IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

VATAP No. 11 of 2015(O&M)
Date of decision: 18.9.2015

M/s Ambuja Cement Limited

……Appellant

State of Punjab and another

…..Respondents

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Sandeep Goyal, Advocate for the appellant-assessee.

Mr. Jagmohan Bansal, Additional Advocate General, Punjab.

Ajay Kumar Mittal,J.

1. This order shall dispose of VATAP Nos.11 to 14 of 2015 as according to the learned counsel for the parties, the issue involved in all these appeals is identical. However, the facts are being extracted from VATAP No.11 of 2015.

2. VATAP No.11 of 2015 has been filed by the revenue under Section 9(2) of the Central Sales Tax Act, 1956 (in short, "the CST Act) read with Section 68 of the Punjab Value Added Tax Act, 2005 (in short, "the PVAT Act) against the order dated 30.3.2015, Annexure A.6 passed by the Punjab Tribunal (constituted under the Punjab Value Added Tax Act,

2005) in Appeal No.283 of 2014 for the assessment year 2009-10, claiming following substantial questions of law:-

> "i) Whether on the facts and circumstances of the case, the learned Tribunal is justified in holding that the first appellate authority was within his jurisdiction to remand the matter for fresh assessment including those issues which were not subject matter of appeal before him?
>
> ii) Whether on the facts and circumstances of the case, the appellate authority is empowered to decide those issues which have not been raised in the grounds of appeal and no appeal has been filed by the revenue?

3. A few facts relevant for the decision of the controversy involved as narrated in VATAP No.11 of 2015 may be noticed. The assessee is a dealer who is engaged in the manufacturing and sale of cement having its manufacturing units at Ropar and Bathinda in Punjab. The Ropar unit is exempted under the provisions of the Punjab General Sales Tax (Deferment and Exemption) Rules, 1991 read with notification dated 6.4.2005 issued under section 92(3) of PVAT Act for a period from 24.6.2004 to 23.6.2019 for an amount of ₹ 498,49,74,000/-. Similarly, Bathinda unit is exempt for an amount of ₹ 171,87,00,000/- for a period from 14.2.2001 to 13.2.2016. The assessee is registered with assessing authority, Ropar for the purpose of sales tax assessment. Assessment of the dealer for the year 2009-10 was taken up for consideration by the assessing authority on the basis of annual returns filed by the appellant in VAT 20. In the reruns filed by the appellant, it had calculated notional tax liability on the stock transfers made by it to its own branches in other States for subsequent sale as per the value of goods at the time of dispatch derived by adding margin and primary freight upto

the destination in the cost of the goods and some portion of gross profit so as to arrive at the correct value of stock transfer. The value so determined was considered as the estimated value of the goods so transferred as per condition 3(ii) of the notification dated 6.4.2005 issued under section 92(3) (a) of the PVAT Act. The estimated value of stock transfer considered by the appellant included the cost of production and primary freight besides some portion of gross profit whereas other expenses like secondary freight, forwarding expenses, godown rent, administrative expenses and octroi etc. were left to be borne by the consignee branch. The tax was calculated on the said value at the rate of 4% and was reduced from the total overall exemption limit of the assessee which was available to it at the beginning of the year 2009-10. For the assessment years 2005-06 and 2006-07, similar methodology had been adopted by the appellant and was being accepted by the respondents. Before the Assistant Excise and Taxation Commissioner, detailed submissions had been made by the assessee to the effect that only the value of goods at factory gate and primary freight can be considered to be the estimated value of the goods stock transferred on which the notional tax was to be calculated at the rate of 4%. Accordingly, the designated Officer vide order dated 31.1.2013, Annexure A.1 calculated the tax on the cost of goods at factory gate plus primary freight. However, while doing so, he had included the primary freight again and thereby committed the mistake of including the same amount twice over even though in principle, he had agreed with the appellant that besides these two components, the value of goods could not be included in any other manner. Feeling aggrieved, the assessee filed appeal before the Deputy Excise and Taxation

Commissioner (Appeals) [DETC(A)]. The DETC (A) recorded the version of the Excise and Taxation Inspector in detail to the effect that the impugned order was illegal and needed to be set aside as fresh orders were required to be made since the stock transfer price had been determined on the lower side and therefore, the case needed reconsideration in the interest of State revenue and justice. According to the assessee, infact, the appeal proceedings being carried out were converted into revisional proceedings for the benefit of the department by the first appellate authority and that too without granting any opportunity of hearing in that regard. The assessee went in appeal before the VAT Tribunal. During the pendency of the said appeal, the respondents initiated fresh assessment proceedings in pursuance to the directions given by the first appellate authority. The assessee approached this Court by filing CWP No.18476 of 2014. This court allowed the assessment proceedings to continue but directed that draft order shall be produced before the court on the next date of hearing. The assessee approached the Apex Court by filing SLP(C) No.26831 of 2014. The Apex Court granted liberty to the assessee to raise the issues before this court. In pursuance to the aforesaid order, this Court relegated the assessee to appear before the VAT Tribunal and counsel for the State had agreed that during the pendency of the appeal before the Tribunal, the consideration of draft assessment order shall be kept in abeyance. Accordingly, this court disposed of the said writ petition with a direction that the Tribunal shall decide the appeal within three months from that date i.e. 6.10.2014. Vide order dated 30.3.2015, Annexure P.6, the appeals filed by the assessees were dismissed. Hence the instant appeals by the assessees.

4. We have heard learned counsel for the parties.

5. The primary issue that arises for consideration in this appeal is whether the first appellate authority was justified and within its jurisdiction to remand the matter for passing fresh assessment order after considering the issues which were not assailed by the assessee. Support was drawn from judgments in ***State of Haryana vs. Frick India limited,*** (1990) 76 STC 148 (P&H), ***Global Business India Pvt. Limited vs. State of Haryana*** (2013) 45 PHT 439 (P&H) and ***State of Kerala vs. M/s Vijaya Stores,*** (1978) 4 SCC 41 to urge that it was not within the domain of the first appellate authority to have remanded the matter on which the assessee was not aggrieved. The revenue had other remedies open in case the order was found to be not in consonance with law.

6. On the other hand, learned counsel for the State besides supporting the impugned order submitted that the revisional authority for the assessment year 2007-08 had initiated revisional proceedings but had dropped them in the light of the order of the first appellate authority. Thus, a prayer was made for revival of the revisional proceedings.

7. The matter is no longer res integra. In ***State of Haryana vs. Frick India Limited,*** (1990) 76 STC 148, the question for consideration was whether the appellate authority was competent to go into the matters which were not raised in appeal and direct examination of the fresh issues by the assessing authority which the appellate authority considered, had not been properly examined at the time of consideration of the appeal, without having recourse to the provisions of Section 40 of the Haryana General Sales Tax Act, 1973 (in short, the HGST Act"). After considering the matter,

it was held by this Court that under the HGST Act, the appellate authority i.e. the DETC(A) had not been vested with the powers to act on his own motion. Only when an appeal was filed under Section 39 of the Act, did the appellate authority adjudicate upon the specific issues raised in the grounds of appeal or upon those which were urged before it at the time of hearing. The respondent was also given an opportunity to be heard and to reply to the points raised by the appellant. However, the appellate authority while deciding an appeal filed by a party could not take up issues on merit which had not been raised by the appellant. The respondent in the appeal could not invite the appellate authority to take up on merits points or issues not raised,pleaded or urged by the appellant. Accordingly, the DETC(A) was not held to be competent to go into the matters not raised in the appeal and set aside the order of the assessing authority. The relevant observations read thus:-

> "6. It is manifest that Section 39 ibid confers a right on a party aggrieved by any order passed under the Act or the rules made thereunder to file an appeal. When the order is made by the Assessing Authority, the appeal lies to the Deputy Excise and Taxation Commissioner ; when the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner and if the order is made by the Commissioner, to the Tribunal.
>
> 7. It is also clear from the language of Section 39 and has indeed been conceded by the learned counsel for the parties that both the assessee and the department can file appeals against the orders by which they are aggrieved. On an appeal filed, the appellate authority has been invested with powers to pass such orders as it may deem to be just and proper including an order enhancing the amount of tax or penalty or interest or all. Section 39 has been drafted on the pattern of various sections in

> different statutes conferring powers of appeal. In substance, it conforms to Section 96 of the Code of Civil Procedure. Wide powers have been given to the appellate authority to examine the impugned orders and to judge and determine their legality and propriety. Any party aggrieved by any order passed by an authority exercising jurisdiction under the Act or the Rules, may file an appeal against that order raising its grievances and pleas challenging the legality and propriety of the order. Whatever pleas are raised by a party in its appeal, are examined by the appellate authority and a decision is rendered thereon affirming by varying, amending or rescinding the impugned orders or remanding the case for fresh decision. This jurisdiction, however, can be invoked only on appeal filed by a party. The Deputy Excise and Taxation Commissioner in contradistinction of the Commissioner has not been invested with powers to act on his own motion. Only when an appeal is filed, the appellate authority adjudicates upon the specific issues raised in the grounds of appeal or those which are urged before it, at the time of hearing. The respondent is also given an opportunity of hearing and replying to the points raised and urged by the appellant."

Further, the judgment in ***Frick India Limited's*** case (supra) was followed by this Court in ***Global Business India Pvt. Limited's*** case (supra), wherein it was recorded as under:-

> "11. The issue in respect of the power of the Tribunal to enhance the tax liability came up for consideration before the Supreme Court in State of Kerala v. Vijaya Stores, (1978) 4 SCC 41. The Court held that Kumar Vimal the Tribunal cannot enhance the Tax lability against the dealer in an 2013.04.26 12:24 I attest to the accuracy and integrity of this document Chandigarh VATAP Nos.123 & 122 of 2012 -7- appeal filed by him. The court observed as under:

"5. Considerable emphasis was laid by counsel for the appellant upon sub-section (4) which indicates what things the Appellate Tribunal may do while disposing of an appeal and in particular it was pointed out that under sub-section (4)(a)(i) the Appellate Tribunal has been given power "to enhance the assessment" while disposing of an appeal against an order of assessment after giving the party a reasonable opportunity of being heard and it was urged that such power could be exercised even when the appeal against the Appellate Assistant Commissioner's assessment order had been preferred by the assessee and not by the Department. To place such a construction on sub-section (4)(a)(i) would amount to ignoring the scheme of Section 39. Sub-section (1) provides for an appeal being preferred against an assessment order passed by the Appellate Assistant Commissioner under Section 34(3) either by the assessee or by the Department through an officer empowered by the Government in that behalf. Further, sub- section (2) provides for filing of cross-objections by a party, against whom an appeal has been preferred, notwithstanding that he has not himself appealed against the decision or any part thereof and such cross-objections are to be disposed of by Appellate Tribunal as if it were an appeal. Then comes sub- section (4) which enumerates the various powers conferred upon the Appellate Tribunal while disposing of such appeals (including cross-objections) and the power conferred upon the Appellate Tribunal under Section 4(a)(i) is "to confirm, reduce, enhance or annul the assessment"; the power to enhance the assessment must be appropriately read as relatable to an appeal or cross-objections filed by the Department. The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it, and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-section (4) (a) (t) above. In other words, in the absence of an appeal or cross-objections by the Department against the Appellate Assistant Commissioner's order the Kumar Vimal Appellate Tribunal will have no jurisdiction or power to enhance 2013.04.26 12:24 I attest to the accuracy and integrity of this document Chandigarh VATAP Nos.123 & 122 of 2012 -8- the assessment. Further, to accept the construction placed by the counsel for the appellant on sub-section (4) (a) (i) would be really rendering sub-section (2) of Section 39 otiose, for if in an appeal preferred by the assessee against the Appellate Assistant Commissioner's order the tribunal would have the power to enhance the assessment, a provision for cross-objections by the Department was really unnecessary. Having regard to the entire scheme of Section 39, therefore, it is clear that on a true and proper construction of sub-section (4)(a)(i) of Section 39 the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the Department".

A Division Bench of this Court in State of Haryana vs. Frick India Ltd., 1990 (76) STC 148 followed the said decision in relation to the power of the Tribunal under the Haryana General Sales Tax Act, 1973. Similar view has been taken by a single bench of this court in a judgment reported as Fixwell Pushin Cords Pvt. Ltd. case (supra).

We may notice that the provisions under consideration in Vijaya Stores case (supra) were some what different. The Kerala Act contemplated filing of appeal and cross objections. Therefore, the court held that scheme of the Statue does not contemplate enhancement of Tax, without availing the remedy of appeal or cross objections. Though, in the Statue under consideration, there is no provision of filing of cross objections but that fact will not materially change the position of law. Therefore, we hold that without appeal or the provisions of cross- objections, the Tribunal or the Appellate Authorities under the Act could not enhance the tax lability.

> Consequently, the appeals are allowed and the order passed by the Tribunal and the first Appellate Authority are set aside. The matter is remitted back to the Joint Excise and Taxation Commissioner to pass fresh Kumar Vimal 2013.04.26 12:24 I attest to the accuracy and integrity of this document Chandigarh VATAP Nos.123 & 122 of 2012 -9- orders in accordance with the orders now passed by this court. However, the acceptance of these appeals will not preclude the Revenue to initiate such other proceedings as are permissible in law against the dealer in accordance with law."

8. Similarly in ***The State of Kerala vs. M/s Vijaya Stores,*** (1978) 4 SCC 41, enhancement of assessment by the Tribunal in the absence of cross appeal or cross objections by the department was held to be impermissible. It was observed by the Apex Court as under:-

> The question raised before us really turns upon the correct interpretation to be placed on s. 39(4) of the Act, but sub ss. (1), (2), (3) and (4) of s. 39 are material for our purposes which run thus:
>
> "39. Appeal to the Appellate Tribunal. (1) Any officer empowered by the Government in this behalf or any other person objecting to an order passed by the Appellate Assistant Commissioner under sub section (3) of section 34 and any person objecting to an order passed by the Deputy Commissioner under subsection (1) of section 35, and any person objecting to an order passed by the inspecting Assistant Commissioner under clause (c) of sub-section (4) of section 28 may, within a period of sixty days from the date on which the order was served on him in the manner prescribed, appeal against such order to the Appellate Tribunal;
>
> Provided that the Appellate 'Tribunal may admit an appeal presented after the expiration of the said period if it is satisfied that the appellant had sufficient cause t`or not

presenting the appeal within the said period.

(2) The officer authorised under sub-section (1) or the person against whom an appeal has been preferred, as the case may be on receipt of notice that an appeal against the order of the Appellate Assistant Commissioner has been preferred under sub-section (1) by the other party, may, notwithstanding that he has not appealed against such order or any part thereof, file, within thirty days of the receipt of the notice, a memo random of cross-objections, verified in the prescribed manner against any part of the appellate Assistant Commissioner, and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub- section (1) . [1961] 12 S.T.C. 677.

19-526 SCI/78542 (3) The appeal or the memorandum of cross-objections shall be in the prescribed form and shall be verified in the prescribed manner, and, in the case of an appeal preferred by any person other than an officer em powered by the Government under sub-section (1), it shall be accompanied by such fee not exceeding one hundred rupees as may be prescribed.

(4) In disposing of an appeal, the Appellate Tribunal may, after giving the parties a reasonable opportunity of being head either in person or by a representative.

(a) in the case of an order of assessment or penalty.

(i) confirm, reduce, enhance or annul the assessment or penalty or both;

(ii) set aside the assessment and direct the asses sing authority to make a fresh assessment after such further enquiry as may be directed; or

(iii) pass such other orders as it may think fit; or

(b) in the case of any other order, confirm, cancel or vary such order."

Considerable emphasis was laid by counsel for 'the appellant upon sub-s.(4) which indicates what things the Appellate Tribunal may do while disposing of an appeal and in particular it was pointed out that under 'sub-s.(4)(a)(i) the Appellate Tribunal has been given power 'to enhance the assessment" while disposing of an appeal against an order of assessment after giving the party a reasonable opportunity of being heard and it was urged that such power could be exercised even when the appeal against the Appellate Assistant Commissioner's assessment order had been preferred by the assessee and not by the Department. To place such a construction on sub-s. (4)(a)(i) would amount to ignoring the scheme of s. 39. Sub-s. (1) provides for an appeal being preferred against an assessment order passed by the Appellate Assistant Commissioner under s. 34(3) either by the assessee or by the Department through an officer empowered by the Government in that behalf. Further, sub-3. (2) provides for filling of cross-objections by a party, against whom an appeal has been preferred, notwithstanding that he has not himself appealed against the decision or any part thereof and such cross-objections are to be disposed of by Appellate Tribunal as if it were an appeal. Then comes sub-s. (4) which enumerates the various powers conferred upon the Appellate Tribunal while disposing of such appeals (including cross-objections) and the power conferred upon the Appellate Tribunal under s. 4(a) (i) is "to confirm, reduce, enhance or annul the assessment"; the power to enhance the assessment must be appropriately read as relatable to an appeal or cross-objections filed by the Department. The normal rule that a party not appealing from a decision must be deemed to be satisfied with the decision, must be taken to have acquiesced therein and be bound by it. and, therefore, cannot seek relief against a rival party in an appeal preferred by the latter, has not been deviated from in sub-s.(4)(a)(i) above. In other words, in the absence of an appeal or cross-objections by the

Department against the Appellate Assistant Commissioner's order the Appellate Tribunal will have no jurisdiction or power to enhance the assessment. Further, to accept the construction placed by the counsel for the appellant on sub-s. (4)(a)(i) would be really rendering sub-s. (2) of s. 39 otiose, for if in an appeal preferred by the assessee against the Appellate Assistant Commissioner's order the tribunal would have the power to enhance the assessment, a provision for cross- objections by the Department was really unnecessary. Having regard to the entire scheme of s. 39, therefore, it is clear that on a true and proper construction of sub-s. (4) (a) (i) of s. 39 the Tribunal has no jurisdiction or power to enhance the assessment in the absence of an appeal or cross-objections by the Department."

9. In view of the above, the first appellate authority was not justified in remanding the matter for fresh assessment for considering those issues which were not subject matter of appeal before it. Consequently, the impugned order dated 30.3.2015 passed by the Tribunal as well as order dated 17.7.2014 passed by the DETC(A) for remanding the matter for fresh assessment are set aside and the matter is remanded to the first appellate authority to pass fresh order in accordance with law after hearing learned counsel for the parties. Needless to observe, that it shall be open for the State to take recourse to any remedy in accordance with law in which revisional proceedings were initiated and were later on dropped on the basis of the order of the first appellate authority and/or the Tribunal. The appeals stand disposed of.

(Ajay Kumar Mittal)
Judge

September 18, 2015
gs

(Ramendra Jain)
Judge