

“33 (5) No Appeal Preferred by an Assessee to an Appellate Authority Shall Vs. State of Haryana and Others

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Court : Punjab and Haryana

Decided On : May-30-2014

Appellant : “33 (5) No Appeal Preferred by an Assessee to an Appellate Authority Shall

Respondent : State of Haryana and Others

Judgement :

VATAP No.154 of 2013 1 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH VATAP No.154 of 2013(O&M) Date of decision: 30.5.2014 M/s Star Rice Industries PVT.LTD..Appellant VERSUS State of Haryana and othersRespondents CORAM: HON'BLE Mr.JUSTICE HEMANT GUPTA HONBLE Mr.JUSTICE FATEH DEEP SINGH Present: Mr.Alok Mittal, Advocate for the appellant.

Mr.Pardeep Singh Poonia, Additional Advocate General, Haryana.

***** HEMANT GUPTA, J.

The present appeal under Section 36 of the Haryana Value Added Tax Act, 2003 (for short the Act) arises out of an order passed by Haryana Tax Tribunal, Chandigarh (for short the Tribunal) on 03.04.2012 whereby an appeal filed by the appellant against the order passed by the Joint Excise and Taxation

Commissioner on 04.08.2009 was dismissed.

The Assessing Authority passed an order of assessment on 26.03.2009.

The appellant filed an appeal against the order of assessment but the same was dismissed for the reason that the appellant has not submitted bond of the disputed amount before the Assessing Authority as required under Section 33(5) of the Act.

In further appeal, the Members of the Sales Tax, Haryana Tax Tribunal differed but the majority opinion is that in terms of amendment in the Haryana Value Added Tax Act, 2003 by Haryana Act No.10 of 2009 notified on 20.03.2009, a condition was imposed that payment of amount of tax admitted to be due and interest Diwakar Gulati 2014.05.31 14:32 I attest to the accuracy and integrity of this document VATAP No.154 of 2013 2 thereon is required to be furnished either by way of a bank guarantee or adequate security to the satisfaction of the Assessing Authority.

Since, such deposit has not been made, therefore, the appeal has been rightly dismissed.

It is the said order which is challenged before this Court.

The provisions of Section 33(5) of the Act have been amended by Haryana Act No.10 of 2009.

The amended provision as notified on 20.03.2009 reads as under:- 33 (5) No appeal preferred by an assessee to an appellate authority shall be entertained unless it is filed within sixty days from the date of the order appealed against.

The appellate authority shall ensure before entertaining the appeal that the appellant has paid the amount of tax admitted to be due and interest thereon, and a bank guarantee or adequate security to the satisfaction of the assessing authority, in the manner, as may be prescribed, for the amount in dispute has also been furnished.

Prior to the amendment, the unamended provisions of Section 33(5) of the Act were the following:- 33 (5) No appeal preferred by an assessee to an appellate authority shall be entertained unless it is filed within sixty days from the date of the order appealed against and the amount of tax and interest admitted by the appellant to be due as a result of the said order has been paid by him.

Learned counsel for the appellant contended that since the assessment order in question relates to the year 2005-06, prior to the amendment in Section 33 of the Act, therefore, the unamended provision of the statute would be applicable.

We find that the following substantial question of law arises for consideration in the present appeal:- i) Whether the provisions of Section 33(5) of the Act notified on 20.03.2009 can be applicable for the Assessment year of 2005-06 in the absence of it not having retrospective effect?.

Diwakar Gulati 2014.05.31 14:32 I attest to the accuracy and integrity of this document VATAP No.154 of 2013 3 ii) Whether the Learned Authorities, in the facts and circumstances of the case, was justified in not hearing the appeal on merits for want of surety bond even though there being no statutory requirement in respect of the assessment year 2005-06?.

In support of the aforesaid questions, learned counsel for the appellant refers to two Division Bench judgments of this Court reported as [2004].136 STC261(P&H) titled as Khazan Chand Nathi Ram versus State of Haryana and others and [2005].139 STC51(P&H) titled as Oswal Agro Mills LTD.versus State of Punjab and others.

In the aforesaid judgments, it has been held that the appeal is a statutory right and that the law as it is applicable on the dates of commencement of lis will be applicable.

On the other hand, Mr.Poonia, Additional Advocate General, Haryana, for the respondents, has argued that right of appeal is a statutory right and such right cannot be taken away with retrospective effect but the condition of pre-deposit is a

condition relating to procedure of filing of appeal, therefore, it will operate retrospectively i.e. even in respect of appeals relating to assessment prior to the date of amendment.

Mr. Poonia referred to large number of judgments but such judgments have been considered by the Division Bench of this Court of which one of us (Hemant Gupta. J.) was a member.

We find that in view of the judgments of this court relied upon by the learned counsel for the appellant, the appeal is bound to be allowed after the questions of law are answered in its favour.

In *Khazan Chand Nathi Rams* case (supra) the right of appeal was being examined after the repeal of Haryana General Sales Tax Act, 1973 and commencement of Haryana Value Added Tax.

It was held that Diwakar Gulati 2014.05.31 14:32 I attest to the accuracy and integrity of this document VATAP No.154 of 2013 4 right of appeal, in the absence of any provision in the new Act will be governed by the law since repealed.

It was held to the following effect:- 34.

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).³⁶.

In civil proceedings, lis 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 lis 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 lis.

Consequently, there would be no occasion for the parties to file an appeal.

However, if such returns are not accepted, the cause of action which 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 Patels* case [1961].12 STC219(SC).AIR 1967 SC344 37.

In view of the above discussion, we hold that right of appeal is a vested right as if exists on the date of commencement of lis.

The lis 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 (applicable to State of Haryana).

The said judgment does not examine the issue as to whether the amendment relating to procedure in filing of appeal will have retrospective effect. Diwakar Gulati 2014.05.31 14:32 I attest to the accuracy and integrity of this document VATAP No.154 of 2013 5 effect i.e.in respect of appeals arising out of assessment, the returns of which were filed before the amendment.

Such question was examined vide separate judgment of the same date in Oswal Agro Mills Ltd.s case (supra).wherein the substituted sub-section (5) of Section 20 of Punjab General Sales Tax Act, 1948 was examined.

The amendment makes it mandatory for appeal to be entertained, prior minimum deposit to the extent of 25% of tax, penalty, if any imposed and the interest accrued thereon.

The provision prior to the said amendment, gives discretion to the Appellate Authority to dispense with the pre-deposit of tax, interest or penalty.

It was held therein that since return in all the writ petitions have filed prior to the amendment in the Act, therefore, provision as it existed prior to amendment would be applicable.

It was held to the following effect:- 8.In view of the above discussion, we hold that right of the appeal is a vested right as it exists on the date of commencement of lis.

The lis 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 lis 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.

In view of the judgment of Division Bench of this Court examining the similar matters in Oswal Agro Mills Ltd.s case (supra).the return filed before amendment would be governed by unamended provisions.

We find that the conditions of entertaining the appeal by Haryana Act No.10 of 2009 could not be made applicable in respect of assessment proceedings initiated prior to the amendment.

Diwakar Gulati 2014.05.31 14:32 I attest to the accuracy and integrity of this document VATAP No.154 of 2013 6 Consequently, the orders passed by Joint Excise and Taxation Commissioner dated 04.08.2009 and that of the Haryana Tax Tribunal communicated on 03.04.2012 are set aside and the matter is remitted back to the Joint Excise and Taxation Commissioner to decide the appeal on merits after seeking compliance of unamended provision of Section 33(5) of the Act.

(HEMANT GUPTA) JUDGE MAY30 2014 (FATEH DEEP SINGH) D.

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