(2008) 12 VST 123

High Court Of Punjab And Haryana At Chandigarh

Case No: None

M.U.S. Marketing Pvt. Ltd.		APPELLANT
	Vs	
State of Punjab and Another		RESPONDENT

Date of Decision: Dec. 10, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100A
- General Clauses Act, 1897 - Section 6
- Motor Vehicles Act, 1988 - Section 173
- Punjab Value Added Tax Act, 2005 - Section 39, 68, 92

Citation: (2008) 12 VST 123

Hon'ble Judges: M.M. Kumar, J; Ajay Kumar Mittal, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Ajay Kumar Mittal, J.
In this appeal by the appellant-assessee u/s 68(1) of the Punjab Value Added Tax Act, 2005 (for short, "the Act"), the order dated November 29, 2005 of the Sales Tax Tribunal, Punjab, Chandigarh (hereinafter referred to as, "the Tribunal") passed in Appeal No. 597 of 2004-05 has been challenged. The assessee has claimed that the following substantial questions of law arise for consideration ofthis Court:

1. Whether the penalty u/s 14B of the Punjab General Sales Tax Act, 1948 is imposable on the facts and in the circumstances of the case?

2. Whether there is mens rea on the part of the appellant in the present case so as to attract penalty u/s 14B of the PGST Act?

3. Whether penalty u/s 14B is attracted in the present case despite the fact that transaction in the present case has attracted tax at 10 per cent in total in spite of eight per cent otherwise imposable in case the contention of the State Government is accepted?

4. Whether the order passed by learned Sales Tax Tribunal is perverse and is against the facts borne out of the record?

5. Whether the order passed by learned Sales Tax Tribunal adheres to the principles of natural justice?

6. Whether the learned Tribunal was justified in not dealing with all the contentions raised by the appellant during the course of hearing and not disposing of all of them?

2. Briefly, the facts are that the three vehicles bearing No. PB-11C-9351, PB-10D-9914 and HR-29B-4825 carrying iron and steel were intercepted by the Excise and Taxation Officer, Dera Bassi near Zirakpur and the documents relating to the goods were checked. On checking, the documents relating to the goods were not found proper and genuine. Accordingly, a show cause notice was issued to the appellant. The Assistant Excise and Taxation Commissioner, Patiala imposed a penalty of Rs. 4,50,000 u/s 14B(7) of the Act vide order dated May 6, 2004. Against the said order, the appellant filed an appeal before the Deputy Excise and Taxation Commissioner (Appeals), who vide order dated September 28, 2004 dismissed the same affirming the penalty order dated May 6, 2004. Feeling dissatisfied with the order dated September 28, 2004, the appellant filed second appeal before the Tribunal, who vide order dated November 29, 2005 dismissed the same.

3. At the commencement of the arguments, learned State counsel raised preliminary objection regarding maintainability of the appeal. According to the learned Counsel, the case relates to the supply order dated May 4, 2000 when the provisions of the Punjab General Sales Tax Act, 1948 were applicable whereas the appeal has been filed under the provisions of the Punjab Value Added Tax Act, 2005 (in short, "the 2005 Act"). The learned Counsel argued that the appellant had a remedy of filing a reference petition before the Tribunal and, therefore, the appeal was not maintainable. He relied upon the decisions of the Supreme Court in Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, and Ramesh Singh and another Vs. Cinta Devi and others, in support of his submission.

4. Mr. K. L. Goyal, learned Counsel for the appellant, vehemently controverted the submissions made by the learned State counsel and argued that u/s 68 of the 2005 Act, the present appeal is maintainable and he relied upon Section 92 in his support. Elaborating further, he submitted that the 2005 Act came into force from the 1st day of April, 2005 and the Tribunal having decided the matter after that day, the provisions of the 2005 Act would govern the filing of appeal and, therefore, the present appeal is maintainable. Our attention was drawn to the judgments of the honourable Supreme

Court in Garikapatti Veeraya Vs. N. Subbiah Choudhury, , Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., and a Full Bench judgment ofthis Court in Parshotam Dass Vs. State of Haryana, .

5. We have given our thoughtful consideration to the submissions of the learned Counsel for the parties but do not find any merit in the preliminary objection of the learned State counsel. It would be apposite to reproduce Sections 68 and 92 of the 2005 Act which are relevant for resolving the controversy. They read thus:

68(1) An appeal or revision shall lie to the High Court from every order passed in appeal or revision by the Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner or a person aggrieved by any order passed by the Tribunal, may file an appeal to the High Court and such appeal shall be,--

(a) filed within a period of sixty days from the date on which the order appealed against is received by the aggrieved person or the Commissioner; and

(b) in the form of a memorandum of appeal, precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal or revision shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal or revision, be allowed to argue that the case does not involve such question:

Provided that nothing in this section shall be deemed to take away or abridge the power of the High Court to hear, for reasons to be recorded, the appeal or revision on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law, so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which,--

(a) has not been determined by the Tribunal; or

(b) has been wrongly determined by the Tribunal, by reason of a decision on such question of law as is referred to in Sub-section (1).

7. The payment of any amount, due to be paid by a person, in accordance with the order of the Tribunal in respect of which an appeal has been preferred under this section, shall not be stayed by the High Court pending the final disposal of such appeal, but if such amount is reduced as the result of such appeal, the excess tax, penalty, interest or sum forfeited, shall be refunded in accordance with the provisions of Section 39 of this Act.

(8) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals or revisions under this section.

Section 92.--(1) With effect from the date of coming into force of this Act, the Punjab General Sales Tax Act, 1948 (Punjab Act 46 of 1948), shall stand repealed.

(2) The repealing of the Act under Sub-section (1) shall not,--

(a) revive anything not in force or existing at the time when the repeal takes effect; or

(b) affect the previous operation of the repealed Act or anything done or suffered thereunder; or

(c) affect any obligation, or liability acquired, accrued or incurred under the repealed Act; or

(d) affect any penalty, forfeiture or punishment incurred or inflicted in respect of any offence or violation committed under the provisions of the repealed Act; or

(e) affect any investigation, enquiry, assessment, proceeding, any other legal proceeding or remedy instituted, continued or enforced under the repealed Act,

and any such penalty, forfeiture or punishment or any proceeding or remedy instituted, continued, or enforced under the repealed Act, shall be deemed to be instituted, continued or enforced under the corresponding provisions of this Act.

(3) Notwithstanding such repeal,--

(a) the provisions of Section 10A, 10B and 30A of the repealed Act and the Rules framed thereunder relating to tax concessions to industrial units and assessment thereof, shall remain in force subject to the exceptions, restrictions and conditions, as may be notified by the State Government from time to time;

(b) all Rules made and notification issued under the provisions of the repealed Act and/or Rules made thereunder and in force on the date of the commencement of this Act, shall remain in force, unless such Rules and notifications are superseded in express terms or by necessary implication by the provisions of this Act or the Rules made and notifications issued thereunder;

(c) any reference to any section of the repealed Act in any rule or notification, shall be deemed to refer to the relevant corresponding section of this Act, until necessary amendments are made in such rule or notification;

(d) the limitations provided in this Act, shall apply prospectively, and all events occurred and all issues, which arose prior to the date of commencement of this Act, shall be governed by the limitations provided or the provisions contained in the repealed Act;

(e) anything done or any action taken under the Act so repealed (including any notification, order, notice issued, application made, or permission granted), which is not inconsistent with the provisions of this Act, shall be deemed to have been done or taken under the corresponding provisions of this Act as if, this Act was in force at the time when such thing was done, or action was taken, and shall continue to be in force, unless and until superseded by anything done or any action taken under this Act;

(f) any reference to any provisions of the repealed Act by this Act to an officer, authority or Tribunal shall, for the purposes of carrying into effect the provisions contained in this section, be construed as reference to the corresponding officer, authority or Tribunal, appointed or constituted by or under this Act ; and if any question arises as to who such corresponding officer, authority or Tribunal is, then the matter shall be referred to the State Government and the decision of the State Government thereon shall be final; and

(g) if any difficulty arises in giving effect to the provisions of this section, the State Government may, by general or special order published in the Official Gazette, do anything not inconsistent with such provisions which appears to it to be necessary or expedient, keeping in view the context of the subject-matter.

6. u/s 68(1) of the 2005 Act, it has been provided that an appeal or revision shall lie to the High Court from every order which has been passed by the Tribunal while exercising appellate or revisional jurisdiction, if the High Court is satisfied that the case involves a substantial question of law.

7. Section 92 deals with repeal and saving of Punjab Act 46 of 1948. Under Sub-section (1), the provisions of the Punjab General Sales Tax Act, 1948 have been repealed. Sub-section (2) is in terms of Section 6 of the General Clauses Act, 1897 (for short, "the 1897 Act") and provides for eventualities enumerated therein in view of repealing of the 1948 Act under Sub-section (1). Sub-section (3) thereof, amongst others, provides that even after repeal, all rules and notifications which are issued under the old Act shall remain in force unless they are specifically repealed or withdrawn. It also provides for various contingencies which may arise with regard to rules and notifications issued under the old provisions.

8 We now make reference to various legal propositions enunciated by different judicial precedents. The Constitution Bench of the apex court in Garikapatti Veeraya Vs. N. Subbiah Choudhury, while considering the effect of a repeal of an enactment on the

scope and nature of right of appeal had formulated the following five propositions:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

9 Under the 5th principle, the Constitution Bench had laid down that the vested right of appeal can be taken away only by a subsequent amendment, if it so provides expressly or by necessary intendment and not otherwise.

10. In interpreting Section 6 of the 1897 Act, the honourable Supreme Court in Commissioner of Income Tax, Bangalore Vs. Venkateswara Hatcheries (P) Ltd. etc. etc., observed thus:

...It is a very well recognised rule of interpretation of statutes that where a provision of an Act is omitted by an Act and the said Act simultaneously re-enacts a new provision which substantially covers the field occupied by the repealed provision with certain modification, in that event such re-enactment is regarded as having force continuously and the modification or changes are treated as amendment coming into force with effect from the date of enforcement of the re-enacted provision....

11. In Parshotam Dass Vs. State of Haryana, , the Full Bench ofthis Court of which one of us (M. M. Kumar, J) was a Member was considering the effect of two Acts, i.e., the CPC (Amendment) Act, 1999 and the CPC (Amendment) Act, 2002 which came into force with effect from July 1, 2002, on the letters patent appeals in the High Court which right had been taken away by the said amendments. The issue which was formulated reads as under:

(1) Whether letters patent appeal would lie against the judgment and decree passed by the learned single judge in an appeal arising from an original or appellate decree or

order?

(2) Whether the letters patent appeals filed before July 1, 2002 are liable to be dealt with and decided in accordance with amended Section 100A of the C. P. C.?

12. The first question was answered in the negative and under the second issue, it was held that the letters patent appeal filed before July 1, 2002 shall be governed by the unamended provisions. The Full Bench observed that mere existence of a right of appeal on the date of repeal of a statute cannot be considered a vested right or an accrued right. An available right would become vested right only when it is exercised, otherwise it would continue to be an embryological right. The letters patent appeals which are to be filed after July 1, 2002 shall be governed by the amended provisions.

13. In view of the above, it would be clear that Section 92 of the 2005 Act repealed the remedy of filing the reference which was available under the 1948 Act and instead conferred right of filing the appeal or revision on a party by operation of Section 68 of the said Act on a substantial question of law, to the High Court. All those appeals which are decided by the Tribunal after coming into force of the 2005 Act would, thus, be governed by the provisions of Section 68 of the said Act and in all such cases the appeal or revision would lie to the High Court on a substantial question of law. Once it is held that the appeal filed by the assessee is maintainable, the preliminary objection raised by the learned State counsel is, thus, rejected.

14. In all fairness to the learned State counsel, we make reference to the judgments relied upon by him. The issue before the apex court in Ramesh Singh and another Vs. Cinta Devi and others, was whether a right of appeal accrues to a claimant under the Motor Vehicles Act, 1939 (old Act) on the institution of a claim application in the Motor Accident Claims Tribunal notwithstanding its repeal by the Motor Vehicles Act, 1988 (new Act). In this case, the accident had taken place on May 27, 1988, on the basis of which a claim petition was filed on December 23, 1988 under the Motor Vehicles Act, 1939 (old Act). The new enactment came into force with effect from July 1, 1989. The claim petition came to be decided on June 29,1992 after coming into force of the new Act. The appeal was filed under the old Act on September 25, 1992 where there was no provision for pre-requisite for deposit of an amount as required by the proviso to Section 173 of the new Act. The apex court by relying upon Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others, held that unless the new Act expressly or by necessary implication makes the provision applicable retrospectively, the right to appeal will crystallise in the appellant on the institution of the application in the Tribunal of first instance and that vested right of appeal would not be dislodged by the enactment of the new Act. It was held that in that situation, the appellant would be entitled to file the appeal without fulfilling the requirement of the proviso to Section 173 of the new Act. This is not the position in the present case.

15 Now, adverting to the merits of the present case, it may be noticed that the Tribunal while deciding the appeal observed that the dealer had admitted the factual position regarding supply of material to the Panchkula Society directly by change of documents by ISSCO, Chandigarh who was the main supplier and that the dealer was working on its behalf as a supply contract as well as transporter. The only plea raised by the appellant was that this transaction was first of its kind and it was not aware of the legal position regarding charging of eight per cent inter-State tax and it was under those circumstances that only two per cent tax has been charged and had prayed for taking a lenient view and for reduction of the penalty to the minimum,

16. perusal of the aforesaid observations shows that the dealer had admitted regarding the commission of the offence but had only prayed for reduction in the quantum of penalty. Once it is established that the dealer was guilty of suppression of sales by charging less tax, it was the discretion of the Assessing Officer to have reduced the quantum of penalty. Since the goods were meant for trade, the amount of penalty cannot be said to be excessive in any manner. In the facts and circumstances, no question of law much less a substantial question of law would arise from the impugned order as claimed by the appellant.

17. Finding no merit in this appeal, the same is hereby dismissed.