

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

VATAP No.10 of 2013 (O&M)
RESERVED ON: 05.08.2015
DATE OF DECISION: 14.08.2015

M/s HPL Socomec P. Ltd.

....Appellant

versus

State of Haryana and others

.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE G.S. SANDHAWALIA

Present: Mr. Rajiv Agnihotri, Advocate for the appellant

Ms. Mamta Singla Talawar, AAG, Haryana

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

This is an appeal under Section 36 of the Haryana Value Added Tax Act, 2003 against the order of the Haryana Tax Tribunal dated 05.09.2011 dismissing the appellant's appeal against the order of the Higher Level Screening Committee (HLSC) dated 10.08.2005 by which the HLSC held the appellant's industrial unit to be eligible for sales tax exemption only on the fixed capital investment of Rs.3,26,210/- and for the issuance of an eligibility certificate entitling the appellant to avail exemption to that extent alone, as against the appellant's claim for sales tax exemption of Rs.54.08 lacs. The appellant has also challenged the order of the Tribunal dated 22.06.2012 rejecting its application for review of the order dated 05.09.2011.

2. In paragraph-27 of the appeal, several questions of law have been raised. We, however, admit the appeal on the following substantial questions of law as framed by us:-

- i) Whether the Higher Level Screening Committee is entitled to reopen a case on its own where its earlier decision had been overruled by the appellate authority-Secretary in exercise of powers under Rule 28A(5) (g) of the Haryana General Sales Tax Rules, 1975?
- ii) Whether the Higher Level Screening Committee is entitled to ignore the order of the appellate authority i.e. Secretary passed under Rule 28A(5) (h) and to refuse to comply with the order on the basis that it was doing so on a ground that had not been considered by the appellate authority?

We have answered the questions in the negative, in favour of the appellant/assessee.

3. The appellant is engaged in the manufacture of onload changeover switches, switch boards and parts and accessories in relation thereto. The appellant's unit commenced commercial production on 24.06.1993. On 26.06.1993, the appellant applied for an eligibility certificate. The application was pending till the year 1998.

4. On 28.11.1996, the Deputy Excise and Taxation Commissioner reported to the HLSC that the appellant was not eligible for exemption as out of the total fixed capital investment of Rs.58.75 lacs claimed in the application, Rs.54.08 lacs was in respect of purchase of old moulds and dies. On a finding that the investment in old moulds and dies was more than 25% of the fixed capital investment, it was held that the company did not qualify to be a new industrial unit in view of rule 28A of the Haryana General Sales Tax Rules, 1975. Accordingly, it was observed that the appellant was not qualified for the grant of an eligibility certificate. By an order dated 29.01.1998, the HLSC held that the appellant was not entitled to be issued the eligibility certificate and rejected the appellant's application which was made in Form S.T.70. What is recorded in the order is important and as follows.

The appellant's claim was enquired into by the field authorities and was also scrutinized by the Deputy Excise and Taxation Commissioner and G.M., DIC, Gurgaon. A joint inspection report was put up before the HLSC. The HLSC ordered another joint inspection of the appellant's unit. The appellant was directed to call back the entire machinery which had been sent to Chennai. The appellant, however, informed the district authorities that the machinery could not be called back from Chennai and requested for the inspection of the machinery at Chennai. An officer of the department visited Chennai and made necessary enquiries regarding the machinery which was available with a concern by the name of M/s Devi Polymers Limited at Chennai. The appellant's application for an adjournment thereafter before the HLSC was rejected with the observation that the appellant was deliberately trying to delay the matter after having availed the maximum exemption. It was held

that the investment of Rs.54.08 lacs had been made in old machinery i.e. dies and tools. They have been shown as having been purchased from Havell's Circuit Breakers Private Limited, Noida. It was held that the machinery had earlier been used by M/s Havell's Circuit Breakers Private Limited, Noida and had been purchased from them. The order contains reasons in respect of the finding that the machinery in respect of which the exemption was claimed was old. It is not necessary to refer to these reasons for ultimately it has been held that the machinery was new and that finding has attained finality. It has not been challenged before us by the respondents/department.

5. The appellant's first appeal before the Commissioner Industries was dismissed on 26.07.1999. The appellant filed Civil Writ Petition No.11173 of 1999 in this Court challenging this order. This Court by an order dated 26.5.2000 directed the HLSC to hold a fresh enquiry into the question as to whether the moulds and dies were old or new and directed the company to be associated with the enquiry.

6. The HLSC, by an order dated 17.05.2002, once again concluded that the same were old.

7. This brings us to the most crucial aspect of the matter. The appellant filed an appeal before the Financial Commissioner & Secretary Industries, Department of Industries. The appeal was allowed by an order dated 09.05.2003. It is important to note that the Secretary by the said order observed that it was not disputed that the appellant purchased a part of the machinery in question from HPL India Limited in the year 1993 of the value of Rs.54.08 lacs and commenced commercial production on 26.06.1993 and that the

appellant at some point of time shifted this machinery to M/s Devi Polymers Limited at Chennai who was doing job work for the appellant. It was further noted that the final product was assembled in the premises rented by the appellant. These observations are important in view of the contention now raised that the machinery had never been installed in Haryana. It is significant that the order notes that a visit was made to the appellant's premises by the DETC, Gurgaon on 22.06.1995 where he was told that the machinery had been sent to Chennai. At that time, it was not even contended that the machinery had not earlier been installed in Gurgaon as is now sought to be contended. The order has commented adversely upon the fact that though the notices were issued in October, 1993, the first visit was made by the DETC to the appellant's premises only in June, 1995. It was conclusively held that the tools and dies were new at the time of purchase and that the HLSC had wrongly concluded otherwise. This finding has attained finality. The Secretary passed the following order which is vital for the purposes of this appeal:-

"I, therefore, quash the impugned order, accept the appeal & direct the HLSC to issue eligibility certificate to the appellant."

This order too has attained finality.

By the impugned order, the HLSC has sought to reopen the entire matter and to reject the application to a substantial extent now on the ground that the machinery had never been installed in Haryana. It is necessary to examine the consideration of the impugned order by referring to the relevant provisions of the Act and the rules.

We have come to the conclusion that under the scheme under Rule 28A the order of the Secretary had attained finality and that it was not open to the HLSC to ignore the order and to hear the matter afresh on the ground that the HLSC had failed to consider a particular aspect of the matter.

8. Rules 28A(2) (c), (f) (i), (g) (iii), 5(a) to (h) of the Haryana General Sales Tax Rules, 1975, read as under:-

"Rule-28A

CLASS OF INDUSTRIES, PERIOD AND OTHER CONDITIONS FOR
EXEMPTION/DEFERMENT FROM PAYMENT OF TAX.

(2) For the purpose of this Chapter, unless the context otherwise requires.

(a) & (b)

(c) "New industrial Unit" means a unit which is or has been set up in the State of Haryana and comes or has come into commercial production for the first time during the operative period and has not been or is not formed as a result of purchase or transfer of old machinery except when purchased in the course of import into the territory of India or when the cost of old machinery does not exceed 25% of the total cost of machinery re-establishment, amalgamation, change of lease, change of ownership, change in constitution, transfer of business, reconstruction or revival of the existing unit;

(d), (e)

(f) 'eligible industrial unit' means:-

(i) a new Industrial Unit of expansion or diversification of the existing unit, which-

(I) to (V) & (ii)

(g) "fixed capital investment" means investment in-

(i) & (ii)

(iii) new plant and machinery Including generating set), tools and equipment.

..... .

5(a) Every eligible Industrial Unit which is desirous of availing benefit under this rule shall make an application in form S.T.70 in triplicate alongwith attested copies of the documents mentioned therein to the General Manager District Industries Centre within 90 days of the date of its going into commercial production or the date of coming into force of this rule whichever is later. No application shall be entertained if not preferred within time. An application with incomplete or incorrect particulars including the documents required to be attached therewith shall be deemed as having not been made if

the applicant fails to complete it on an opportunity afforded to him in this behalf.

b) Applications from small scale units will be considered by the Lower Level Screening Committee and those from Medium/Large scale units by the Higher Level Screening Committee.

(c) The General Manager, District Industries Centre shall immediately forward one copy of the application and documents on receipt to the Deputy Excise and Taxation Commissioner incharge of the District who will send his comments within a period of 21 days. In case of medium/Large scale industry, a copy of the comments will also be sent by him to the Commissioner.

(d) The General Manager, District Industries Centre will, within 30 days of receipt of the application from the small scale industry, place the proposal before the Lower Level Screening Committee with his report and recommendations alongwith comments, if any of the Deputy Excise and Taxation Commissioner concerned for its decision.

(e) The General Manager, District Industries Centre will within 30 days of receipt of the application from the medium/large scale industry, forward his report and recommendations alongwith the comments if any, of the deputy Excise and Taxation Commissioner to the Additional Director of Industries who will place his proposal before the Higher Level Screening Committee within a further period of 15 days for its decision.

(f) An appeal from the original decision of the lower Level Screening Committee shall lie to the Higher Level Screening Committee, if preferred within 30 days of communication of the decision. The decision of the Higher Level Screening Committee in such appeal shall be final.

(g) An appeal from the original decision of the Higher Level Screening committee shall lie to the Secretary Industries, if preferred within 30 days of communication of the decision. The decision of the Secretary Industries shall be final."

(h) The eligibility certificate will be issued by the General Manager District Industries Centre in cases approved by the Lower Level Screening Committee and by the Director of industries or any officer nominated by him not below the rank of Additional Director in cases approved by the Higher Level Screening Committee normally within a period of 45 days from the date of receipt of the application in the office of the General Manager, District Industries Centre. The certificate shall be valid from the date of commercial production or from the date of issue of entitlement/exemption certificate as the case may be

for a period as laid down under sub-rule(4) unless cancelled or withdrawn. A copy of the eligibility certificate shall also be sent to the Deputy Excise and Taxation Commissioner concerned."

9. The appellant's application would be considered against the provisions of rule 28A(2)(c), (f), (i), (g)(iii). In order to be considered an eligible industrial unit, the enterprise must be a new industrial unit or an extension or diversification of existing unit which fulfills the conditions in clauses (I) to (V) of rule 28A(2)(f)(i). In order to be considered a new industrial unit within the meaning of Section 28A(2)(c), the unit must be one which has been set up in the State of Haryana and has not been or is not formed as a result of purchase or transfer of old machinery except when purchased in the course of import into the territory of India or when the cost of old machinery does not exceed 25% of the total cost of machinery, etc. Thus, as far as the second part is concerned, it was conclusively held by the Secretary that the machinery was new and not old. That finding has attained finality.

The issue as to whether the unit has been set up in the State of Haryana or not was not considered, as the appellant's application for the eligibility certificate was not rejected on that ground. It was never contended by the department that the unit had not been set up in the State of Haryana. This is despite the fact that site visits were made and during those visits, the authorities were fully aware of the fact that the machinery had been shifted to Chennai to the premises of M/s Devi Polymers Limited who were doing job work for the appellant at the premises rented by the appellant. As noted earlier, the order of the Secretary expressly records that it was not disputed that the appellant had purchased a part of the machinery in the year 1993 of

the value of Rs.54.08 lacs and had come into commercial production on 24.06.1993 and that the appellant had shifted this machinery to Chennai. Implied therein is a finding that the machinery had been set up in Haryana. There is an implied if not an express admission to that effect in the order. In any event, it was not contended in the earlier proceedings that the machinery had not been set up in Haryana.

10. To reiterate, therefore, the Secretary had by the order dated 09.05.2003 directed the HLSC to issue the eligibility certificate to the appellant. The scheme of rule 28A(5) establishes the hierarchy of the authorities and the binding nature of their orders. The appellant is a medium/large scale industry. It made the application for the eligibility certificate in Form S.T.70 as required by sub-rule 5(a) and (c), to the General Manager, District Industries Centre. The appellant being a medium/large scale unit, its application was to be considered by the HLSC. Under clause (c), the General Manager, District Industries Centre was to immediately forward a copy of the application to the Deputy Excise & Taxation Commissioner who was to send his comments. Under clause (e), the General Manager, District Industries Centre was to forward his report and recommendations along with the comments, if any, of the DETC to the Additional Director of Industries. The Additional Director of Industries was to place his proposal before the HLSC. What is important for the present purposes is to note that an appeal against the decision of the Lower Level Screening Committee (LLSC) lies to the HLSC and the decision of the HLSC in such appeal shall be final and an appeal from the original decision of the HLSC lies to the Secretary Industries and the decision of the Secretary Industries shall be final. The appellant had challenged the

decision of the HLSC dated 29.01.1998 refusing to grant the eligibility certificate before the Secretary and the Secretary had, by the order dated 09.05.2003, expressly directed the HLSC to issue the eligibility certificate to the appellant. This order attained finality in view of rule 28A(5)(g). The HLSC thereafter had nothing to do with the matter. It had passed its order dated 29.01.1998 upon which it became *functus officio*. Its order was amenable to an appeal under rule 28A(5)(g) whereunder the decision of the Secretary became final which had not been challenged by the respondents.

11. In fact, upon the decision of the Secretary Industries, the HLSC had no jurisdiction to deal with the matter for any purpose and in any respect. The order of the HLSC dated 29.01.1998 had merged into the order of the Secretary dated 09.05.2003. Under clause (h), the Director of Industries or any officer nominated by him not below the rank of Additional Director ought to have issued the eligibility certificate, as the eligibility certificate ordered to be granted by the order of the Secretary dated 09.05.2003 must be deemed to have been an eligibility certificate issued by the HLSC.

12. Pursuant to the order of the Secretary, the matter was put up before the HLSC. The HLSC examined the matter treating the moulds and tools as new. Indeed, It was bound to do so in view of the order of the Secretary and the findings therein. The HLSC ought to have, in compliance with the order of the Secretary in appeal, granted the eligibility certificate. Instead, in its meeting held on 30.06.2004, it recorded its *prima facie* finding that the machinery had not been erected at Gurgaon and it was being

used in Chennai and that an investment of only Rs.3.26 lacs could be considered for tax benefits. The HLSC, on the one hand, recorded that nobody had appeared for the appellant at the final meeting and, on the other hand, recorded that "it was an undisputed fact" that the machinery worth Rs.54.08 lacs was not erected at the appellant's industrial unit at Gurgaon but was sent to M/s Devi Polymers Limited at Chennai.

13. In fact, as recorded in the order of the Secretary, the undisputed fact was to the contrary. As we indicated earlier, the undisputed fact was, albeit impliedly, that the machinery had been set up in Haryana and was shifted to Chennai. In view of the fact that the Secretary's order had attained finality, this dispute is entirely irrelevant if the HLSC did not have any jurisdiction to go into this new point on its own. The HLSC, however, held that the only point decided by the Secretary was that the dies and moulds were new and that the Secretary had not taken any decision as to whether the same had been set up at the appellant's unit in Haryana. Having come to the finding entirely without jurisdiction, that the machinery had not been set up in Haryana, the HLSC held the appellant to be entitled for tax exemption only to the extent of Rs.3,26,210/- as against the appellant's claim of Rs.54.08 lacs.

14. Under the scheme of Rule 28A, there is a clear hierarchy. The orders of the LLSC are appealable to the HLSC and the orders of the HLSC are appealable to the Secretary. In the first case, the order of the HLSC in appeal shall be final and in the second case the order in appeal of the Secretary shall be final. The orders appealed against merge into the orders of the appellate authorities. It is not open then for the HLSC to reopen

the order of the Secretary which had attained finality on another ground. This would be permissible only if the order of the Secretary in appeal had been reviewed, modified or set aside, assuming, of course, that the order could have been reviewed, modified or set aside. The HLSC, in any event, had no power or jurisdiction to review, modify or set aside the order of the Secretary. A view to the contrary would lead to an absurdity. Such a view would entitle the HLSC to refuse to comply with the order of the appellate authority i.e. the Secretary *ad infinitum*. There would be no end to the proceedings for in that event irrespective of the number of times that the order of the HLSC is overruled and set aside in appeal by the Secretary, it would be open to the HLSC to reconsider the matter on another ground neither urged before nor considered by the Secretary, i.e., the appellate authority. This would in effect permit the HLSC to sit in appeal over the orders of the appellate authority.

15. The appellant challenged the order of the HLSC before the Haryana Tax Tribunal, which passed the impugned order. The Tribunal held that the order in appeal of the Secretary had not mentioned the amount for which the eligibility certificate was to be issued and that the order was passed only on the issue of the machinery being old or new. Had we come to the conclusion that it was open to the HLSC to revisit the matter on another ground, we would have remanded the matter to the Tribunal for there is no satisfactory consideration even on facts as to whether the machinery had been installed in Haryana or not. However, as we are of the view that the HLSC had no jurisdiction to reopen the issue on another ground, we do not consider it necessary to do so. It would be an exercise in futility in view of our finding that the

HLSC had no jurisdiction to reopen the issue. The Tribunal wrongly held that merely because an issue had not been considered in the appeal, it was open to the HLSC to suo motu reopen the case.

16. Once an order of the Secretary in appeal against the order of the HLSC attains finality, the HLSC cannot reopen the same case including on a ground which had not either been urged before the Secretary or pressed by the department. It is true, as contended by Ms. Talwar, the learned Deputy Advocate General, Haryana, that the appellate order passed by the Secretary recorded that the only question which was to be decided was whether the tools and dies were new when the appellant purchased the same. That however would make no difference. It would not entitle the lower authority, in this case the HLSC, to reopen a matter which has attained finality before the appellate authority.

17. The questions are, therefore, answered in favour of the appellant and against the respondents. The impugned order of the Tribunal and of the HLSC are set aside. The respondents are ordered and directed to comply with the order of the Secretary dated 09.05.2003.

(S. J. VAZIFDAR)
ACTING CHIEF JUSTICE

14.08.2015
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(G. S. SANDHAWALIA)
JUDGE

Note: Whether reportable: YES
