IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

VATAP No.13 of 2013 (O&M)
DATE OF DECISION: 20.07.2015

M/s Elis Exports

…..Appellant

versus

The State of Haryana and another

.....Respondents

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

Present: Mr. Rohit Gupta, Advocate for the appellant

Ms. Mamta Singla Talawar, AAG, Haryana

..

S.J.VAZIFDAR, ACTING CHIEF JUSTICE:

1. This is an appeal under Section 36 of the Haryana Value Added Tax Act, 2003, against the order of the Special Bench of the Haryana Tax Tribunal dated 17.11.2009.

The Special Bench was constituted as the members of the Division Bench had differed on the question as to whether the revisional authority had jurisdiction under Section 40 of the Haryana General Sales Tax Act, 1973 (hereafter to be referred to as 'the HGST Act'). The Special Bench held that the revisional jurisdiction had rightly been invoked by the revisional authority. The appellant contends that assuming that the case on merits is well founded, it was a case for re-assessment under Section 31 by the assessing authority and not one for revision under Section 40.

2. Sections 31 and 40 of the HGST Act read as under:-

> "31. Reassessment of tax - If in consequence of definite information which has come into his

> possession, the assessing authority discovers that the turnover of the business of a dealer has been under assessed, or has escaped assessment in any year, the assessing authority may, at any time within three years from the date of final assessment order and after giving the dealer a reasonable opportunity, in the prescribed manner, of being heard, proceed to reassess the tax payable on the turnover which has been under assessed or has escaped assessment."
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> "40. Revision- (1) The Commissioner may on his own motion call for the record of any case pending before, or disposed of by, any officer appointed under sub-section (1) of section 3 of the Act to assist him or any Assessing Authority or Appellate Authority, other than the Tribunal, for the purposes of satisfying himself as to the legality or to propriety of any proceedings or of any order made therein and may pass such order in relation thereto as he may think fit:
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> Provided that no order, shall be so revised after the expiry of a period of five years from the date of the order:
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> Provided further that the aforesaid limitation of period shall not apply where the order in a similar case is revised as a result of the decision of the Tribunal or any court of law:
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> Provided further that the assessee or any other person shall have no right to invoke the revisional powers under this sub-section.
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> (2) The State Government may, by notification, confer on any officer the powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect of such areas as may be specified in the notification.
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> (3) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard."

3. The appellant contends that the following substantial question of law arises in this appeal:-

> "Whether on the facts and circumstances of the case, it was a case fit for revision under Section 40 of the Haryana General Sales Tax Act, 1973 or a case fit for reassessment under Section 31 of the said Act."

4. The appellant carries on business *inter alia* of the export of medicines. The appellant returned an aggregate turn over of about Rs.7.25 crores for the year 1998-99 in the quarterly returns filed with the Assessing Authority. At the time of assessment, the assessee contended that its true turnover as per books of accounts was only Rs.4.94 crores. The appellant furnished the balance-sheet along with a reconciliation statement which was accepted by the Assessing Authority. The assessing authority accepted the gross turnover to be Rs.4.94 crores as per the books. As the entire turnover of Rs.4.94 crores related to exports, the same was exempted from tax.

It is important to note a few aspects regarding the assessment order made by the ETO-cum-Assessing Authority under the HGST Act for the assessment year 1999-2000. The order *inter alia* states that the dealer had filed his returns assessing the gross turnover to be towards export out of India and accordingly had not deposited any tax. The order further states as follows. Being not satisfied with the returned sale version, a statutory notice was issued under Section 28(2) of the HGST Act. In response to the notice, the appellant produced the books of accounts and other relevant documents. It is important to note that the order expressly states that these books and relevant documents had been examined in detail and found to be maintained in the normal course of business. It is also important to note that the order states that there was some difference in sales in the return filed and in the books produced and that the appellant had furnished a reconciliation statement for the purpose of assessment. It is equally important to note that the Assessing Authority expressly stated that the account books of the dealer had been examined in detail and that the assessment order was passed keeping in view the same. The case was filed with a 'nil' demand as the Assessing Officer found the gross turnover to be almost entirely in respect of the exports.

A similar order was passed by the Assessing Authority under the Central Sales Tax Act, 1956. The order records that after allowing for the export claim no taxable turnover was left for the purpose of assessment and the case was filed ending in 'nil' demand.

5. This brings us to the disputed action initiated and taken by the Deputy Excise Taxation Commissioner under Section 40 of the HGST Act. By a notice dated 20.02.2003, addressed to the appellant, the revisional authority stated that he had examined and inspected the record for the said assessment year for the purpose of satisfying himself as to the legality and propriety of the assessment order. He recorded that he had observed that the assessment order suffered from the following illegalities and improprieties:-

> "1. Sale of Duty Entitlement Pass Book Licence to exporters worth Rs.53,05,167/- has escaped assessment as per information and Rs.2278165 as per balance sheet."

The notice stated that the assessment order, therefore, needed to be revised. By the notice, the appellant was given an opportunity to explain as to why the order be not revised.

6. The appellant filed a reply to the above notice. For the purpose of this appeal, it is necessary only to note the appellant's contention that the revisional authority had no jurisdiction to invoke the provisions of Section 40 of the HGST Act.

7. The revisional authority by an order dated 28.04.2004 held that this was a fit case under Section 40. On merits, it was held that the appellant was liable to tax on account of sale of Duty Entitlement Pass Book (DEPB) license to exporters. The revisional authority accordingly sent the matter back to the Assessing Authority for determining the tax liability on account of sale of DEPB by the appellant.

8. The appellant filed an appeal before the Tribunal. As we mentioned earlier, the members of the Division Bench of the Tribunal differed on the question as to whether the jurisdiction under Section 40 was rightly invoked or not. The matter was, therefore, referred to a special bench, which answered the question in the affirmative.

9. As noted by the Tribunal, when the assessment order was passed, it was a contentious issue. The DEPB was held to be goods by a Division Bench judgment of the Delhi High Court dated 24.07.2001 in *Philco Exports vs. Sales Tax Officer and others, [2001] 124 STC 503 (Delhi)*. A similar view was taken by this Court in *Liberty Enterprises vs. State of Haryana and another, [2007] 5 VST 12 (P&H)*, by the Bombay High Court in *Jindal Drugs Limited and another vs. State of Maharashtra and another [2008 of 17 VST 164 (Bom)]* and finally by the Supreme Court in *Yasha Overseas vs. Commissioner of Sales Tax & Ors., (2008) 8 Supreme Court Cases 681*. As we noted earlier, the assessment order was passed for the year 1998-99 on 18.05.2000 and for 1999-2000 on 27.4.2001 and for 2000-01 on 10.06.2002. The assessment orders in respect of the first two years were passed even before the judgment of the Delhi High Court. The Tribunal noted that while passing the assessment

order dated 10.6.2002 for the assessment year 2000-01, the Assessing Officer had obviously not noted the above judgments.

On merits, it was admitted that in view of the judgment of the Supreme Court, which we will shortly refer to, the appellant was liable to pay tax in respect of the sale of DEPB. The only question urged before us was that even so it was, at the highest, a case for re-assessment under Section 31 and not for revision under Section 40.

10. Mr. Gupta, however, submitted that there is a clear demarcation between the powers under Section 31 and Section 40 of the HGST Act. In this regard, he relied upon a judgment of this Court in *Haryana Agro Industries Corporation Limited vs. State of Haryana and others, [2002] 125 Sales Tax Cases 18 (P&H)*. The Division Bench held:-

> "8. A conjoint reading of the provisions quoted above shows that while section 31 speaks of reassessment of tax, section 40 provides for revision. Under section 31, the Assessing Authority can reassess the tax payable on the turnover which has been under-assessed or has escaped assessment. This power can be exercised within three years from the date of finalisation of assessment and subject to the giving of notice and reasonable opportunity of hearing to the dealer. Section 40(1) empowers the Commissioner to suo motu call for the record of the case pending before, or disposed of by, any officer appointed under section 3(1) to assist him or any Assessing Authority or Appellate Authority for the purposes of satisfying himself as to the legality or to propriety of any proceedings or of any order made therein and pass such order in relation to said proceedings or order as he may think fit. The period of limitation prescribed for exercise of power under this sub-section is five years from the date of the order. Sub-section (2) of section 40 empowers the State Government to issue notification conferring on any officer the powers of the Commissioner under sub-section (1). Sub-section (3) of section 40 represents embodiment of the rule of hearing. It provides that no order under section 40 can be passed adversely affecting any person unless such person is given a reasonable opportunity of being heard.

9. The above analysis of sections 31 and 40 shows that the Legislature has conferred powers upon the Assessing Authority and the Commissioner to deal with different types of cases and has prescribed different periods of limitation for exercise of powers under the two sections. While the Assessing Authority can undertake the exercise for reassessment if it discovers that the turnover of the business of a dealer has been under-assessed or escaped assessment, the Commissioner has been vested with the power to call for the record of pending as well as decided cases to satisfy himself as to the legality and/or propriety of any proceedings or of any order and then pass appropriate order. In our opinion, the use of different phraseology in the two sections is clearly indicative of the Legislature's intention to confer powers upon different authorities to deal with different situation and, therefore, the power exercisable by one authority cannot be exercised by another authority. In other words, the power vested in the Commissioner to *suo motu* call for the record of pending proceedings or decided cases to satisfy himself as to the legality and/or propriety of the pending proceedings or final order cannot be used for dealing with a case of escaped assessment which is the exclusive preserve of the Assessing Authority. In view of this, we are inclined to agree with Shri Sawhney that the notices issued by respondent No.2 under section 40 of the Act were *ultra vires* of the powers of the said respondent and on that ground alone the impugned orders are liable to be quashed.

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13. In Bidar Sahakar Sakkare Karkhane Ltd. v. State of Karnataka [1985] 58 STC 65, a division the Bench of Karnataka High Court interpreted sections 12-A and 21(2) of the Karnataka Sales Tax Act, 1957 and held as under:

"The revisional power cannot be exercised in respect of a matter which falls within the power to reassess escaped turnover. The revising authority, in other words, should not trench upon the powers which are expressly reserved to the assessing authority under section 12-A of the Karnataka Sales Tax Act, 1957. the Deputy Commissioner, in exercise of his revisional jurisdiction, should not ignore that limitation. It is clear from the provisions of section 12-A of the Act that the reason for the turnover escaping assessment is immaterial. It might be by oversight, mistake or by design. If the record reveals no application of mind by the assessing authority in respect of a part of the turnover, then it must be deemed to have escaped assessment. It would therefore be a clear case falling within the exclusive jurisdiction of the assessing authority for reassessment, no matter whether that part of the turnover was in or outside the record of assessment. If, on the other hand, the assessing authority has applied his mind and erroneously excluded any part of the turnover, then certainly it would be a case for the revisional authority to revise the assessment.

> Where the assessee, a co-operative institution having a sugarcane factory, included harvesting charges incurred in the purchase of sugarcane to the factory, the assessing authority without applying his mind omitted to include those expenses in the taxable turnover, and the Deputy Commissioner in exercise of his powers under section 21(2) of the Karnataka Sales Tax Act set aside the assessment and directed the assessing authority to redo the assessment by including in the purchase turnover, the harvesting charges incurred by the assessee.
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> Held, that since the assessing authority did not apply his mind to the disputed turnover, the revising authority could not have invoked the powers under section 21(2) of the Act."
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> The argument of Shri Jaswant Singh that the expression "legality or propriety" used in section 40(1) of the Act should be liberally construed so as to include a case of escaped assessment sounds attractive but having regard to the scheme of the Act, we are unable to accept the same. If the Legislature intended to invest the revisional authority with the jurisdiction and power to deal with all types of cases, then it would have incorporated a *non obstante* clause in section 40. In the absence of such clause, we are unable to interpret section 40(1) as empowering the Commissioner or other designated officer to exercise power conferred upon the Assessing Authority under section 31.
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> 15. We are further of the view that the expression "legality or propriety" would take within its folds all types of illegalities and improprieties which may have crept in the proceedings pending before the Assessing Authority or which may have affected the final adjudication, but it cannot take within its sweep, the cases of escaped assessment because in such cases there is no assessment/adjudication by the Assessing Authority or Appellate Authority."

Mr. Gupta also relied upon the notice in that case, which was extracted in the judgment, and contended that the wording thereof was similar to the wording of the notice in the present case dated 20.02.2003. He relied upon paragraph-17 of the Division Bench judgment where the Division Bench held that notice did not even advert to the relevant provisions of the Act else it would have indicated that the proposed action was being taken on account of a particular illegality or impropriety.

11. The question whether the assessment order suffers from any illegality or impropriety in the present case at least is one of fact. The Tribunal construed the assessment order in detail and came to a positive finding that the assessment order was passed on account of a mistake of law and that the Assessing Authority had, in fact, considered the entire record and had not brought to tax the sale proceeds on account of the sale of DEPB in view of the legal position as he perceived it to be. We were, in fact, informed that prior to the assessment order, the proceeds for the sale of DEPB were not brought to tax in the case of most of the assessees. The point was first decided by the Delhi High Court and thereafter by several other High Courts and finally by the Supreme Court.

12. We are unable to say that the finding of the Tribunal that the Assessing Authority had taken the case into consideration is perverse, unreasonable or totally unsustainable. The Tribunal has taken the relevant facts in this regard into consideration. For instance, as we noted earlier, the assessment order was passed pursuant to the notice issued under Section 28(2) on account of the Assessing Authority not being satisfied with the returned sale version. Pursuant thereto, the appellant produced the account books and other relevant documents. The order expressly states that the same had been "examined in detail and found to be maintained in normal course of business". The issue, therefore, did not escape the Assessing Authority. The balance-sheet, admittedly, was also produced. The balance-sheet had attached to it the trading, profit and loss account for the year ending as on 31.03.2000. There is a specific entry regarding the sales of the

DEPB. The balance-sheet was also examined by the Assessing Authority. Considering all the facts and circumstances of the case, the Tribunal’s view cannot be said to be an impossible one.

13. The appeal, therefore, does not raise a substantial question of law.

14. The appeal is dismissed.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

20.07.2015
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(G.S. SANDHAWALIA)
JUDGE