

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.05.2013

+ **W.P.(C) 2763/2013**

M/S BAJAJ OVERSEAS IMPEX

..... Petitioner

versus

THE SPECIAL COMMISSIONER-I & ANR.

..... Respondents

AND

+ **W.P.(C) 2766/2013**

M/S AARCO ELECTRONIKS (DELHI)

..... Petitioner

versus

THE ADDL. COMMISSIONER VAT & ANR.

... .. Respondents

Advocates who appeared in this case:

For the Appellant : Mr Balram Sangal, Mr Rajesh Jain, Mr Rajesh Mahna, Mr Virag Tiwari and Mr Vineet Bhatia, Advocates.

For the Respondent : Ms Avnish Ahlawat and Mr Nitesh Kumar, Advocates

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. These writ petitions raise common issues and are, therefore, being decided together. We shall refer to the facts of the W.P.(C) No.2763/2013. The petitioner has challenged the order dated 21.03.2013 whereby the Special Commissioner

has directed the petitioner to deposit a sum of ₹ 25 lacs as a condition precedent for hearing the objections. While doing so, the said Special Commissioner invoked the provisions of the 3rd proviso to Section 74(1) of the Delhi Value Added Tax Act, 2004 (hereinafter referred to as the “said Act”). The said 3rd proviso was introduced with effect from 01.10.2011 by virtue of the Delhi Value Added Tax (Second Amendment) Act, 2011.

2. In respect of W.P.(C) No.2763/2013, the relevant period is the financial year 2010-2011 whereas in W.P.(C) No.2766/2013, the relevant period is the financial year 2008-2009. In so far as W.P.(C) No.2763/2013 is concerned, the petitioner had filed returns on a monthly basis under the assessment procedure provided in Section 31 of the said Act. Subsequently, the Value Added Tax Officer passed 12 separate default assessment orders for each month of the financial year 2010-2011 on 26.12.2012. By virtue of the said default assessment orders an additional tax demand of ₹ 83,20,595/- was raised. The interest amount was also computed at ₹ 25,43,571/- and, therefore, the disputed tax amount along with interest thereon was computed at ₹ 1,08,64,166/-. In addition, penalties were also imposed totaling to ₹ 89,17,873/-. Since the petitioner was dissatisfied with the default assessment orders, the petitioner filed objections under Section 74 of the said Act on 11.02.2013. As a pre-condition for hearing those objections, the Special Commissioner (the Objection Hearing Authority) by virtue of the impugned order dated 21.03.2013, as mentioned above, imposed a pre-condition of a deposit of ₹ 25 lacs being made by the petitioner. It is against that order that the petitioner in W.P.(C) No.2763/2013 is before us. In the other writ petition, that is W.P.(C) No.2766/2013, a similar sequence of events has occurred and it ultimately resulted in the impugned order dated 19.03.2013 whereby the petitioner has been asked to pre-deposit 25% of the disputed tax and interest and 10% of the penalty amount.

3. In both these petitions, the contention raised on behalf of the petitioner is that the 3rd proviso to Section 74(1) did not exist on the statute book during the relevant period, that is 2008-2009 in W.P.(C) No.2766/2013 and 2010-2011 in W.P.(C) No.2763/2013. Secondly, it was contended that their right to file objections was a substantive right and was more or less like the right to file an appeal. At the point of time when they filed their returns, the 3rd proviso to Section 74(1) of the said Act did not exist on the statute book. Therefore, their substantive right of preferring objections without the requirement of making a pre-deposit could not be taken away by virtue of an amendment which was neither expressly retrospective nor by implication. In support of these arguments, the learned counsel for the petitioners relied upon the following decisions:-

1. **Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh & Ors.**: 4 STC 114 (SC).
2. **Khazan Chand Nathi Ram v. State of Haryana & Others**: 136 STC 261 (P & H).
3. **Vitthalbhai Naranbhai Patel v. Commissioner of Sales Tax, Madhya Pradesh**: 12 STC 219 (SC).
4. **Deputy Commercial Tax Officer v. Cameo Exports & Others**: 147 STC 218 (Mad).

4. In response to the arguments advanced by the learned counsel for the petitioners, the learned counsel appearing on behalf of the respondents, first of all, submitted that there was nothing new which was introduced by virtue of the insertion of the 3rd proviso to Section 74(1) of the said Act. It was contended that Section 35(2) permitted the enforcement of recovery of the assessed tax and penalty even before the objections were disposed of or resolved by the Objection Hearing Authority. It was submitted that although the language of sub-section 2 of Section 35 of the said Act is couched in the negative, in the sense that, it has

been provided that the Commissioner may not enforce the payment of any amount in dispute under an assessment until the objection is resolved by the Commissioner, it did not mean that the Commissioner could not enforce the payment of the assessed tax and penalty before the objections were resolved. It was contended that even under Section 35(2), the Commissioner could ask for payment of the assessed tax and penalty. Therefore, according to the learned counsel for the respondents, nothing new as such has been added by the insertion of the 3rd proviso to Section 74(1) of the said Act.

5. It was contended in this situation that the two provisions of Section 35(2) and Section 74(1) of the said Act should be read harmoniously. And if it is so read, then, it would easily be seen that the requirement of making a deposit existed even prior to the insertion of the 3rd proviso to Section 74(1) of the said Act.

6. The second point urged on behalf of the respondents was that the relevant date for considering the applicability of the 3rd proviso to Section 74(1) of the said Act would not be the date of the return but would be the date of filing of the objections. In the present case, in both the writ petitions, the default assessment orders had been made after the amendment and, consequently, the objections had also been filed after the amendment had been introduced. Therefore, according to learned counsel for the respondents, the 3rd proviso to Section 74(1) would be clearly applicable in the case of the petitioners herein. Thirdly and lastly, it was contended on behalf of the respondents that the decisions relied upon by the learned counsel for the petitioners pertained to appeals and, as such, they were not applicable to the facts of the present cases because in the present cases what was being considered was the right to make objections and not the right of filing appeals. It was contended that the objections contemplated under Section 74 of the said Act could not be construed appeals.

7. The learned counsel for the respondents had also placed reliance on a Division Bench decision of this Court in the case of **Sales Tax Bar Association v. Government of NCT of Delhi** in W.P.(C) No.4236/2012 and or other connected matters decided on 07.12.2012.

“35. Collection of assessed tax and penalties

(2) Where a person has made an objection to an assessment or part of an assessment in the manner provided in section 74 of this Act, the Commissioner may not enforce the payment of any amount in dispute under that assessment until the objection is resolved by the Commissioner.

- (a) any amounts due under this Act that are not the subject of a dispute before the Commissioner; or
- (b) any amounts due under this Act where the person has made an appeal to the Appellate Tribunal.

“74. Objections

- (a) an assessment made under this Act (including an assessment under section 33 of this Act); or
- (b) any other order or decision made under this Act,

PROVIDED that no objection may be made against a non-appealable order as defined in section 79 of this Act:

PROVIDED FURTHER that no objection against an assessment shall be entertained unless the amount of tax, interest or penalty assessed that is not in dispute has been paid failing which the objection shall be deemed to have not been filed:

PROVIDED ALSO that the Commissioner may, after giving to the dealer an opportunity of being heard, direct the dealer to deposit an amount deemed reasonable, out of the amount under dispute, before such objection is entertained:

PROVIDED ALSO that only one objection may be made by the person against any assessment, decision or order:

PROVIDED ALSO that in the case of an objection to an amended assessment, order, or decision, an objection may be made only to the portion amended:

PROVIDED ALSO that no objection shall be made to the Commissioner against an order made under section 84 or section 85 of this Act if the Commissioner has not delegated his power under the said sections to other Value Added Tax authorities.

(2) xxxx xxxx xxxx xxxx”

(Underlining added)

9. A plain reading of Section 35 would indicate that as a normal rule, the Commissioner is not to enforce the payment of any amount in dispute under an assessment until the objections, if preferred, are resolved by the Commissioner. In other words, normally, the Commissioner cannot and does not insist upon the payment of any amount in dispute till the objections are decided. Section 74 provides for making of the objections. The 3rd proviso to Section 74(1) was introduced with effect from 01.10.2011 did not exist. In another words, prior to 01.10.2011, the Commissioner could not have insisted upon a deposit being made as a condition for entertaining the objection under Section 74. It is only after 01.10.2011 that the Commissioner could, after giving the concerned dealer an

opportunity of being heard, direct the dealer to deposit an amount deemed reasonable out of the amount under dispute as a pre-condition for entertaining the objection filed by the dealer under Section 74. It is also apparent that while inserting the 3rd proviso to Section 74(1), it has not expressly been made retrospective. The learned counsel for the petitioners had drawn our attention to the provisions of Section 74A(5), 81(2) 2nd proviso and Section 106(4) which are all provisions which have been expressly made retrospective. It is therefore, clear that where the legislature wanted a provision to have retrospective effect it had done so expressly. In the present case, the 3rd proviso the Section 74(1) has clearly not been expressly made retrospective. It is also not retrospective by implication. The learned counsel for the respondents were unable to point out any provision which would indicate that the said proviso was applicable retrospectively by implication.

10. In this background, it would be pertinent, at this juncture, to examine the decisions referred to by the learned counsel for the parties. In ***Hoosein Kasam Dada*** (*supra*) the Supreme Court held that a right of appeal was not merely a matter of procedure but that it was a substantive right. It further held that the right of appeal from a decision of an inferior Tribunal to a superior Tribunal becomes vested when the proceedings are first initiated in and before a decision is given by a inferior court/Tribunal.

11. It was also observed by the Supreme Court that a provision which is calculated to deprive the appellant of a vested settled right of appeal cannot be regarded as a mere alteration in procedure. The Supreme Court, *inter alia*, observed as under:-

“Finally, Sri Ganapathy Iyer faintly urges that until actual assessment there can be no “lis” and, therefore, no right of appeal can accrue before that event. There are two answers to this plea.

Whenever there is a proposition by one party and an opposition to that proposition by another a “lis” arises. It may be conceded, though not deciding it, that when the assessee files his return a “lis” may not immediately arise, for under Section 11(1) the authority may accept the return as correct and complete. But if the authority is not satisfied as to the correctness of the return and calls for evidence, surely a controversy arises involving a proposition by the assessee and an opposition by the State. The circumstance that the authority who raises the dispute is himself the judge can make no difference, for the authority raises the dispute in the interest of the State and in so acting only represents the State. It will appear from the dates given above that in this case the “lis” in the sense explained above arose before the date of amendment of the section. Further, even if the “lis” is to be taken as arising only on the date of assessment, there was a possibility of such a “lis” arising as soon as proceedings started with the filing of the return or, at any rate, when the authority called for evidence and started the hearing and the right of appeal must be taken to have been in existence even at those dates. For the purposes of the accrual of the right of appeal the critical and relevant date is the date of initiation of the proceedings and not the decision itself.”

12. It is apparent from the above extract that for the purposes of accrual of the right of appeal the critical and relevant date is the date of initiation of the proceedings and not the decision itself. In the context of the factual matrix of the present petitions, it would translate to the date of filing of the returns and not the date of the default assessment orders or even the date on which the objections were filed. It is apparent that if the returns filed by the dealer are accepted, then there is no *lis*. However, if the returns are not accepted, as in the present case, there is a clear *lis* between the parties. And, that *lis* would be considered to have arisen on the date on which the return was filed.

13. In ***Khazan Chand Nathi Ram*** (*supra*) the Punjab and Haryana High Court considered a similar situation. The High Court held that the right of appeal was a vested right and accrued to the litigant and existed as on and from the date the *lis*

commenced. It further held that such a right would be governed by the law prevailing on the date of the institution of the suit or proceeding and not by the law that prevails on the date of its decision or at the date of the filing of the appeal. The court held as under:-

“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 (as applicable to State of Haryana).”

14. It is obvious that the Punjab and Haryana High Court took the view that the *lis* in that case had commenced on the date when the return was filed or was required to be filed.

15. In ***Vitthalbhai Naranbhai Patel*** (*supra*) a Constitution Bench of the Supreme Court noticed its earlier decision in ***Hoosein Kasam Dada*** (*supra*) and approvingly noted that the decision in ***Hoosein Kasam Dada's*** case proceeded on the ground that when a *lis* commences, all rights get crystallized and no clog upon a likely appeal can be put, unless the law was made retrospective expressly or by clear implication. However, on the facts of the case before it, the Supreme Court observed that, from the record of that case, they could not determine as to when the *lis* commenced and therefore, they could not conclusively state as to whether the *lis* had commenced before the amendment of the law and that the ruling in ***Hoosein Kasam Dada's*** case would or would not apply. However, the fact remains that the ruling in ***Hoosein Kasam Dada's*** case clearly implies that all the rights get crystallized on the date on which the *lis* commences. As we have noticed above, when a return is filed it may or may not result in a *lis*. In case the return is accepted, obviously there is no *lis*. However, when a return is

not accepted, for whatever reason, there is a clear *lis* between the assessee and the revenue. In such a situation the *lis* would be deemed to have commenced on the date of which the return was filed. This is exactly what was noted by the Punjab and Haryana High Court in the case of ***Khazan Chand Nathi Ram*** (*supra*).

16. In the case of ***Cameo Exports*** (*supra*), *inter alia*, a specific question that was required to be examined was whether the right of appeal had crystallized and vested in a party on the date of filing of the return or on some other date. After examining various decision including the decisions in ***Hoosein Kasam Dada*** (*supra*) and ***Vitthalbhai Naranbhai Patel*** (*supra*) a Division Bench of the Madras High Court held as under:-

“25. In view of the foregoing discussion, we hold that the crucial date on which the right of the assessee to prefer an appeal under Section 31 or Section 36 of the Act is the date on which the returns are filed under the Act. In all these appeals, returns were filed long prior to the date when the provisions of Section 31 of the Act was amended by virtue of Act 14 of 1999. Further more, it is not disputed by the parties that the aforesaid amendments to the Act have not been given retrospective effect as and from an anterior date and those amendments are prospective. Therefore, the appeals are liable to be entertained without insisting of pre-deposit of 25 per cent of the disputed tax as per the amended provisions of the Act.”

17. All these decisions go to show that the right of appeal is a substantive right and it gets crystallized on the date on which the return is filed. An interference with the substantive rights, which already stand vested in a party at the time when the return is filed, that interference can only be done by an expressly retrospective amendment or by an amendment which is clearly retrospective by implication. In the present case, we find that there is no express retrospectivity insofar as the 3rd proviso to Section 74(1) is concerned nor can any retrospectivity be read into the said provision by implication. Therefore, in view of the above

decisions, the law applicable would be the one that obtained on the date when the returns were filed. In the present writ petitions, the returns were filed much prior to the introduction of the 3rd proviso of Section 74(1) and therefore, the said proviso would have no applicability. Consequently, the Commissioner could not have insisted on the petitioners making a pre-deposit as a condition for having their objections heard.

18. As regards the submissions made by learned counsel for the respondents that nothing new was introduced by the 3rd proviso to Section 74(1) inasmuch as similar provisions were contained in Section 35(2) of the said Act, we fail to see how this can be an argument at all. This is so because the provisions of the Section 35(2) and the 3rd proviso of Section 74(1) of the said Act operate in entirely different fields. Section 35 deals with collection whereas Section 74 deals with objections. It is very clear that *dehors* the issue of collection of assessed tax and penalty under Section 35, the objections could be preferred and entertained by the Objection Hearing Authority under Section 74 of the said Act. However, because of the insertion of the 3rd proviso to Section 74(1) of the said Act, an impediment or a clog has been created in the right of a dealer in having his objections heard until and unless a deposit as directed by the Commissioner is made. While the collection of tax and penalty under Section 35 is not an impediment to the hearing of the objections, the requirement of making a deposit under the 3rd proviso of Section 74(1) of the said Act is a definite impediment in the hearing/entertainment of objections which may be taken by dealers. The two provisions, therefore, operate in entirely different fields. The submissions made by the learned counsel for the respondents are clearly untenable.

19. Another submission which had been made by the learned counsel for the respondents was that the date filing of objections should be the material date. This aspect has already been dealt with by us above wherein we referred to the

various decisions of the Supreme Court as also the decisions of the Punjab and Haryana High Court and the Madras High Court which have all led us to conclude that it is the date of filing of the return which is the relevant date and not the date of filing of the objections.

20. Lastly, it was contended by the learned counsel for the respondents that all those decisions which had been referred to by the petitioners relate to appeals and not to objections and there is clear distinction between appeals and objections. While there may be some merit in this contention that objections are not appeals as such, the point which is relevant is that the right of appeal is a substantive right and that substantive right cannot be taken away retrospectively unless it is by way of specific, express or implied, legislative provision. Similarly, the right of making objections is not a mere procedural right. It is a substantive right. Even if we construe the right of making objections as being different from a right of appeal, the foundation of the argument remains the same. Both are substantive rights and they cannot be interfered with lightly. Therefore, all the decisions referred to by the learned counsel for the petitioners and which have been taken note of by us, would be equally applicable to the objections under Section 74 of the said Act.

21. Even the decision cited by the learned counsel for the respondents in the case of ***Sales Tax Bar Association*** (*supra*) does not tend to support any of the contentions raised by her. On the contrary, it would tend to support the submissions made on behalf of the petitioner. This would be apparent from the following extract from the said decision:-

“21..... Section 35(2) again provides that where objections have been preferred, the demand under Sections 32 and 33 may not be enforced until the objection is resolved. A conjoint reading of the said provisions clearly shows that enforcement of the demand under Sections 32 and 33 if made the subject matter of objection,

is dependent upon the outcome of the objections and till the objections are decided, the disputed demand under Sections 32 and 33 is not to be enforced. Though undoubtedly the third proviso to Section 74(1) has now given a power to the Objection Hearing Authority to direct the disputed tax or penalty or any part thereof also to be deposited but the very fact that the second proviso as well as Section 35(2) have also been retained along therewith on the statute book is indicative of the invocation of the third proviso being only if the circumstances so demand and not in the usual course.....”

“23..... On the contrary a reading of Section 74(1) and Section 35 clearly shows that the liability for payment of the disputed demand under a best judgment assessment under Sections 32 & 33 arises only on the conclusion of objections and which as aforesaid is after the decision on objections and not prior thereto. That being the position, the question of the assessee, during the pendency of objections having the status of a defaulter and thereby suffering any disability does not arise.”

22. In view of the forgoing discussion, we hold that since the returns in each of these petitions had been filed much prior to the introduction of the 3rd proviso to Section 74(1) of the said Act, the Commissioner could not have invoked that proviso and required the petitioners to make the pre-deposits as a condition for entertaining their objections. Consequently, the impugned orders are set aside and the respondents are directed to hear the objections without the requirement of the petitioners making any pre-deposit. The writ petitions are allowed as above. There shall be no order as to costs.

23. All the pending applications also stand disposed of.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

MAY 8, 2013/MK/RK