

(2010) 12 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 15259 of 2010

Jct Limited

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 24-12-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 35F
Constitution of India, 1950 — Article 226, 227
Gujarat Value Added Tax Act, 2003 — Section 11(3), 73, 73(4), 80(1)

Citation : (2011) 41 VST 312

Hon'ble Judges : Harsha Devani, J;H. B. Antani, J

Bench : Division Bench

Advocate : S.N. Soparkar and A. P. Nainawati, for the Appellant; Maithili Mehta, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—Rule. Ms. Maithili Mehta, learned Assistant Government Pleader, waives service of rule on behalf of the respondents. Having regard to the controversy involved in the present case, which lies in a very narrow compass, the matter is taken up for final hearing today.

2. The petitioner is a dealer engaged in the business of manufacture and sale/purchase of various types of textile products. The petitioner made an application dated July 7, 2006 u/s 80(1) (e) of the Gujarat Value Added Tax Act, 2003 (the Act) to the Joint Commissioner of Commercial Tax (Legal), Gujarat for determination of availability of credit of value added tax paid at the rate of four per cent on purchase of raw material within the State of Gujarat. The said application came to be decided vide order dated November 30, 2006 holding that as per the provisions of section 11(3)(b)(i), four per cent would be deducted from the tax credit available to the petitioner and the remaining amount would be admissible as tax credit. No finding was given in relation to inapplicability of section 11(3)(a)(i) of the Act. Being aggrieved, the petitioner preferred an

appeal before the Tribunal u/s 73 of the Act which came to be dismissed vide order dated May 1, 2007. Against the said order, the petitioner preferred an appeal before the High Court which came to be admitted and is still pending.

3. During the pendency of the aforesaid appeal before the High Court, the Assistant Commissioner of Commercial Tax served the petitioner with notices for amount assessed along with assessment orders for the period April 1, 2006 to March 31, 2007 and April 1, 2007 to July 31, 2007 raising demands of Rs. 2,60,50,957 and Rs. 61,42,150, respectively. Aggrieved by the aforesaid orders, the petitioner filed two separate appeals u/s 73 of the Act along with stay applications before the first appellate authority, that is, the Deputy Commissioner. Vide order dated July 9, 2010, the Deputy Commissioner of Commercial Tax (Appeals) rejected the stay applications and dismissed both the appeals. Being aggrieved, the petitioner preferred appeals before the Gujarat Value Added Tax Tribunal (the Tribunal) being Appeals Nos. 565 and 566 of 2010 on July 26, 2010 along with stay applications for setting aside the order passed by the Deputy Commissioner of Commercial Tax (Appeals). The Tribunal, after hearing the appeals for admission as well as the stay applications, vide order dated September 6, 2010 directed the petitioner to pay 50 per cent of the total tax dues within a period of three months from the date of the order, that is, an amount of Rs. 1,17,70,107 for assessment year 2006-07 and April 1, 2007 to July 31, 2007. Being aggrieved by the order passed by the Tribunal directing pre-deposit of an amount of Rs. 1,17,70,107, the petitioner has moved the present petition under articles 226 and 227 of the Constitution of India.

4. Mr. S. N. Soparkar, learned senior advocate appearing on behalf of the petitioner, invited the attention of the court to the impugned order of the Tribunal and more particularly, to paragraphs 20.5 to 25 thereof to point out that the Tribunal has placed reliance upon a decision of the apex court in the case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, and has considered the question of undue hardship as envisaged u/s 35 of the Central Excise Act while considering the question of waiver of stay applications filed by the petitioner. Inviting attention to the provisions of sub-section (4) of section 73 of the Act, it was pointed out that under the Gujarat Value Added Tax Act, the Tribunal may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against the orders enumerated in the earlier provisions without payment of tax with penalty (if any) or, as the case may be, of the penalty, or on proof of payment of such smaller sum as it may consider reasonable or on the appellant furnishing in the prescribed manner security of such amount as the appellate authority may direct. Referring to the provisions of section 35F of the Central Excise Act, 1944, it was pointed out that under the proviso thereto, the Tribunal is empowered to dispense with depositing the duty demanded or the penalty levied provided that the Tribunal is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person subject to such conditions as it may deem fit to impose so as to safeguard the interests of the Revenue. It was submitted that the decision of the

apex court in the case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, on which reliance has been placed upon by the Tribunal has been rendered in the context of provisions of section 35F of the Act. It was submitted that in the present case, the Tribunal was concerned with the question of waiver of pre-deposit under sub-section (4) of Section 73 of the Gujarat Value Added Tax Act which does not lay down that the deposit of duty can be dispensed with only where it would cause undue hardship to the person concerned and that the same has to be subject to such condition as the Tribunal may deem fit so as to safeguard the interests of the Revenue. It was submitted that the concept of undue hardship is alien to the Gujarat Value Added Tax Act and as such, the Tribunal while considering an application under the Gujarat Value Added Tax Act could not have brought in the concept of undue hardship as envisaged u/s 35 of the Central Excise Act as well as the concept of imposing conditions as prescribed under the said provision.

5. Mr. Soparkar further submitted that while considering the issue of undue hardship, the Tribunal has only considered the issue of financial hardship and not the prima facie case on the merits. It was submitted that the Tribunal has equated the term "undue hardship" with "financial hardship" and has passed the impugned order by considering the financial condition of the petitioner. It was submitted that the Tribunal in the preceding paragraph has admitted that the petitioner has raised a substantial question of law which means that the petitioner has made out a strong prima facie case on the merits in its favour; however, the Tribunal has overlooked the same under the guise of financial hardship. It was accordingly submitted that the Tribunal having considered the application filed by the petitioner under the Gujarat Value Added Tax Act by bringing in the concept of undue hardship, etc., as envisaged under the provisions of section 35F of the Central Excise Act, which is not relevant while considering an application u/s 73(4) of the Act, the matter requires consideration and the impugned order of the Tribunal is required to be set aside and the matter is required to be remanded for the purpose of deciding the stay application afresh in the light of the provisions of section 73 of the Gujarat Value Added Tax Act.

6. The petition is opposed by Ms. Maithili Mehta, learned Assistant Government Pleader, who has placed reliance upon the averments made in the affidavit-in-reply dated December 21, 2010 made on behalf of respondent No. 1. It was submitted that the Tribunal has passed the interim order after appreciating the relevant provisions of law and the documentary evidence on record and as such, no case is made out so as to warrant intervention by this court.

7. As can be seen from the impugned order of the Tribunal, in the earlier paragraph, the Tribunal has considered the merits of the case and in paragraph 20.4, the Tribunal has considered the legal submissions and has found that the petitioner had raised a substantial question of law and has accordingly admitted the appeal. In paragraph 20.5, the Tribunal has referred to the judgment of the

Supreme Court in the case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, and has discussed the issue of undue hardship and has considered the expressions "undue hardship to such person" and "to safeguard the interests of the Revenue". The Tribunal has in paragraphs 20.5 to 20.10 reproduced paragraphs 11 to 15 of the said decision. In paragraph 21 of the order, the Tribunal has recorded that the petitioner had filed affidavit showing that it is facing financial difficulty and that the learned advocate for the petitioner had invited the attention of the Tribunal to the fact that during both the years 2006-07 and 2007-08, the petitioner had suffered loss of approximately 97 crores, for the year 2008-09 it had suffered loss of Rs. 35 crores, and for the year 2009-10 the loss suffered is Rs. 60 crores. The Tribunal has thereafter recorded that considering the prima facie case of the petitioner, as part of the issue raised by the petitioner is covered by the judgment of the Tribunal the petitioner has a weak prima facie case. The Tribunal has thereafter noted that looking to the prima facie case of the petitioner and looking to the financial position, the petitioner has even paid some amount; and considering the total tax liability for assessment year 2006-07 has directed the petitioner to pay 50 per cent of the total tax dues within three months from the date of the said order in both the appeals.

8. Thus, on a bare perusal of the impugned order, it is apparent that the Tribunal has considered the application made by the petitioner under subsection (4) of section 73 in the light of the decision of the Supreme Court in the case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, On a perusal of the said decision, it is apparent that the same has been rendered in the context of section 35F of the Central Excise Act, 1944 which specifically provides that where in a particular case, the Appellate Tribunal is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Appellate Tribunal, may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the interests of the Revenue. Since, the expressions "undue hardship to such person" and "to safeguard the interests of the Revenue" are specifically provided in the proviso to section 35F of the Central Excise Act, the Supreme Court, in the said decision has construed the provisions accordingly. However, in the facts of the present case, the Tribunal was considering an application under sub-section (4) of section 73 of the Gujarat Value Added Tax Act. Sub-section (4) of section 73 provides that an 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 with penalty (if any) or, as the case may be, of the penalty, or
- (b) on proof of payment of such smaller sum as it may consider reasonable, or
- (c) on the appellant furnishing in the prescribed manner, security of such amount as the appellate authority may direct.

9. Thus, there is a vast difference between the language employed in section 35F of the Central Excise Act and section 73 of the Gujarat Value Added Tax Act. The Gujarat Value Added Tax Act nowhere provides that the Tribunal shall consider the question of waiver of the amount of pre-deposit only in case where undue hardship is made out and in such manner so as to protect the interests of the Revenue. The said provision merely provides that the Appellate Tribunal may, if it thinks fit, for reasons to be recorded in writing, pass such order dispensing with payment of tax with penalty. Therefore, when the provisions are worded differently, the Tribunal was not justified in drawing an analogy from the provisions of section 35F of the Central Excise Act while considering the question of waiver of pre-deposit under the Value Added Tax Act.

10. On behalf of the respondents, it has been contended that the Tribunal has considered the question as to whether or not a prima facie case has been made out and that merely because the Tribunal has referred to the issue of undue hardship, is no reason for the court to interfere when there is otherwise no infirmity in the impugned order of the Tribunal. The aforesaid submission does not merit acceptance inasmuch as, as is apparent from the impugned order of the Tribunal, strong reliance has been placed by the Tribunal upon the decision of the Supreme Court in the case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, while considering the stay applications filed by the petitioner. Thus, when the Tribunal, while arriving at its conclusion has taken into consideration both relevant as well as extraneous material, it is not possible to state as to what extent the mind of the Tribunal has been influenced one way or the other by such extraneous material. In the circumstances, the impugned order of the Tribunal insofar as the same pertains to the stay applications filed by the petitioner, stands vitiated as having been passed on the basis of irrelevant and extraneous material and as such, cannot be sustained.

11. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned order dated September 6, 2010 passed by the Gujarat Value Added Tax Tribunal on the stay applications filed by the petitioner in Second Appeals Nos. 565 and 566 of 2010 is hereby quashed and set aside. The stay applications filed by the petitioner are restored to the file of the Tribunal for deciding the same afresh in the light of the provisions of sub-section (4) of section 73 of the Gujarat Value Added Tax Act. Rule is made absolute accordingly with no order as to costs.

12. The interim protection granted by this court vide order dated December 1, 2010 shall continue till the Tribunal finally decides the stay applications filed by the petitioner.