IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

MVA TAX APPEAL NO.18 OF 2015

M/s Siddhi Diamonds Tools and Abrasives ... Appellant
v/s
Assistant Commissioner of Sales Tax and ors. ... Respondents

Mr Ram Upadhyay i/b M/s Law Competere Consultus for Appellant.
Mr J.S. Saluja, AGP for State.

CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA JJ.

DATE : 15TH SEPTEMBER 2015

***P.C.*:-**

1. Heard Mr Upadhyay, learned counsel appearing on behalf of the Appellant – Applicant and Mr Saluja, learned counsel appearing on behalf of the Respondent – State. This Appeal of the Appellant challenges the order passed by the 5th Bench of the Maharashtra Sales Tax Tribunal, Mumbai in VAT Appeal No.164 of 2015 on 30th March 2015.

2. The Tribunal has partly allowed this Appeal. It has modified the order of the 1st Appellate Authority. It has directed the

Appellant to deposit Rs.22,00,000/- with the 1st Appellate Authority on or before 30th May 2015.

3. The Appellant is aggrieved by such a direction. Mr Upadhyay, learned counsel appearing on behalf of the Appellant, submits that the Tribunal has not adverted to any of the relevant and necessary factors. The Appellant has pointed out that the order was passed by the Assessing Officer in the absence of the Appellant. Secondly, he has relied upon the material in his possession. The Appellant is a sole proprietary concern. He was in personal difficulty during March 2012 till June 2013 because his father was under hospitalization and eventually expired on 26th June 2013. He had entrusted the business affairs to his Manager and who filed a return of income. That was based on the knowledge of the Manager and that is how this return filed for the period 2008-2009, the imported goods were held to be not accounted for. The import was bonafide but was not accounted for in the light of the reasons assigned above. The order of assessment was passed after considering average profit of 35 %. This assessment by the Assessing Officer resulted in levy of higher tax, penalty and interest. That is why the Appeal was filed

and the 1st Appellate Court, without adverting to the requisite materials, imposed the condition of pre-deposit. That condition is that the Appellant should pay a sum of Rs.25,46,131/- and that is because it is assumed that the Assessing Officer's order is correct and legal.

4. The Tribunal should have looked into all these factors, the hardship and thereafter pass an order imposing reasonable condition. The Tribunal has brought down the sum only to Rs.22,00,000/-. It is not possible for the Appellant to meet such a condition.

5. Mr Upadhyay places reliance upon two judgments of the Hon'ble Supreme Court of India, the first one is in the case of State of Kerala v/s C. Velukutty, reported in 1966 (17) STC 465 SC. There, the Hon'ble Supreme Court has held that even the Assessing Authority should have some basis or material before it while passing the order. The Assessing Authority must not act capriciously and dishonestly, he could make an assessment of the income fairly by considering the business and the nature of dealings.

6. The second judgment relied upon is in the case of M/s

Benara Valves Ltd. and others, v/s Commissioner of Central Excise and another, in Civil Appeal Nos.5166 and 5167 of 2006, decided on 23rd November 2006. Reliance is placed by Mr Upadhyay on paragraph 5 of this judgment of the Hon'ble Supreme Court. With the assistance of Mr Upadhyay, we have perused the memorandum of appeal and all annexures. We have found that the Assessing Officer has made an estimate or judgment of the income on the basis that certain imports carried out were not accounted for. He has taken the value of the imported goods and thereafter calculated and computed the tax component. He has thereafter worked out the penalty and interest. This assessment according to us, may be capable of being challenged in appeal. That is so challenged and the Appeal is pending is also apparent. The Appellant had sought stay of recovery of tax during the pendency of this Appeal. That is how he made the application and the 1st Appellate Authority passed an order holding that prima facie the Appellant has not disclosed the imports in his returns and that these goods are sold locally as scrap. The VAT on the same is not disclosed nor paid. That is why the quantification can only be determined after verification of books.

Therefore, he directed payment of Rs.25,46,131/- as a pre-condition for deciding the Appeal on merits.

7. Against such an order, the Appellant – Applicant approached the Tribunal. The Tribunal heard the Appellant extensively, considered the relevant factors and in paragraph 6 found that the Appellant should be directed to pay the amount of tax and interest but it has computed and brought down the amount of Rs.25,46,131/- to Rs.22,00,000/-.

8. We do not find that the Tribunal's order raises any substantial question of law. The discretion has been exercised reasonably and not arbitrarily or capriciously. The principles which are laid down in the decision of M/s Banara Valves Ltd. have been thus applied. If the order passed by the Tribunal is discretionary and it has adverted to necessary and requisite materials, then, we do not find that it has in any manner brushed aside the legal principles. Whether the assessment made by the Assessing Officer is correct or not will have to be decided by the 1st Appellate Authority at the hearing of the Appeal. The Appellant will get opportunity to place relevant facts, figures and materials before the Authority at that

time. However, there can not be and in the peculiar facts and circumstances an unconditional stay of recovery of taxes. That is how the rights and equities have been balanced by the Tribunal. Such an order cannot be termed as contrary to law, arbitrary or perverse warranting our interference. The appeal does not raise any substantial question of law. It is dismissed.

9. We also do not find any substance in the contention of Mr Upadhyay that there is adequate material to guide the Appellate Authority in matters of granting stay pending disposal of the Appeal. Therefore, this guiding factors, if any, have also been taken into consideration in the present case.

(B.P. COLABAWALLA, J.) **(S.C.DHARMADHIKARI J.)****

** **CERTIFICATE**
Certified to be a true and correct copy of hthe original signed Judgment/Order.