

(2004) 03 P&H CK 0007

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No"s. 12974 and 16067 of 2003 and 4044 of 2004

Oswal Agro Mills Ltd.

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision : 22-03-2004

Acts Referred:

Punjab General Sales Tax Act, 1948 — Section 20(5)

Citation : (2005) 139 STC 51

Hon'ble Judges : N.K. Sud, J; Hemant Gupta, J

Bench : Division Bench

Advocate : K.L. Goyal, in C.W.P. Nos. 12974 and 16067 of 2003 and Avneesh Jhingan, in C.W.P. No. 4044 of 2004, for the Appellant; Salil Sagar, A.A.G., for the Respondent

Final Decision : Allowed

Judgement

Hemant Gupta, J.—This judgment shall dispose of three writ petitions, i.e., Civil Writ Petitions Nos. 12974, 16067 of 2003 and 4044 of 2004 as all these writ petitions raise identical questions of law. However, for the facility of reference, facts are being taken from Civil Writ Petition No. 12974 of 2003.

2. The petitioner has impugned the order passed by the Sales Tax Tribunal, Punjab, dated May 27, 2003 in the present writ petition whereby the petitioner has been directed to deposit 25 per cent of the tax demand, on the strength of the Punjab General Sales Tax (Third Amendment) Act, 2000, raised by the Assessing Authority.

3. In respect of the assessment year 1989-90, the Assessing Authority raised a tax demand of over Rs. 3.34 crores vide order dated August 16, 2002 under the Punjab General Sales Tax Act, 1948. On the same day, assessment was framed under the Central Sales Tax Act, 1956 raising a demand of Rs. 2,99,084 including a penalty of Rs. 82,000.

4. The petitioner filed appeal before the Deputy Excise and Taxation

Commissioner (Appeals), Patiala Division, Patiala, along with an application to entertain the appeal without prior payment on account of weak financial position of the assessee. The appellate authority directed the appeals to be entertained subject to deposit of Rs. 83,75,000 under the Punjab General Sales Tax Act, 1948 and Rs. 75,000 under the Central Sales Tax Act, 1956. Aggrieved against such order, the petitioner filed an appeal before the Sales Tax Tribunal, Punjab, with a prayer to direct the appellate authority to entertain the appeal without any prior payment. However, the learned Sales Tax Tribunal vide impugned order dated May 27, 2003, relying upon the amendment made in the Punjab General Sales Tax Act, 1948, vide Punjab Act No. 4 of 2000 notified on April 7, 2000, directed the payment of 25 per cent of tax within one month from the date of the order.

5. The provisions of Section 20(5) of the Punjab General Sales Tax Act, 1948 regarding the entertainment of appeal prior to amendment on April 7, 2000 read as under :

"20(5). No appeal shall be entertained by an appellate authority unless such appeal is accompanied by satisfactory proof of the payment of the 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 an appeal without the tax or penalty or both having been paid or after part payment of such tax or penalty or both."

6. The amended provision of Section 20(5) of the Punjab General Sales Tax Act, 1948, reads as under :

"20(5). No appeal shall be entertained by an appellate authority unless such appeal is accompanied by satisfactory proof of the prior minimum payment of twenty-five per cent of the tax, penalty, if any, imposed and the interest accrued thereon."

7. The Amended Act has not given retrospective effect to the provisions of Section 20(5) of the Punjab General Sales Tax Act, 1948, either expressly or by necessary implication.

8. Vide separate judgment of even date in Civil Writ Petition No. 17178 of 2003 Reported in [2004] 136 STC 261 titled Khazan Chand Nathi Ram v. State of Haryana, it has been held by this Bench that the right of appeal is a vested right which has to be seen on the date the Us commences. It has been further held that in tax matters, the Us commences on the date when the return is filed or is required to be filed in pursuance of the notice issued. For such a view, this Bench has relied upon the Constitution Bench of the honourable Supreme Court in the cases of Garikapatti Veeraya Vs. N. Subbiah Choudhury, and Vitthalbhai Naranbhai Patel Vs. Commissioner of Sales Tax, M.P., Nagpur, . The judgment of another Constitution Bench in Hardeodas Jagannath v. State of Assam [1970] 26

STC 10, has been noticed and a finding has been returned that the earlier decision of the Supreme Court in Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh [1953] 4 STC 114 (MP) as approved in Garikapatti Veeraya Vs. N. Subbiah Choudhury, , is required to be followed. This Court has concluded as under:

"In view of the principle of law laid down by the Full Bench of this Court, Indo Swiss Time Limited v. Umrao (1981) 83 PLR 335, we are of the opinion that the law has been more elaborately and accurately laid down in Garikapatti Veeraya Vs. N. Subbiah Choudhury, wherein earlier judgment in Hoosein Kasam Dada's case [1953] 4 STC 114 (SC) has been quoted with approval. Therefore, we prefer to follow the view of the honourable Supreme Court in Hoosein Kasam Dada's case [1953] 4 STC 114, as approved in Garikapatti Veeraya Vs. N. Subbiah Choudhury, .

The decision rendered by a single Bench of this Court in Haryana Spun Pipe Construction Co.'s case [1983] 53 STC 112 (SC) is solely based on the judgment of the honourable Supreme Court in Hardeodas Jagannath Vs. State of Assam and Others, , as well as a division Bench judgment of this Court in Subhash Chander & Co. v. State of Punjab [1979] STC 331 (P&H). The division Bench judgment referred to does not deal with the question arising in the present case. Since we have preferred to follow the earlier Constitution Bench judgment in Garikapatti Veeraya Vs. N. Subbiah Choudhury, , the said judgment of the learned single Bench does not lay down good law.

In view of various judgments referred to above and on the reading of Section 61(2) of the HVAT Act, 2003 it is concluded that Section 61(2) of the HVAT Act does not give any retrospective effect to the provisions of the aforesaid Act either expressly or by necessary implication. Sub-section (2) of Section 61 of the HVAT Act, 2003 contemplates transfer of pending proceedings pertaining to application, appeal, revision or other proceedings to the authorities constituted under the HVAT Act, 2003 and to be disposed of by the authorities so constituted. Such authorities constituted under the HVAT Act has been given deemed fiction to be in existence for the purpose of such application, appeal, revision or such other proceedings so as to be in force on the date such application, appeal, revision or other proceedings have been made or preferred. Since expressly or by necessary intendment, no retrospective effect is sought to be given, therefore, the effect of repeal of the HGST Act is required to be examined with reference to Section 4 of the Punjab General Clauses Act, 1898 (as applicable to the State of Haryana).

Section 4 of the Punjab General Clauses Act, 1898 (as applicable to the State of Haryana) is the relevant provision of law in such a situation where the subsequent Act while repealing the old Act has not provided for any retrospective operation of the new Act either expressly or by implication. Section 4 of the Punjab General Clauses Act contemplates that in the absence of any contrary intention expressly or impliedly, any right, privilege, liability or obligation under the old law will continue to be governed under the old law. The assessee has a

right to file appeal under the HGST Act with a liability or obligation to pre-deposit the amount of tax, interest and penalty. Such obligation or liability confers a right in favour of the State to insist upon pre-deposit of tax, interest or penalty. From the judgments of the honourable Supreme Court in Hoosein Kasam Dada's case [1953] 4 STC 114 SC and Garikapatti Veeraya Vs. N. Subbiah Choudhury, , it is apparent that the right of appeal is a vested right and accrues to the litigant and exists as on and from the date the Us commences. Such right is actually exercised when the adverse judgment is pronounced. Such right is to be governed by the law prevailing on the date of the institution of the suit or proceeding and not by the law that prevails on the date of its decision or at the date of the filing of the appeal.

In civil proceedings, Us commences on the presentation of the plaint or in cases claiming compensation under the Motor Vehicles Act on filing claim application. The question is when Us can be said to commence under the taxation laws. Section 25 of the HGST Act enjoins a duty upon an assessee to file quarterly return and deposit tax thereon. If such returns are accepted, there is no Us. Consequently, there would be no occasion for the parties to file an appeal. However, if such returns are not accepted, the cause of action will arise on the date when returns are required to be filed. The cause of action can be said to be arisen also when an assessee is called upon to furnish return on his failure to do so in terms of the provisions of the old Act. In fact, that is the relevant date as in Vitthalbhai Naranbhai Patel Vs. Commissioner of Sales Tax, M.P., Nagpur, .

In view of the above discussion, we hold that right of appeal is a vested right as it exists on the date of commencement of Us. The Us can be said to commence under the HGST Act on the date when return is filed or is required to be filed. Therefore, the provisions of Section 39(5) of the HGST Act would continue to govern the right of appeal vested in the petitioner which is saved in terms of Section 4 of the Punjab General Clauses Act (as applicable to State of Haryana)."

9. The returns in all the writ petitions have been filed prior to the amendment of the Act on April 7, 2000. Since Us has commenced prior to the amendment of the Punjab General Sales Tax Act, 1948, the provisions as it existed prior to the amendment would be applicable.

10. In view of the above, the writ petition is allowed. The order passed by the Sales Tax Tribunal, Punjab, dated May 27, 2003, is set aside. The Tribunal is directed to decide the matter afresh keeping in view the findings recorded above.