S.R.JOSHI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.439 OF 2024

Bul Infra Developers Pvt. Ltd., … Petitioner

Versus

The State of Maharashtra through
Ministry of Finance & Others …Respondents

WITH
INTERIM APPLICATION NO.686 OF 2024
IN
WRIT PETITION NO.439 OF 2024
WITH
WRIT PETITION NO.14101 OF 2022
WITH
INTERIM APPLICATION NO.692 OF 2024
IN
WRIT PETITION NO.14101 OF 2022
WITH
WRIT PETITION (ST.)NO.10625 OF 2022
WITH
INTERIM APPLICATION NO.684 OF 2024
IN
WRIT PETITION (L) NO.10625 OF 2022
WITH
INTERIM APPLICATION NO.678 OF 2024
IN
WRIT PETITION NO.790 OF 2024
WITH
WRIT PETITION (ST.)NO.10632 OF 2022
WITH
INTERIM APPLICATION NO.679 OF 2024
IN
WRIT PETITION (L) NO.10632 OF 2022
WITH
WRIT PETITION (ST.)NO.10636 OF 2022
WITH
INTERIM APPLICATION NO.680 OF 2024
IN

SMITA RAJNIKANT JOSHI

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WRIT PETITION (L)NO.10636 OF 2022
WITH
WRIT PETITION (ST.)NO.10638 OF 2022
WITH
INTERIM APPLICATION NO. 681 OF 2024
IN
WRIT PETITION (L) NO.10638 OF 2022
WITH
WRIT PETITION NO.16295 OF 2023
WITH
INTERIM APPLICATION NO.682 OF 2024
IN
WRIT PETITION NO.16295 OF 2023
WITH
WRIT PETITION NO.16294 OF 2023
WITH
INTERIM APPLICATION NO.683 OF 2024
IN
WRIT PETITION NO.16294 OF 2023
WITH
WRIT PETITION NO.13764 OF 2022
IN
INTERIM APPLICATION NO.690 OF 2022
IN
WRIT PETITION NO.13764 OF 2022
WITH
WRIT PETITION NO.13766 OF 2022
WITH
INTERIM APPLICATION NO.691 OF 2024
IN
WRIT PETITION NO.13766 OF 2022
WITH
WRIT PETITION (ST.)NO.12111 OF 2022
WITH
INTERIM APPLICATION NO.677 OF 2024
IN
WRIT PETITION (L)NO.12111 OF 2022

Mr, Arun Jain with Mr. Ashutosh Dash, for the Petitioner/Applicant.
Ms. Shruti D. Vyas, Addl. G.P. with Ms. P.N. Diwan, AGP for the Respondent-State in WP No. 439 of 2024, WP No.14101 of 2022, WP No.790 of 2024, WP No.16295 of 2023, WP No.16294 of 2023, WP

No.13764 of 2022, WP No.13766 of 2022 and WP (St.) No.12111 of 2022.
Mr. Kedar B. Dighe, Addl.G. P. with Ms. P. N. Diwan, AGP for the Respondent-State in WP(St.) No.10625 of 2022,WP (St.) No.10632 of 2022, WP(St.) No.10636 of 2022 and WP (St.) No.10638 of 2022.

CORAM: G. S. KULKARNI & FIRDOSH P. POONIWALLA, JJ.
DATED: 19 JANUARY, 2024

P.C.

We have heard the learned Counsel for the Petitioner on these batch of Petitions which primarily seeks to assail the Assessment Orders passed by the Assessing Officer under the provisions of Section 23 of the Maharashtra Value Added Tax (MVAT), 2007.

2 At the outset, the learned Counsel for the Petitioner submitted that the grievance of the Petitioner canvassed in the present Petition would stand covered considering the view taken by this Court in a batch of Petitions in ***Bharat Udyog Limited & Another v/s. State of Maharashtra & Another*** in Writ Petition No.15338 of 2023, along with companion Petitions, decided on 20th December, 2023.

3 The issues which have arisen before the Court were in regard to the provisions of sub-section (6A) of Section 26 of the Act and the legal position in that regard which stood concluded in view of the decision of the Supreme Court in the case of ***State of Telangana v/s. Tirumala Constructions***[1]. The Counsel for the Petitioner has submitted that these Petitions can be disposed of in terms of the orders passed in the case of Bharat Udyog Limited (supra). For convenience, we note our orders which were passed in Bharat Udyog Limited (supra) which reads thus:-

1 2023 (10) 1028 SC

"1 These batch of petitions raise common issues of law, inasmuch as, these petitions were filed assailing the Constitutional validity of Section 26(6A) of the Maharashtra Value Added Tax Act, 2002 (for short "2002 Act"), which was inserted by Maharashtra Amendment Act 31 of 2017 w.e.f. 15th April 2017. For convenience sub-sections (6A), (6B) and (6C) of Section 26, is required to be noted which reads thus:-

*"[**(6A)** No appeal against an order, passed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017, shall be filed before the appellate authority in first appeal, unless it is accompanied by the proof of payment of an aggregate of the following amounts, as applicable,-*

(a) in case of an appeal against an order, in which claim against declaration or certificate, has been disallowed on the ground of non-production of such declaration or, as the case may be, certificate then, amount of tax, as provided in the proviso to sub-section (6),

(b) in case of an appeal against an order, which involves disallowance of claims as stated in clause (a) above and also tax liability on other grounds, then, an amount equal to 10 per cent. of the amount of tax, disputed by the appellant so far as such tax liability pertains to tax, on grounds, other than those mentioned in clause (a),

(c) in case of an appeal against an order, other than an order, described in clauses (a) and (b) above, an amount equal to 10 per cent. of the amount of tax disputed by the appellant,

(d) in case of an appeal against a separate order imposing only penalty, deposit of an amount, as directed by the appellate authority, which shall not in any case, exceed 10 per cent. of the amount of penalty, disputed by appellant:

Provided that, the amount required to be deposited under clause (b) or, as the case may be, clause (c), shall not exceed rupees fifteen crores.

***(6B)** No appeal shall be filed, before the Tribunal, against an order, which is passed on or after the commencement of the Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 2017, unless it is accompanied by the proof of payment of an aggregate of following amounts, as applicable,—*

(a) in case of an appeal against an order, in which claim against declaration or certificate has been disallowed on the grounds of non-production of such declarations or, as the case may be, certificates then, amount of tax, as provided in the proviso to sub-section (6),

(b) in case of an appeal against an order, which involves disallowance of claims as stated in clause (a) above and also tax liability on other grounds, then, an amount equal to 10 per cent. of the balance amount of disputed tax, so far as such tax liability pertains to tax, on grounds, other than those mentioned in clause (a),

(c) in case of an appeal against an order, other than an order, described in clauses (a) and (b) above, an amount equal to 10 per cent. of the balance amount of disputed tax,

(d) in case of an appeal against any other order, an amount, as directed by the Tribunal:

Provided that, the amount required to be deposited under clause (b) or, as the case may be, clause (c), shall not exceed rupees fifteen crores.

Explanation.— For the purposes of clause (b) or clause (c) of sub-section (6B), the expression, "balance amount of disputed tax" shall mean an amount of disputed tax, which remains outstanding, after considering the amount paid, as directed by the appellate authority in first appeal under clause (b) or, as the case may be, clause (c), respectively of sub-section (6A).

(6C) *The appellate authority or, as the case may be, Tribunal shall stay the recovery of the remaining disputed dues, in the prescribed manner, on filing of an appeal under sub-section (6A) or, as the case may be, sub-section (6B).]*"

2 It may be observed that the Central Goods and Services Tax and Maharashtra Goods and Services Tax Act, 2017 (for short "CGST & MGST Act, 2017") came to be enacted and brought into force from 1st July 2017, in view of the Constitution 101st Amendment Act, 2017, which was notified on 16th September 2017. By enactment of the CGST & MGST Act, 2017, the 2002 Act stood subsumed in these GST legislations.

3 On such change in legislative regime, in regard to the validity of the provisions of requirement of pre-deposit as introduced by sub-section (6A), (6B) and (6C) to Section 26 of the 2002 Act, as incorporated by Maharashtra Act 31 of 2017 w.e.f. 15th April 2017 had fell for consideration of this Court in ***Anshul Impex Pvt. Limited Vs. State of Maharashtra***[2]*. The said proceedings came to be decided on 28th September 2018, wherein this Court held such an amendment to be inapplicable to the years prior to the amending act.*

4 It appears that subsequent to the decision of this Court in ***Anshul Impex Pvt. Ltd. (supra)****, the State amended the 2002 Act by an ordinance namely Maharashtra Ordinance No.VI of 2019 published in the Government Gazette on 6th March 2019, whereby an explanation came to be inserted below sub-section (6C) of Section 26 with effect from 15th April 2017. The said explanation*

2 (STA No.2 of 2018 dt. 28.09.2018)

is also required to be noted which reads thus:-

"(6C) The appellate authority or, as the case may be, Tribunal shall stay the recovery of the remaining disputed dues, in the prescribed manner, on filing of an appeal under sub-section (6A) or, as the case may be, sub-section (6B).]

[Explanation.—For the removal of doubts, it is hereby clarified that, the provisions of sub-sections (6A), (6B) and (6C) shall be applicable for any appeal, against all such orders, referred to in those sub-sections, irrespective of the period to which the order, appealed against, relates or irrespective of the date on which the proceedings in respect of such order have commenced.]"

(emphasis supplied)

5 Such amendment as brought about by the ordinance was subsequently replaced by an Act of the legislature, namely the Maharashtra Tax Laws (Amendment and Validation) Act 2019 as notified on 9th July 2019. As seen from the explanation below sub-section (6C) of section 26, it had the effect of clarifying that, the provisions of sub-sections (6A), (6B) and (6C) shall be applicable for any appeal, against all such orders, referred to in those sub-sections, irrespective of the period to which the order, appealed against, relates or irrespective of the date on which the proceedings in respect of such order had commenced.

6 It appears that the such amendment as brought about to the 2002 Act by the 2019 Act was challenged before this Court in the case of ***United Projects Vs. State of Maharashtra***[3]*. Such proceedings were referred for adjudication before a full bench of this Court, which rendered its judgment on 12th July 2022, whereby it was held that the State Government had legislative competence to remove the substratum of the foundation of a judgment retrospectively, namely as to what was held by the Division Bench in the case of* ***Anshul Impex Pvt. Ltd. (supra)****. It was held that the State Government was empowered to carry out amendment suitably to amend the law by use of appropriate phraseology as pointed out by the Court in any judgment and by amending the law inconsistent with a law decreed by the Court, so that the defects which were pointed out were never on the statute for effective enforcement of law. It was also held that there was no judicial encroachment directly or indirectly by the State Government by inserting the impugned amendment which were the subject matter of the said petitions.*

7 On such backdrop as also a similar legislative amendments

3 WP/ST/11589/2021 & WP/13754/2018

were made by other States, the proceedings were taken before the Supreme Court which came to be decided by the Supreme Court on a batch of appeals in the case of **The State of Telangana & Ors. Vs. Tirumala Constructions**[4]. *The proceedings arising from the decision of the Full Bench of the Bombay High Court were also part of the said proceedings, namely the challenge to the decision of the full bench of this Court in* **United Projects Vs. State of Maharashtra (supra)**. *In adjudicating such issues, insofar as the decision of this Court in* **United Projects Vs. State of Maharashtra (supra)** *was concerned, the Supreme Court held that in view of the conclusions as reached on interpretation of the Constitutional amendment and also the provisions of Article 246A of the Constitution, the judgment of the Bombay High Court in the* **United Projects Vs. State of Maharashtra (supra)** *was required to be held to take an erroneous view and accordingly the same was set aside. The relevant observations in regard to the Supreme Court considering the Maharashtra position can be found in paragraph Nos.114 and 115, as also in the conclusion which are required to be noted which reads thus:-*

*"**114.** As far as the Maharashtra appeals are concerned, the assessees' grievance is that the retrospective amendments, made to the Maharashtra VAT Act, were void. On 15.04.2017, the State published Maharashtra Tax Laws (Levy, Amendment and Validation) Act 2017 in the Government Gazette thereby amending various provisions of various Acts. In paragraph No. 26 of the MVAT Act, 2002, Sections 6(A), 6(B) and 6(C) were inserted. The effect of these was to require a mandatory pre-deposit of 10% of the disputed tax liability. This was challenged, and the Nagpur Bench of the Bombay High Court in Anshul Impex Pvt. Ltd. Vs. State of Maharashtra STA No.2/2018 in a Judgment delivered on 28th September, 2018 (hereinafter, "Anshul Impex Private Ltd") held the amendment inapplicable to a lis which had started in 2011. The state again amended the enactment, through ordinance i.e. Maharashtra Ordinance No.VI of 2019, published in the Government Gazette on 6th March, 2019. By the Ordinance the State of Maharashtra inserted an explanation w.e.f. 15th April 2017. According to the state, the explanation was inserted for the purpose of removal of doubts, in view of the Judgment of Nagpur Bench of the court in Anshul Impex Private Ltd. (supra). On 9th July 2019, the Maharashtra Tax Laws (Levy, Amendment and Validation) Act 2019 was enacted. It was published in the Government Gazette on 9th July 2019. The Ordinance was replaced by the enactment of the State Legislature inserting various provisions including the said explanation to Section 26 (6C) of the MVAT Act, 2002. The explanation had the effect of clarifying that the pre-deposit requirements applied to pre-2017 appeals and revisions. This was challenged. The High Court, by a Full Bench ruling United Projects Vs. State of Maharashtra (Writ Petition (Stamp) No.11589 of 2021, and Writ Petition No.13754 of 2018), decided on 12.07.2022 upheld the amendment. It was held that*

4 2023 (10) TMI 1208 SC

"The State Government has legislative competence to remove the substratum of foundation of a Judgment retrospectively. The State Government is empowered to carry out amendment suitably to amend the law by use of appropriate phraseology removing the defects pointed out by the Court in any judgment and by amending the law inconsistent with the law declared by the Court so that the defects which were pointed out were never on the statute for effective enforcement of law. There is no judicial encroachment directly or indirectly by the State Government by inserting amendment which are the subject matter of these petitions as sought to be canvassed by the learned senior counsel for the petitioner.

In our view curing the defect pointed out by any Court through a judgment or simplicitor removing such defects does not amount to encroachment directly or indirectly or overruling the view taken by the Court or overreaching the powers of the State Government by nullifying the effect of the law laid down by the Court."

115. *In the opinion of this court, there is no quarrel with the proposition that a legislative body is competent to enact a curative legislation with retrospective effect. Yet, the same vice that attaches itself to the Gujarat amendment, i.e. lack of competence on the date the amendment was enacted i.e. in this case, 09.07.2019, the Maharashtra legislature ceased to have any authority over the subject matter, because the original entry 54 had undergone a substantial change, and the power to change the VAT Act, ceased, on 01.07.2017, when the GST regime came into effect. Therefore, for the same reasons, as in the other cases, the amendments to the Maharashtra VAT Act cannot survive.*

VI. Conclusions

116. In view of the foregoing discussion and conclusions, the findings of the court in these cases are:

(i) …..

(ii) …..

(iii) …..

(iv) The amendments in question, made to the Telangana VAT Act, and the Gujarat VAT Act, after 01.07.2017 were correctly held void, for want of legislative competence, by the two High Courts (Telangana and Gujarat High Court). The judgment of the Bombay High Court Court is, for the above reasons, held to be in error; it is set aside; the amendment to the Maharashtra Act, to the extent it required pre-deposit is held void. "

8 It is on the above backdrop, the proceedings are before us.

9 Mr. Rastogi would submit that in regard to the substantive challenge as raised in this petition, the issue in regard to the pre-deposit would stand concluded/covered by the decision of the

Supreme Court in the case of **The State of Telangana & Ors. Vs. Tirumala Constructions (supra)***. It is however submitted that the Petitioners in these petitions are yet to file their appeals before the Appellate Authority/Tribunal and now the Petitioners intend to file their respective appeals alongwith the delay condonation applications as also applications for waiver of pre-deposit. In view of the decision of the Supreme Court in* **The State of Telangana & Ors. Vs. Tirumala Constructions (supra)***, it is submitted that the Petitioners would take further steps to file the appeals within a period of four weeks from today along with appropriate applications for condonation of delay and for waiver of pre-deposit.*

10 In the facts and circumstances of the case and considering the finality now having reached in regard to the issue of pre-deposit being put to rest by the decision of the Supreme Court in **The State of Telangana & Ors. Vs. Tirumala Constructions (supra)***, we are of the opinion that the request of the Petitioners to approach the Appellate Authority/Tribunal needs to be accepted. We accordingly dispose of these petitions by the following order:-*

O R D E R

(i) The Petitioners shall approach the Appellate Authority/Tribunal by filing their respective appeals along with applications praying for condonation of delay and also waiver of pre-deposit within a period of four weeks from today. If such appeal alongwith application are filed as permitted such proceedings be considered by the Appellate Authority/Tribunal in accordance with law and appropriate orders be passed on the application as also on the appeals.

(ii) All contentions of the parties on such proposed proceedings are expressly kept open.

(iii) Petitions are disposed of in the aforesaid terms. No costs.

(iv) In view of disposal of these petitions, the above interim applications do not survive and they are also disposed of.

11 At this stage, we are informed by Mr. Rastogi that there are demand notices which are issued to some of the Petitioners, if that be so, the Petitioner is free to move an appropriate application and seek appropriate interim relief in the appeals which are proposed to be filed. However, as we have permitted the Petitioners to file an appeal within a period of four weeks, we direct the department not to take any further steps in regard to such demands for a period of four weeks from today. Such limited protection as *granted by us is merely to enable the Petitioners to approach the Tribunal/Appellate Authority, which ought not to be construed, in any manner, as an expression on the merits of the case of the Petitioners, which would be for the Appellate Authority/Tribunal to decide."*

4 The learned Counsel for the Respondent would also not dispute that the Petitions can be conveniently disposed of in terms of the above directions of this Court in the case of Bharat Udyog Limited (supra), with liberty to the Petitioner to approach the Appellate Tribunal by filing their respective Appeals.

5 Accordingly, we dispose of these Petitions in terms of the following orders:-

(i) The Petitioners shall approach the Appellate Authority/ Tribunal by filing their respective appeals, along with applications praying for condonation of delay and also waiver of pre-deposit, within a period of four weeks from today. If such appeal, along with such applications, are filed, the same can be considered by the Appellate Authority/ Tribunal in accordance with law and appropriate orders be passed on the application as also on the appeals;

(ii) The Petitioners are permitted to file the Appeals within a period of four weeks from the date a copy of this Order is made available on the official web-site of this Court. If the Appeals are filed, the same be considered by the Tribunal on merits and without any objection as to limitation, inasmuch as the Petitioners were pursuing the present proceedings bona fide;

(iii) In regard to the demand notices, to enable the Petitioners to file an Appeal and also the stay application in the Appeal in respect of such demand notices, such demand notices be not given effect to for a further period of four weeks. This is without prejudice to the rights and contentions of the parties and ought not to be construed any expression on the merits of the rival contentions.

6 Needless to observe that all contentions of the parties in the proposed Appeals to be filed by the Petitioners are exclusively kept open.

7 Writ Petitions stands disposed of. No order as to costs.

8 Interim Applications, if any, would also not survive and the same are also disposed of on the above terms.

(FIRDOSH P. POONIWALLA, J.) (G. S. KULKARNI , J.)