
(2014) 06 GUJ CK 0034

Gujarat High Court

Case No: Tax Appeal No. 4 of 2014 and Civil Application No. 3 of 2014

Karnavati Ispat Pvt. Ltd.

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision: June 27, 2014

Citation: (2014) 73 VST 489

Hon'ble Judges: Mukesh R. Shah, J; Kaushal Jayendra Thaker, J

Bench: Division Bench

Advocate: Jeevan R. Vasave and P.R. Parmar, Advocate for the Appellant; Jaimin Gandhi, Assistant Government Pleader, Advocate for the Respondent

Judgement

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@JUDGMENTTAG-ORDER

Mukesh R. Shah, J.

Being aggrieved and dissatisfied with the impugned judgment and order passed by the Gujarat Value Added Tax Tribunal, Ahmedabad, dated September 12, 2013 in Second Appeal No. 21 of 2013 by which the learned Tribunal has dismissed the appeal preferred by the assessee, the assessee has preferred the present tax appeal to consider the following substantial questions of law:

"(1) Whether, under the facts and circumstances of the case and principles laid down by the honourable Supreme Court and the High Courts, the Tribunal was right in holding that the purchases made from M/s. Shree Bhavani Ispat, were not allowable as tax credit because, registration of all the selling dealers was cancelled retrospectively, or ab initio. So on the date of purchase, the selling dealer was not holding valid registration and hence the tax credit on these purchase was not allowable?

(2) Whether the Tribunal was right in applying or imposing its general observation (decision) on all the appellants, without considering genuineness and bona fide of individual case?

(3) Whether the Tribunal justified in remanding the matter on the issue of penalty and disallowing the appeals on the issue of tax credit?"

At the outset, it is required to be noted that the assessing officer denied the input-tax credit claimed by the appellant on the goods purchased from its vendor-M/s. Shree Bhavani Ispat, Bhavnagar, on the ground that the selling dealers from whom the appellant purchased the goods were found indulged only in billing activities and no genuine transactions of sale and purchase were carried out and registration of selling dealer as vendor was cancelled ab initio. The said order of denying the input-tax credit has been confirmed up to the learned Tribunal to the extent of disallowance of input-tax credit and interest levied thereon is concerned, however, so far as the levy of penalty is concerned, the learned tribunal has remanded the matter back to the assessing officer by observing that despite the discretion vested to levy appropriate penalty, without exercising the discretion, highest penalty has been imposed.

2. We have heard Mr. Jeevan R. Vasave, learned advocate appearing on behalf of the appellant-dealer and Mr. Jaimin Gandhi, learned Assistant Government Pleader appearing on behalf of the respondent-State. We have perused the impugned orders passed by the learned assessing officer and the learned Tribunal.

2.1. It is not in dispute that while passing the impugned judgment and order the learned Tribunal has heavily relied upon its decision in the case of Madhav Steel Corporation, rendered in Second Appeal No. 451 of 2011 where on the similar ground and on the similar facts and circumstances of the case, the learned Tribunal has confirmed the order disallowing the input-tax credit as Well as interest. It is not in dispute that as such the learned Tribunal considered the decision in the case of Madhav Steel Corporation as lead case and the said judgment and order came to be relied in subsequent decision and while passing the impugned order. It is required to be noted that the decision of the learned Tribunal in the case of Madhav Steel Corporation came to be challenged by the dealer before this court by way of Tax Appeal No. 742 of 2013 and the same came to be heard by the Division Bench of this court along with other Tax Appeals and by a detailed judgment and order dated December 12, 2013, the Division Bench of this court (Madhav Steel Corporation v. State of Gujarat [2014] 72 VST 318 (Guj)) has confirmed the judgment and order passed by the learned Tribunal in the case of Madhav Steel Corporation. Relevant paragraphs of the aforesaid decision rendered by this court in the case of Madhav Steel Corporation [2014] 72 VST 318 (Guj) in Tax Appeal No. 742 of 2013 and other allied appeals are as under (pages 332-338 in 72 VST):

"5.1. The Learned advocate appearing on behalf of the respective appellants-dealers has challenged the impugned judgment and order/s passed by the learned Tribunal firstly on

the ground that the second appeal before the learned Tribunal was against the order passed by the Joint Commissioner--first appellate authority dismissing the appeal/s on the ground of non-deposit of the pre-deposit. Therefore, it is the case on behalf of the respective appellants--original appellants that the learned Tribunal ought not to have gone into the merits of the respective assessment orders and ought to have restricted the second appeals against the order/s passed by the first appellate authority--Joint Commissioner dismissing the appeal/s on the ground of non-deposit of the pre-deposit. However, in the facts and circumstances of the case, the aforesaid cannot be accepted. At the outset it is required to be noted that as such before the learned Tribunal the respective appellants challenged the assessment order passed by the Deputy Commissioner of Commercial Tax also along with the order passed by the first appellate authority dismissing the appeal. In the second appeal before the learned Tribunal, the appellant made the following prayers:

"(a) The second appeal may please be admitted for regular hearing without insisting any part payment and/or security.

(b) A stay order may please be issued against the recovery of dues.

(c) The assessment order passed by the learned Deputy Commissioner of Commercial Tax, Range-18, Valsad and summarily rejection order passed in appeal by the learned Joint Commissioner of Commercial Tax, Appeals-2, Vadodara, may please be modify by holding that--

"(i) The appellant is entitled to tax credit under section 11 of the VAT Act on the purchases made of Rs. 2,84,153 net of tax made from M/s. Mangal Enterprise, Bhavnagar and Rs. 5,69,03,694 net of tax made from M/s. Shree Bhavani Ispat, Bhavnagar, in the facts and circumstances of the case.

(ii) The interest charged under section 30(5) of the VAT Act of Rs. 18,28,540 and penalties charged of Rs. 22,85,008 under section 34(7) of the VAT Act and Rs. 37,28,319 under section 34(12) of the VAT Act are unjustified and not tenable in law."

(d) Any other just and proper order may be passed as may be deemed fit in the facts and circumstances of the case."

5.2 it is also required to be noted that even the learned advocate appearing on behalf of the appellant made elaborate submissions on merits against the assessing officer passed by the Deputy Commissioner. Under the circumstances when the appellant challenged the assessment order before the learned Tribunal in the second appeal and they made elaborate submissions on merits against the assessment order passed by the Deputy Commissioner and when the same have been dealt with by the learned Tribunal, it cannot be said that the learned Tribunal has committed any error in considering the appeal on merits against the assessment order passed by the assessing officer.

Identical question came to be considered by this court in [R.G. Scrap Traders Vs. State of Gujarat](#). In the case before this court in the aforesaid tax appeal, the appeal before the learned Tribunal was against the order passed by the learned first appellate authority rejecting the appeal on the ground of non-payment of pre-deposit and before the learned Tribunal the appellant also challenged the original order of assessment and made elaborate submissions before the learned Tribunal on merits against the assessment order which came to be dealt with by the learned Tribunal and thereafter when the decision was against the appellant, it was submitted on behalf of the appellant that the learned Tribunal ought to have decided the appeal on merits and ought to have restricted the appeal passed by the first appellate authority rejecting the appeal on the ground of non-deposit of pre-deposit and to that the Division Bench of this court has negated the same by observing in paras 11 and 12 as under (pages 418 and 419 in 2 VST-OL):

"11. Now, so far last contention on behalf of the appellant that as the appeals before the learned Tribunal were against the order passed by the first appellate authority dismissing the appeal on the ground of non-deposit of pre-deposit and therefore, the learned Tribunal ought not to have entered into the merits of the case and/or decided the appeals on merits against the order of assessment and the reliance placed upon the decision of the honourable Supreme Court in the case of Smithkline Beecham Co. Health C. Limited [2003] 157 ELT 497 (SC) is concerned, it is required to be noted that in fact the learned advocate for the appellant made submissions on merits before the learned Tribunal. Even written submissions were submitted on behalf of the appellant, which were on merits of the case and against the assessment order. Therefore, it was the appellant who invited decision on merits. When the written submission was made on merits against the order of assessment and the learned Tribunal dealt with and considered the same and thereafter dismissed the appeals on merits, thereafter having lost on merits, it is not open for the appellant to make aforesaid grievance. If despite submitting the case on merits, the Tribunal had not dealt with the appeals on merits, in that case, the appellant would make the grievance of non-consideration of appeal on merits, though submissions have made. When pointed out question was asked to the learned advocate for the appellant, that if the appellant would have succeeded on merits in the appeal, the appellant would have raised the aforesaid grievance, the learned advocate for the appellant has fairly conceded that in such case the appellant would not have made such grievance. Under the circumstances, when the appellant made submissions on merits against the order of assessment as if the appeals before the Tribunal were against the order of assessment and when the Tribunal has dealt with and considered the same and decided the appeals on merits and when the appellant has lost in the appeals on merits, thereafter it not open for the appellant now to make the grievance that the Tribunal ought not to have decided the appeals on merits. It is also required to be noted at this stage that as such there is no such grievance raised in the appeal and even no substantial question of law is proposed on the aforesaid. However, as the learned advocate for the appellant has made submissions on that we have dealt with and considered the same.

12. Now, so far as reliance placed upon the decision of the honourable Supreme Court in the case of Smithkline Beecham Co. Health Co. Limited [2003] 157 ELT 497 (SC) is concerned, as such there cannot be any dispute with respect to proposition of law laid down by the honourable Supreme Court in the said decision. It is true that normally when the appeal before the Tribunal is against the order passed by the first appellate authority, dismissing the appeal on the ground of non-deposit of pre-deposit, the Tribunal is not required to enter into the merits of the case. However, it depends upon the facts and circumstances of the case. In a given case it may happen that identical question is before the Tribunal and/or some other appeals are pending before the Tribunal in the case of very appellant-assessee raising the similar question/issue but with respect to different assessment year, with the consent and by passing speaking order, the learned Tribunal may consider the appeals on merits. So far as present appeals are concerned, as observed hereinabove and for the reasons stated above, it is not open for the appellant now to raise a grievance that the learned Tribunal ought not to have entered into the merits of the case and dismissed the appeals on merits, when the submissions were made before the learned Tribunal as if appeals are on merits against the order of assessment also and more particularly, when the appellants have lost on merits."

5.3 Under the circumstances and in the facts and circumstances of the case, no error has been committed by the learned Tribunal in entering into the merits of the case and even considering the appeals on merits against the order of assessment passed by the Deputy Commissioner. At this stage it is required to be noted that as such by the impugned judgment and order, the learned Tribunal has partly allowed the second appeals and has quashed and set aside the order of the assessment passed by the assessing officer insofar as imposing maximum penalty is concerned and has remanded the matter to the assessing officer. Thus, the impugned judgment and order passed by the learned Tribunal is partly in favour of the appellant-dealer against which the appellant/s have not made any grievance. In any case as observed hereinabove, no error has been committed by the learned Tribunal in entering into the merits of the case and decided the appeal on merits and against the order of assessment passed by the assessing officer. Under the circumstances, proposed question No. 1 is answered against the appellant-dealer/s and in favour of the Revenue.

5.4 Now, so far as the rest of the proposed questions of law and the submissions made by the learned advocate appearing on behalf of the appellant that the learned Tribunal as well as the assessing officer have materially erred in not holding the sale transactions to be genuine and in treating the same as billing activities only and the submission/contention on behalf of the appellant that the learned Tribunal has not considered the documentary evidences on record forming part of the paper book such as invoices, weigh bridge, stock register and copy of the account which would prove and establish that the sale transactions were genuine and the learned Tribunal has not dealt with the said documentary evidences are concerned, as the documents which are sought to be relied upon by the appellant/s are on record and the entire paper book is on record,

we ourselves have gone through and considered the same.

5.5 The paper book is running into 400 pages, however relevant pages regarding the physical movement of goods are on pages 77, 79 and 81 and pages 83 to 265 are stock register, which is internal evidence. Pages 283-349 are bank statement and pages 365 to 373 are bank certificate. However, from the aforesaid documents, payments made to M/s. Shree Bhavani Ispat are not proved. From the invoices issued by M/s. Shree Bhavani Ispat--pages 77 and 79 are concerned, the loading and freight column in the said invoices are Nil. The loading and freight charges are for the purpose of transportation of goods. Page 81 is the weigh bridge receipt. However, in the said receipt there is neither the name of the consignor nor the name of the consignee. Under the circumstances, credibility of the weight bridge receipts is in doubt. Learned advocate appearing on behalf of the appellant is not in a position to satisfy the court even from the documents on record, i.e., from the paper book with respect to the actual movement of goods. Thus, as such the learned advocate appearing on behalf of the appellant/s has failed to satisfy the court with respect to the genuineness of the sale transactions and/or purchases made by them from M/s. Shree Bhavani Ispat and M/s. Madhav Steel Corporation by leading evidence and/or on the basis of the documents on record that as such there was movement of goods. Under the circumstances, as such the appellant/s have failed to prove the physical movement of the goods alleged to have been purchased by them from M/s. Shree Bhavani Ispat and M/s. Madhav Steel Corporation. At this stage it is required to be noted that even their vendors--M/s. Shree Bhavani Ispat and M/s. Madhav Steel Corporation have also failed to satisfy and/or prove that they have in fact suppressed the goods from other 23 dealers. Thus, when the vendors could not prove their purchase from other 23 dealers, no goods were available with them which could have been sold to the appellants--original dealers herein and in fact there was no physical movement of the goods. If there were no goods with the vendors which were alleged to have been sold to the appellants-dealers, naturally there cannot be any physical movement of the goods. The appellants/dealers could prove the genuineness of the transactions not only from the cheques alleged to have been paid to the vendors but as such by proving actual physical movement of the goods, which the appellants/dealers have failed to prove. It cannot be disputed that as such the onus to prove the genuineness of the purchase is on the assessee/dealer. Even the onus to prove the genuineness of the purchase of the dealer from whom the appellant-dealers made purchases is also on the dealer. The aforesaid is supported by the decision of the Division Bench of this court in the case of [Happy Oil Industries Vs. State of Gujarat](#) . Under the circumstances, when even considering the documents on record forming part of the paper book, which have been relied upon by the learned advocate appearing on behalf of the appellant/s, the appellant/s-dealer/s have failed to prove the actual physical movement of the goods alleged to have been purchased from the aforesaid two vendors, namely, M/s. Shree Bhavani Ispat and M/s. Mangal Enterprises. Under the circumstances, when the respective appellant/s-dealer/s have failed to establish and prove the aforesaid important aspect of actual physical movement of the goods alleged to have been purchased by them from M/s. Shree

Bhavani Ispat and M/s. Mangal Enterprises and on which the input-tax credit has been claimed, the assessing officer as well as the learned Tribunal have rightly rejected the claim of the respective appellant/s-dealer/s of input-tax credit claimed under section 11 of the Act.

5.6 Now, so far as the contention on behalf of the appellants-dealers that as, when they purchased the goods from the aforesaid two vendors, both the aforesaid two vendors were having the registration and their registration came to be cancelled subsequently retrospectively and therefore, they cannot be denied the input-tax credit on the purchases made by them, made from the aforesaid two vendors is concerned, it is required to be noted that in the present case the input-tax credit/s have not been denied solely on the aforesaid ground. The input-tax credit has/have been denied also on the ground that the respective appellant/s-dealer/s have failed to prove the actual physical movement of the goods alleged to have been purchased by them from the aforesaid vendors and therefore, it is held that there was no actual physical movement of the goods and therefore, the sale transaction is/are not genuine and it was only billing activities to defraud the Government.

6. Considering the aforesaid facts and circumstances of the case and when the appellant/s-dealer/s have failed to satisfy/prove the actual physical movement of the goods alleged to have been purchased by them from the aforesaid two vendors on which the input-tax credit have been claimed and when the sale transactions are found to be not genuine and it appears that there were only billing activities, we are of the opinion that no error has been committed by the assessing officer as well as learned Tribunal in denying the input-tax credit. Under the circumstances, as such the proposed substantial questions of law referred to hereinabove are answered against the appellant/s-dealer/s and in favour of the Revenue. Consequently, all the tax appeals deserve to be dismissed and are, accordingly, dismissed."

2.2. In the present case also it is not established and proved by the dealer that in fact there was movement of goods from its vendor-M/s. Shree Bhavani Ispat, Bhavnagar. Under the circumstances, no error has been committed in holding that the activities by the selling dealer-vendor were the billing activities only and there was no selling deals. Under the circumstances when there was no movement of goods and it was only billing activities, the input-tax credit claimed on such transactions is rightly disallowed.

3. In view of the above and for the reasons stated above in the judgment and order passed by this court in the case of Madhav Steel Corporation v. State of Gujarat [2014] 72 VST 318 (Guj), present appeal deserves to be dismissed and is accordingly dismissed. In view of dismissal of the main tax appeal, Civil Application No. 3 of 2014 also stands dismissed.