the Appellate Commissioner exercised such powers and required the appellant to deposit 25% of the amount confirmed by the adjudicating authority. When the appellant failed to fulfill such requirement, his appeal came to be dismissed. It was against this order that the appellant had preferred appeal before the Tribunal. The scope of the appeal before the Tribunal, therefore, had to be limited to the question of finding out whether the order passed by the Commissioner insisting on the appellant depositing certain amount by way of pre-deposit was valid or not and resultantly, his decision to reject such an appeal for non-compliance with such requirement was correct or not.

5. Unless and until the answers were given to such questions, the appellant's first appeal before the appellate authority was simply not maintainable and could not have been entertained. If that be so, the Tribunal could not have entered into merits and in the appeal before itself and given a judgment on the validity of the order of assessment. In the process, the Tribunal jettisoned the first appeal before the Appellate Commissioner and also waived the requirement of pre-deposit without passing any order to that effect. If the Tribunal was of the opinion that the condition imposed by the Appellate Commissioner was too onerous to be fulfilled by the appellant and the facts of the case warranted interference, the Tribunal could as well have done it. In such a scenario, the Tribunal ought to have placed appeal back to the Appellate Commissioner, on such condition that the Tribunal thought fit to impose on the appellant. In the present case, without expressing any opinion on the Appellate Commissioner imposing the condition of part pre-deposit on the appellant, the Tribunal accepted the appellant's Second Appeal as if there was no intermediary stage of the appeal before the Appellate Commissioner or any requirement of pre-deposit u/s 73(4) of the Act. We cannot lose sight of the fact that the appellant himself also substantially contributed to this complication. In the appeal, his main grounds were against the assessment order. His prayers pertained only to the issues on merits about the additions made by the Assessing Officer. There was no prayer for setting aside the appellate order of imposing condition and subsequently, dismissing his appeal when he failed to fulfill such condition. Even if it were so, the Tribunal could have either permitted the appellant to suitably amend the prayer or if the appellant was not willing to do so, dismiss his appeal as not maintainable. In our opinion, the Tribunal could not have bypassed the first appellate authority and statutory requirement of pre-deposit, unless it was waived by an order in writing.

6. We are at pains to record our findings since we find that this is not an isolated case, where such order has been passed. This Court has come across such orders of the Tribunal on more than one occasion.

7. In an order dated August 30, 2013 rendered in Tax Appeal No. 711 of 2013 in the case of State of Gujarat v. Tudor India Ltd, the Division Bench of this Court had come across one such order of the Tribunal and made the following observations:

7. As we have noticed in number of matters, this unacceptable trend of deciding the appeals on merit, even when the first appellate authority has rejected the case of assessee on the ground of pre-deposit, instead of considering the request of deposit of pre-deposit, such determination of the entire appeal by the Tribunal at the such juncture, in our opinion, is not a desirable approach. We may not choose to interfere in all such cases where the Tribunal has straightway chosen to decide the matter on merit instead of determining issue of predeposit which was at large before it. However, so as to ensure that a dent is made in such practice followed consistently that we have chosen to remand this matter. Once, when assessee chooses not to comply with the requirement of making pre-deposit or contest the matter on the ground of pre-deposit and either side approaches the second appellate authority, there does not arise any question of circumventing the very stage and exercise the powers of first appellate authority. We say so as the Statute provides that even on adjudication of the issue on merit by the first appellate authority, either side is entitled to challenge such reasonings before the second appellate authority. Not only the parties and the second appellate authority would be deprived of the reasonings of the first appellate authority but chance of either sides of availing the opportunity of appeal on merit also gets marred by this process. Even if it is felt by the Tribunal that the issue is covered by the decision of the higher forum, it can always direct the parties to agitate these aspects before the concerned authority [first appellate authority here].

8. We also need to take note of the fact that the intent of incorporating the provision of pre-deposit before proceeding with the appeal is well carved out by the decision of the Apex Court in case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, .

8.1 If either side approaches the Tribunal, being aggrieved by the order of either grant or rejection of requirement of pre-deposit, it is open for the Tribunal to take into consideration the law on the subject and decide the validity of the order of directing or not directing the amount of predeposit. However, that would not ipso facto entitle the Tribunal to give a complete go-bye to the well laid down procedures of law as also such requirement of predeposit and decide the matter on merit. We are also backed in our conclusion by another decision of the Apex Court rendered in case of Commr. of C. Ex., Chandigarh Vs. Smithkline Beecham Co. Health C. Ltd., , wherein it is observed, thus -

2. This appeal is filed against an order passed by the Customs, Excise & Gold [Control] Appellate Tribunal dated 19th December 2002. The Tribunal was hearing an appeal against an order dated 23rd April 2002 passed by the Commissioner of Central Excise (Appeals). By that order, the Commissioner

(Appeals) had merely dismissed the appeal because predeposit was not made. The Commissioner (Appeals) had not gone into the merits. Therefore, the only question before the Tribunal was whether predeposit was required or not. The Tribunal has chosen to go into the merits and decided the appeal on merits also. This should not have been done.

8.2 It is not the case of either side that an identical question of law was pending before the Tribunal in some other appeals concerning the very assessee, or identical question of law in respect of very assessee for different assessment year was before the Tribunal, and in such circumstances, with the consent of the parties it chose to conclude on merit.

8.3 In view of the discussion held hereinabove, we therefore are of the opinion that this appeal deserves to be remanded back to the Tribunal so as to emphasis the requirement of not permitting any such short circuiting of the process at any stage. We have chosen not to enter the arena of merit of the case at all as is apparent from the discussion held hereinabove.

In the result, the judgment of the Tribunal is set aside. This will also have an effect on the portion of the judgment which was in favour of the appellant. The entire second appeal would be heard afresh and decided only on the issues arising in the appeal out of the order of the appellate authority challenged before the Tribunal. The present appeal is disposed of accordingly. There shall be, however, no order as to costs.