
(2015) 03 GUJ CK 0091
In the Gujarat High Court

Case No : Tax Appeal No. 104 of 2015 and Civil Application (OJ) No. 139 of 2015

State of Gujarat

APPELLANT

Vs

Dolphin Metals (I) Ltd.

RESPONDENT

Date of Decision : 19-03-2015

Acts Referred:

Citation : (2015) 82 VST 224

Hon'ble Judges : M.R. Shah, J;S.H. Vora, J

Bench : Division Bench

Advocate : Chintan Dave, Additional Government Pleader, for the Appellant;
Tushar P. Hemani and Vaibhavi K. Parikh, Advocates for the Respondent

Judgement

M.R. Shah, J—The present tax appeal is admitted to consider the following substantial questions of law:

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

(B) Whether the Tribunal erred in not directing that for computing interest liability for subsequent year the assessee will not get benefit of carried forward input-tax credit ?"

Ms. Vaibhavi Parikh, learned advocate, has appeared on behalf of the respondent-dealer and with the consent of the learned advocates appearing on behalf of the respective parties, the present tax appeal is taken up for final hearing today.

2. The main grievance, which is voiced in the present tax appeal, is that despite the fact that the appeal before the learned Tribunal was against the order passed by the first appellate authority on pre-deposit and or against the order passed by the first appellate authority dismissing the appeal solely on the ground of non-deposit of pre-deposit, the learned Tribunal instead of considering the legality and validity of the order passed by the first appellate authority dismissing the appeal on non-payment of the amount of pre-deposit has entered into the merits

of the case and has decided the appeal before it as if the appeal before it was against the order passed by the first appellate authority on merits.

3. Ms. Vaibhavi Parikh, learned advocate appearing on behalf of the respondent-dealer, is not in a position to dispute the above facts.

4. Having heard the learned advocates appearing on behalf of the respective parties and considering the order passed by the first appellate authority as well as the impugned judgment and order passed by the learned Tribunal it emerges that the appeal before the learned Tribunal was against the order passed by the first appellate authority dismissing the appeal on non-deposit of the amount of pre-deposit only, and, therefore, as such, the learned Tribunal ought to have concentrated only on the order passed by the first appellate authority dismissing the appeal not on merits but on non-deposit of the amount of pre-deposit. The learned Tribunal as such was required to consider the legality and validity of the order passed by the first appellate authority with respect to the amount of pre-deposit and or dismissing the appeal on non-payment of pre-deposit as directed earlier. From the impugned judgment and order passed by the learned Tribunal, it appears that the learned Tribunal has without even deciding the main issue in the appeal, i.e., without considering the legality and validity of the order passed by the first appellate authority either with respect to pre-deposit and/or dismissing the appeal on non-deposit of pre-deposit, has entered into the merits of the case and has decided the appeal before it as if the appeal was against the decision of the first appellate authority on merits. The aforesaid is absolutely impermissible.

5. The learned advocates appearing on behalf of the respective parties have brought to our notice number of decisions of this court quashing and setting aside similar orders passed by the learned Tribunal by which in appeal against the order passed by the first appellate authority dismissing the appeal on non-deposit of pre-deposit, the learned Tribunal entered into the merits of the case and decided the appeal.

5.1 In Tax Appeal No. 711 of 2013 in the case of State of Gujarat v. Tudor India Ltd. [2014] 2 VST-OL 288 (Guj), as such the Division Bench of this court deprecated such practice of the learned Tribunal in deciding the appeal on merits when the appeal before the learned Tribunal was against the order passed by the first appellate authority dismissing the appeal on non-deposit of the amount of pre-deposit. In paragraph Nos. 7 to 8.4 the Division Bench has observed and held as under (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 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 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 out by the decision of the apex court in case of *Benara Valves Ltd. v. Commissioner of Central Excise* reported in [2009] 20 VST 297 (SC) : [2006] 204 ELT 513 (SC).

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 *Commissioner of C. Ex. Chandigarh v. Smithkline Beecham Co. Health C. Ltd.* reported in [2003] 157 ELT 497 (SC), 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.

8.4 With this, the present appeal is directed to be remitted back to the Tribunal to decide the issue of pre deposit and on deciding the same to the first appellate authority which shall decide the same on merit in accordance with law. Needless to say that the law on the subject shall govern the decisions of these authorities, while deciding both the issues, i.e., pre-deposit so also on the question of merit."

5.2 Even subsequently also in number of cases different Division Benches had set aside the similar orders passed by the learned Tribunal and remanded the matter to the learned Tribunal to consider the issue or the appeal on the issue of pre-deposit and or dismissing the appeal on non-deposit of the amount of pre-deposit. It appears that despite the above, message has not reached the learned Tribunal and the learned Tribunal has continued to pass similar and such orders ignoring the decision of the High Court. The learned Tribunal is bound to obey the decision of the High Court. It is not open for the learned Tribunal to ignore the directions, observations or orders passed by the High Court. If instead of the learned Tribunal any other person would have ignored the order passed by the High Court it would tantamount to contempt of court. However, we refrain ourselves from making any observations and we rest the matter there with a hope that in future the learned Tribunal will absolutely follow the decision of this court, more particularly, in Tax Appeal No. 711 of 2013 (State of Gujarat v. Tudor India Ltd. [2014] 2 VST-OL 288 (Guj)) and other subsequent decisions.

6. In view of the above and for the reasons stated in the judgment and order passed by the Division Bench of this court in the case of State of Gujarat v. Tudor India Ltd. [2014] 2 VST-OL 288 (Guj) in Tax Appeal No. 711 of 2013, without further entering into the merits of the case and/or expressing anything on merits in favour of either parties, we quash and set aside the impugned judgment and order passed by the learned Tribunal-learned Value Added Tax Tribunal, Ahmedabad, dated February 26, 2014 in Second Appeal No. 489 of 2013 and remit the matter back to the learned Tribunal with a direction to the learned Tribunal to decide the appeal as if the appeal preferred before it is against the order passed by the first appellate authority dismissing the appeal on the ground of non-deposit of the pre-deposit and or with respect to the order of pre-deposit and the learned Tribunal to consider the legality and validity of the order passed by the first appellate authority of pre-deposit and or dismissing the appeal on the ground of non-deposit of pre-deposit only.

7. The present tax appeal is allowed to the aforesaid extent.

8. Registry is directed to send the present order to the learned Tribunal forthwith

and the Registrar of the learned Tribunal is hereby directed to place the copy of this order before the learned Members of Tribunal, including the President of the learned Tribunal.

Civil Application No. 139 of 2015.

In view of disposal of the main tax appeal, no order in the civil application and the same stands disposed of accordingly.