

(2014) 03 GUJ CK 0025
In the Gujarat High Court

Case No : Tax Appeal No. 78 of 2014 and Civil Application No. 63 of 2014

Shaktiraj Metal (P.) Ltd.

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 21-03-2014

Acts Referred:

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

Citation : (2014) 44 GST 803

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

Bench : Division Bench

Advocate : Manish K. Kaji, Advocate for the Appellant; Jaimin Gandhi, Advocate for the Respondent

Judgement

Sonia Gokani, J.—Present Tax Appeal is preferred against the order of the Gujarat Value Added Tax Tribunal ("the Tribunal" for short) dated 11.9.2013. The appellant was carrying on business of trading in aluminum, iron and steel items and scrap thereof. The appellant had worked out output tax on sales made within the State of Gujarat and sales outside the State. Some adjustments were done on output tax liability against input tax credit made available to the appellant. Assessment order was passed on 29.3.2011 by the Assessing Officer disallowing certain claims of the appellant for input tax credit on the ground that vendor's registration certificates were cancelled ab initio. He was also held liable to pay certain amount of tax without penalty and interest.

2. First Appeal was preferred before the Deputy Commissioner of Commercial Tax. Deputy Commissioner vide order dated 29.9.2011 dismissed the appeal for non-payment of a sum of Rs. 10 lakh by way of pre-deposit. The tribunal passed the order directing the appellant to pay 20% of the tax amount which would come to Rs. 1,79 lakhs (rounded off) within one month from the date of said order and granted stay against recovery of outstanding demands on condition of such deposit till the final disposal of the appeal.

2.1 It appears that the tribunal though passed the said order, also further

directed the office to place such matter with other matters of "RC cancellation group". At the time of issuance of notice, we noted that this is one of those cases, where the tribunal converted the assessee's appeal against the order of pre-deposit into one on merits. We also had observed that in past when we came across such orders, and the same were remanded back to the tribunal for rehearing of the appeal only on the point of pre-deposit.

3. We have heard learned counsel Shri Kazi appearing for the appellant and also learned AGP Shri Jaimin Gandhi for the respondent State.

4. Learned AGP has urged that the tribunal's reliance essentially is on the decision in Case of M/s. Madhav Steel Corporation and when the challenge was made to such a decision of the Tribunal, this Court has not entertained the same. He therefore, has urged that no remand in the instant case be made.

According to the learned counsel Shri Kazi the facts of this case cannot be equated with that of M/s. Madhav Steel Corporation and therefore, the Court may direct re-hearing on the aspect of pre-deposit.

5. On thus hearing both the sides and on considering the facts what emerges is, after the order of assessment when the challenge was made before the Deputy Commissioner in the First Appeal, the Deputy Commissioner directed pre-deposit for sum of Rs. 10 lakh. Such order was challenged before the Tribunal by the present appellant. The Tribunal though had directed the appellant to pay 20% of the tax amount making such sum to be Rs. 1.79 lakhs (rounded off) and the same was directed to be paid within a period of 30 days, however, curiously thereafter, without any request from either sides and also without reasonings, the Tribunal also directed the registry to place concerned matter along with the hearing of other group and disposed of the matter on merits. Tribunal thus has chosen to by pass the first appellate authority as is noticed in many other matters.

Therefore, we are of the firm opinion that directions for rehearing on the aspect of pre-deposit in the instant case, shall need to be given, following the decision of this Court in case of Anil Kumar v. State of Gujarat [2014] 43 GST 696/42 taxmann.com 340 (Guj.) vide order dated 30.01.2014. It would be profitable to reproduce some of the relevant observations while remanding this case to the Tribunal for the aforesaid purpose of deciding the issue of pre-deposit:

3. We are of the opinion that the Tribunal committed serious error in examining the appellants grievances on the merits of the order of assessment. The order of assessment was passed by the adjudicating authority, which was appellable 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 appellants 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 by-passed 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.

6. 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 pre-deposit 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 pre-deposit. 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 pre-deposit 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 pre-deposit was not made. The Commissioner [Appeals] had not gone into the merits. Therefore, the only question before the Tribunal was whether pre-deposit 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.

9. The learned Assistant Government Pleader Mr. Jaimin Gandhi, however, relied on the judgment dated September 12, 2013 rendered by the Division Bench of this Court in Tax Appeal No. 667 of 2013 and connected appeals, in which when the Tribunal had under similar circumstances entertained the appeal of the assessee on merits, but dismissed it, the Court held that the appellant cannot raise the ground of impropriety on the part of the Tribunal merely because he has lost in appeal on merits. In the present case, however, we have suo motu taken such an objection against the decision of the Tribunal and in fact, the appellant had partially succeeded before the Tribunal.

7. Resultantly, impugned order dated 11.9.2013 passed by the Gujarat Value Added Tax Tribunal is quashed. Appeal is placed back before the tribunal for fresh consideration and disposal on the issue of pre-deposit.

8. Tax Appeal stands disposed of. In light of order passed in the tax appeal, civil application for stay does not survive. Disposed of accordingly.