
(2015) 02 GUJ CK 0083
In the Gujarat High Court

Case No : Tax Appeal Nos. 1315, 1316 and 1366 of 2014 and 93 of 2015

State of Gujarat

APPELLANT

Vs

City Tiles Limited

RESPONDENT

Date of Decision : 09-02-2015

Acts Referred:

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

Citation : (2015) 83 VST 200

Hon'ble Judges : Jayant M. Patel, J;S.H. Vora, J

Bench : Division Bench

Advocate : Pranav Trivedi and Chintan Dave, AGP, for the Appellant; Devon Parikh, Shalin Shah and Mohit Banker, Advocates for the Respondent

Judgement

Jayant M. Patel, J—As in all the appeals, common questions arise for consideration, they are being considered by this common order. All the appeals have been preferred by the Revenue, wherein the common question formulated and rather maintained by the learned Additional Government Pleader is as under:

"Whether the Tribunal has erred in deciding the appeals on merits, despite the fact that the first appellate authority dismissed the appeals for failure to deposit the pre-deposit?"

2. We have heard Mr. Trivedi as well as Mr. Dave, learned Additional Government Pleaders appearing for the appellant in the respective matters. We have also heard Mr. Devan Parikh, learned counsel with Mr. Shalin Shah and Mr. Mohit Banker, learned counsel appearing for the assessee(s) in the respective matters.

3. The learned counsel appearing for both the sides have brought to our notice the recent order passed by this court in Tax Appeal No. 1320 of 2014 (State of Gujarat Vs. Fair Link Corporation(2015) 80 VST 217) and allied matters decided on February 4, 2015, whereby similar question had arisen for consideration in those appeals.

4. We may record that in Tax Appeal No. 1320 of 2014 and allied matters decided

on February 4, 2015 (State of Gujarat Vs. Fair Link Corporation(2015) 80 VST 217), this court passed the following orders (pages 218 to 225 in 80 VST):

"1. The present appeal has been preferred by the Revenue on the four questions of law mentioned at paragraph No. 5. However, in our view, only first question would arise for consideration, considering the facts and circumstances of the case. The same can be reproduced as under:

"Whether the Tribunal erred in adjudicating on merits despite first appellate authority adjudicated only on the issue of pre-deposit?"

2. We have heard Mr. Dave, learned Additional Government Pleader appearing for the appellant and Mr. Gupta, learned counsel appearing for the respondent.

3. The short facts appear to be that the assessment was made by the Assistant Commissioner of Commercial Tax (hereinafter referred to as the A. O.) and the outstanding tax amount with penalty was assessed at Rs. 1,09,561. The respondent preferred appeal against the order of the assessment and in the said appeal, interim application was made for stay to waive condition of pre-deposit. The first appellate authority vide order dated May 14, 2012, found that as there is no willingness to comply with the condition of pre-deposit, the appeal was not entertained and was dismissed. The Tribunal, in the second appeal, instead of examining the aspect of pre-deposit, has proceeded to examine the merits of the appeal and had passed the impugned order on March 4, 2014 whereby, the Tribunal has partly allowed the appeal. Under the circumstances, the Revenue has preferred the present appeal on the above referred substantial question of law.

4. We may record that similar question came up for consideration before this court in earlier matter of Tax Appeal No. 1317 of 2014 decided on December 11, 2014 (Anupma Rajoriya Vs. State of Rajasthan and Others) as well as in Tax Appeal No. 1353 of 2014 decided on January 9, 2015 (Jyoti Traders Vs. State of Gujarat(2015) 80 VST 210). This court, in the said Tax Appeal No. 1353 of 2014 with Tax Appeal No. 1323 of 2014 (Jyoti Traders Vs. State of Gujarat(2015) 80 VST 210), observed at paragraph Nos. 6 to 11 as under:

"6. In both these appeals, substantial question of law can be formulated as under:

"Where the honourable Tribunal was right in adjudicating the appeal on merits, instead of restricting itself to the issue of pre-deposit?"

7. We have heard Mr. Trivedi, learned Additional Government Pleader for the State and Mr. Asthavadi, learned counsel for the assessee.

8. As such, the facts are not in dispute to the extent that after the order of the assessing officer, appeal came to be preferred by the assessee before the Deputy Commissioner of Commercial Tax and the prayer of the assessee for pre-deposit of 10 per cent of the amount was not accepted and the appeal was dismissed.

Against the said order, the matter was carried before the Tribunal. The Tribunal, instead of considering the aspect of pre-deposit, touched the merits of the appeal and rendered the decision, which is impugned in the present appeal.

9. The learned counsel appearing for both the sides are on agreement on the point that both the present appeals are covered by the decision of this court dated December 11, 2014 in Tax Appeal No. 1317 of 2014 (Anupma Rajoriya Vs. State of Rajasthan and Others), wherein this court has ruled that in a matter where the appeal is preferred before the appellate authority, wherein the condition of pre-deposit was not complied with, it is obligatory for the Tribunal to decide the aspect of pre-deposit and thereafter if such condition is complied with, the matter may be remanded to the first appellate authority, but the Tribunal without considering the said aspect should not consider the merits of the appeal for liability of tax, penalty, interest, etc.

10. At this stage, we may refer to the decision of this court dated December 11, 2014 in Tax Appeal No. 1317 of 2014 (Anupma Rajoriya Vs. State of Rajasthan and Others), the same reads as under:

"1. Notice for final disposal was issued on the premise that a limited question needs to be gone into in this tax appeal. We have considered the following substantial question of law:

"Whether the honourable Tribunal was right in adjudicating the appeal on merits instead of restricting itself to the issue of pre-deposit?"

2. It is undisputed that the appeal before the Tribunal arose out of the order passed by the first appellate authority on question of pre-deposit. The Tribunal, in the impugned judgment, instead of deciding such issue, considered the questions on merits and substantially allowed the assessee's appeal. In our opinion, the only scope of the appeal before the Tribunal was, whether the first appellate authority had committed an error in insisting on a certain pre-deposit being made by the assessee in order to pursue the appeal on merits? In the process, the Tribunal could have either confirmed, set aside or modified such order on the condition of pre deposit. Tribunal could not have allowed the assessee's appeal on merit since the assessee's first appeal before the authority was not maintainable without either making full pre-deposit or complying with the condition of part pre-deposit as may be imposed by the appellate authority and if so, modified by the Tribunal. In our judgment passed in Tax Appeal No. 688 of 2013 (Anilkumar v. State of Gujarat [2014] 2 VST-OL 420 (Guj)), we had recorded as under (pages 425 to 429 in 2 VST-OL):

"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 me 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 per cent of the amount confirmed by the adjudicating authority. When the appellant failed to fulfil 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 under section 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 fulfil 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. [2014] 2 VST-OL 288 (Guj)), the Division Bench of this court had come across one such order of the Tribunal and made the following observations (pages 292 to 294 in 2 VST-OL):

"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 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 of 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 but by the decision of the apex court in case of Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, (2006) 113 ECC 314 : (2006) ECR 314 : (2006) 204 ELT 513 : (2006) 12 SCALE 303 : (2006) 9 SCR 341 Supp : (2008) 12 STR 104 : (2006) 2 UJ 1526 : (2009) 20 VST 297 .

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., (2003) 111 ECR 10 : (2003) 157 ELT 497 , wherein it is observed, thus:

"2. This appeal is filed against an order passed by the Customs, Excise and Gold (Control) Appellate Tribunal dated December 19, 2002. The Tribunal was hearing an appeal against an order dated April 23, 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."

8. The learned Assistant Government Pleader Mr. Jaimin Gandhi, however, relied on the judgment dated September 12, 2013 (R.G. Scrap Traders Vs. State of Gujarat, (2015) 79 VST 234) 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.

9. In the circumstances, the order dated April 29, 2013 passed by the Gujarat Value Added Tax Appellate Tribunal at Ahmedabad is quashed. The appeal be placed back before the Tribunal for fresh consideration and disposal in accordance with law bearing in mind the observations made above. It would be open for the appellant to amend his appeal before the Tribunal, for which he may make an application latest by February 28, 2014. It is clarified that if the appellant fails to amend the prayer clauses of his appeal before the Tribunal, the remanded appeal shall not be entertained by the Tribunal questioning the merits of the order of assessment.

10. This appeal is disposed of accordingly. In view of the order passed in the main appeal, the connected civil application does not survive and the same stands disposed of accordingly."

3. Under the circumstances, the question is answered in favour of the appellant. Judgment of the Tribunal is set aside. Appeal is restored before the Tribunal for fresh consideration bearing in mind the observations made hereinabove. Tax appeal is disposed of accordingly."

11. Neither Mr. Trivedi nor Mr. Asthavadi has contended that there are any distinguishing circumstances in the present appeals. Hence, the question formulated has to be answered in negative. Consequently, the judgment of the Tribunal is set aside. The appeal is restored before the Tribunal for fresh consideration bearing in mind the observations made hereinabove."

(emphasis here italicised supplied)

5. We find that the similar situation would arise in the present matter inasmuch as, as per the above referred decision of this court, the answer to the question has to be in affirmative to the extent that the Tribunal has committed error in examining the matter on merits instead of examining the question for pre-deposit and, therefore, the order passed by the Tribunal would be required to be quashed and set aside with the further direction that the appeal stands restored to the Tribunal for fresh consideration bearing in mind the observations made hereinabove. Hence, ordered accordingly.

6. Before parting with, we need to record that in the proceedings of Tax Appeal No. 711 of 2013 decided on August 30, 2013 (State of Gujarat v. Tudor India Ltd. [2014] 2 VST-OL 288 (Guj)), for which, reference has been made by this court in the order dated December 11, 2014 in Tax Appeal No. 1317 of 2014 (Anupma Rajoriya Vs. State of Rajasthan and Others) , and in any case, all such orders are referred to in the above referred decision of this court in Tax Appeal No. 1353 of 2014 (Jyoti Traders Vs. State of Gujarat(2015) 80 VST 210) , it was observed by the Division Bench of this court, relevant of which, reads as under (pages 292 and 293 in 2 VST-OL):

"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 the 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..."

7. As the Tribunal is not a party impleaded in the present proceedings, we leave it at that and find it proper not to make any further observations at this stage. However, we find that the attention of the Tribunal deserves to be drawn to the aforesaid observations and various decisions of this court observing that the Tribunal was required to examine the aspect of condition of pre-deposit and ought not to have decided the appeal on merits. Therefore, the office shall

forward the copy of the order to the Registrar of the Tribunal with the observation that copy of the order in the present matter shall be communicated by him to each Member of the Tribunal including President of the Tribunal for further consideration in accordance with law.

8. The appeal is allowed to the aforesaid extent. No order as to costs."

5. The learned counsel for both the sides concede that the fact-situation in the present matters are the same as they were in the above-referred matters and a large number of matters, which are decided by various Benches of this court.

6. Under these circumstances, the question is answered in affirmative in favour of the Revenue and against the assessee(s) by holding that the Tribunal has committed error in examining the matter on merits instead of examining the question for pre-deposit. Therefore, the order passed by the Tribunal would be required to be quashed and set aside with the further direction that the appeal stands restored to the Tribunal for fresh consideration bearing in mind the observations made hereinabove. Hence, ordered accordingly.

7. Before parting with, we would like to reiterate that the same directions and observations as were issued in the above referred matter be issued in the present appeals also. As the Tribunal is not a party impleaded in the present proceedings, we leave it at that and find it proper not to make any further observations at this stage. However, we find that the attention of the Tribunal deserves to be drawn to the aforesaid observations and various decisions of this court observing that the Tribunal was required to examine the aspect of condition of pre-deposit and ought not to have decided the appeal on merits. Therefore, the office shall forward the copy of the order to the Registrar of the Tribunal with the observation that copy of the order in the present matter shall be communicated by him to each member of the Tribunal including President of the Tribunal for further consideration in accordance with law. The appeals are allowed to the aforesaid extent. No order as to costs.