

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

VATAP-90-2018 (O/M)

Date of decision : 16.02.2024

M/s Panchkula Roller Flour Mills (P) Ltd.

..... Appellant

Versus

The State of Haryana and another

..... Respondents

CORAM : HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE HARSH BUNGER

Present :- Mr. Sandeep Goyal, Mr. Ishaan Loomba, Mr. Rishab Singla and
Mr. Nitish Bansal, Advocate (s)
for appellant.

Mr. Sharan Sethi, Additional A.G. Haryana.

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HARSH BUNGER, J.

1. Appellant [M/s Panchkula Roller Flour Mills (P) Ltd.] has filed this appeal under Section 36 of the Haryana Value Added Tax Act, 2003, challenging the order dated 28.08.2017 (Annexure A-13), passed by Haryana Tax Tribunal (hereinafter referred to as 'the Tribunal'), in relation to the Assessment Year 1991-92.

2. Briefly, the appellant was running a flour mill and was engaged in the business of trading of Atta, Maida, Suji, Bran etc. The appellant claims to be duly registered as a dealer under the provisions of Haryana General Sales Tax Act, 1973 (hereinafter referred to as 'HGST Act, 1973') as well as Central Sales Tax Act, 1956 (hereinafter referred to as 'CST Act, 1956').

3. It appears that the return filed by the appellant for the Assessment Year 1991-92 was taken up in scrutiny and assessment proceedings were initiated, wherein the Assessing Authority by framing assessment, calculated an excess of Rs. 12,36,560/- under the HGST Act, 1973 and calculated a tax of Rs. 17,46,547/- under the CST Act, 1956, which was adjusted towards exemption limit. As per the appellant, the Assessing Authority had taxed the turn over at the rate of 3% instead of 2%, as provided under the Act.

4. The appellant filed a rectification application (Annexure A-2) on 20.06.1995 before the Assessing Authority for rectification of assessment order on the ground that the Assessing Authority had wrongly taxed the sale of wheat flour at the rate of 3% instead of 2%, as provided under the Act by virtue of Notification dated 28.09.1989 (Annexure A-3). The appellant claims that the Assessing Authority committed the same mistake for the Assessment Year 1990-91, for which the appellant submitted a rectification application.

5. It appears that the Deputy Excise and Taxation Commissioner, Ambala, initiated revisional proceedings on the ground that the Assessing Authority had levied wrong rate of tax, as can be seen from the notice dated 19.09.1996 (Annexure A-4). After initiation of revisional proceedings, since no action was taken by the Revisional Authority, the appellant approached this Court by way of CWP-17526-2000, however, during the pendency of the said writ petition, the Revisional Authority dropped the revisional proceedings, vide its order dated 20.03.2001 (Annexure A-5) and vacated the notice by observing as under :-

“ I have examined the record available on the file and reached to the conclusion that the dealer did not follow the right course under such circumstances where incorrect levy of tax on commodities could be corrected. As per section 33 of the HGST Act, 1973, rectification of clerical mistake arising from the order of the Assessing Authority or any such Authority can be corrected within Two years from passing of such orders. But dealer opted and adopted remedial course of seeking rectification, (available u/s 33 of the HGST Act 1973) by making representation to Assessing Authority vide written request received on 20.6.1995. Rather proper remedy for dealer lies u/s 39 of the HGST Act, 1973 by way of appeal to Joint Excise and Taxation Commissioner, (Appeal). Proceedings initiated u/s 40 (2) of the HGST Act, 1973 seem to be impertinent as such proceedings are initiated normally where loss to State is involved which is not the issue in the present case. Proviso 3 of section 40 (1) clearly provides that Assessee or any other person shall have no right to revoke the Revisional Proceedings under this section. More over the then Revisional Authority has already intimated to the Ld. PETC that Revisional Proceedings are time barred vide this office letter No. 240 dated 26.5.1997. However, since no written order was passed on the proceedings initiated and to meet the ends of Natural Justice, fresh opportunity was given.

More so proceedings u/s 40 (2) of HGST Act, 1973 initiated by Revisional Authority requires to be complete within a period of 5 years from the

date of passing of orders. Proceedings in this case has not been finalized within a stipulated period of 5 years. This case is time barred, hence, I am inclined to vacate notice u/s 40 (2) of HGST Act, 1973 issued by the predecessor.”

6. The appellant challenged the order dated 20.03.2001 (Annexure A-5), passed by the Revisional Authority by preferring appeals before the Tribunal below for assessments of the years 1990-91 and 1991-92. It is apposite to note here that since the appellant preferred appeals against the order of the Revisional Authority, accordingly, the appellant withdrew CWP-17526-2000 on 25.07.2001 (Annexure A-6).

7. The above referred both appeals filed by the appellant came to be allowed by the Tribunal below, vide its order dated 05.12.2001 (Annexure A-8), whereby the cases were remanded back to the Revisional Authority for passing appropriate order on merits.

8. Feeling aggrieved against the aforesaid order, the State filed a single review application for review of aforesaid order dated 05.12.2001 (Annexure A-8) in respect of assessments for the year 1990-91 and 1991-92.

9. Apparently, the review application was listed before a Bench of Two Members of the Tribunal below and while hearing the review application, one of the Members, constituting the Bench, took the view, vide order dated 31.08.2004 (Annexure A-10), that the review was not maintainable and the other Member took the view that the review was maintainable as there was a patent error in the order of the Tribunal below. In the aforesaid circumstances, the matter was referred to a Larger Bench of the

Tribunal, where the State represented and opted that the review application be treated for the assessment of the year 1991-92.

10. The Tribunal below, vide its order dated 28.08.2017 (Annexure A-13), allowed the review application filed by the State and dismissed the appeal of the appellant on the ground that the Tribunal below has wrongly held that the revisional proceedings were to be initiated and completed within a period of five years, as provided under Section 40 of HGST Act, 1973. The Tribunal below further held that the assessee had made the application for rectification for the first time in the year 1995 regarding levy of CST at higher rate, which was after expiry of limitation period. It was further observed that the assessee had a right of appeal to challenge the assessment order, however, he failed to exercise his right of appeal against the assessment order.

11. In the aforementioned circumstances, the appellant has filed the instant appeal before this Court, challenging the aforesaid order dated 28.08.2017 (Annexure A-13), passed by the Tribunal below.

12. Learned counsel for appellant submits that the Tribunal below has erred in law and facts in passing the impugned order dated 28.08.2017 (Annexure A-13) and has wrongly reviewed its earlier order dated 05.12.2001 (Annexure A-8). It is submitted that the Tribunal below has wrongly exercised its review jurisdiction without appreciating that the Assessing Authority had wrongly taxed the inter-state sale of wheat flour at the rate of 3% instead of 2%, as prescribed, vide notification dated 28.09.1989 (Annexure A-3). Learned counsel for appellant submits that although the appellant had not availed of its remedy of appeal against the

order of assessment, passed by the Assessing Authority, however, since revisional proceedings have been initiated by the Revisional Authority, therefore, the appellant could not have been made to suffer due to the fault of the Revisional Authority for the delay in passing the order therein. Learned counsel for appellant, while referring to the judgment in the case of Hotel Oberoi Mount View Versus Assessing Authority, UT submits that the Commissioner can exercise the power of revision suo motu, whenever he receives an information about illegality or impropriety committed by his subordinate authority and the information may come from any source. It is submitted that the Revisional Authority had rightly initiated the revisional proceedings and no fault can be found with the same. With the aforesaid submissions, learned counsel for appellant prayed that the appeal be allowed and the impugned order dated 28.08.2017 (Annexure A-13) be set aside.

13. Per contra, learned State counsel has opposed the prayer made on behalf of appellant by submitting that the Tribunal below has duly considered all the submissions made by the appellant and passed a well reasoned and justified order, which does not call for any interference by this Court. It is submitted that the Assessing Authority had passed the assessment order on 17.07.1992 (Annexur A-1) as regards Assessment Year 1991-92. Against the said assessment order, the appellant had a right of appeal, however, he failed to exercise his right of appeal. It is further submitted that in terms of Section 33 of HGST Act, 1973, an assessee could have filed an application for rectification of the assessment order within two years, however, even the said remedy was not availed of by the appellant within limitation period and the appellant submitted the rectification application for

the first time in the year 1995, which was beyond the period of limitation. It is next submitted that although the Revisional Authority had initiated the revisional proceedings, however, the said proceedings were required to be completed within a period of five years in terms of Section 40 of HGST Act, 1973 and since the revisional proceedings were not concluded within prescribed time frame, the same were rightly dropped by the Revisional Authority. Accordingly, prayer for dismissal of the appeal has been made.

14. We have heard learned counsel for respective parties and have also perused the paperbook with their able assistance.

15. Before considering the case in hand, it would be appropriate to refer to provisions of Section 33 and Section 40 of HGST Act, 1973, which read as under :-

"Section 33 Rectification of Clerical Mistakes :-

An assessing authority or any such authority as may be prescribed, may, at any time, within two years from the date of any order passed by him and subject to such conditions as may be prescribed, rectify any clerical or arithmetical mistake apparent from the record.

Section 40 Revision:-

(1)The Commissioner may call on his own motion 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 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.

Provided that no order, shall be so revised after the expiry of a period of five years from the date of the order:

Provided further that the aforesaid limitation of period shall not apply to a case where the order is revised as a result of the decision of the Tribunal or any court of law in a similar case

Provided further that the assessee or any other person shall have no right to invoke the revisional powers under this sub-section.

(1A) The power under sub-section (1) shall not be exercised in respect of any issue or question which is the subject matter of appeal or review before, or which has been decided on appeal or in review by the Tribunal

(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.

(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.

A perusal of Section 33 of HGST Act, 1973 would reveal that the same provides for rectification of clerical mistakes and errors. The Assessing Authority or any such authority, as may be prescribed, may rectify any clerical or arithmetical mistake apparent from the record, at any time, within two years from the date of any order, passed by him and subject to such conditions, as may be prescribed. Further, Section 40 of HGST Act, 1973, empowers the Commissioner to call on his own motion for the record of any case pending before, or disposed of, by any officer appointed under sub-section (1) of Section 3 of HGST Act, 1973 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 may pass such order in relation thereto, as he may think fit. The first proviso to Section 40 (1) of HGST Act, 1973, provides that no order shall be shall be so revised after the expiry of a period of five years from the date of the order. The third proviso to Section 40 (1) of HGST Act, 1973,

provides that the assessee or any other person shall have no right to invoke the revisional powers under this sub-section.

As would be evident from the above extracted provisions that as far as rectification of an order is concerned, the same can be done by the concerned authority within a period of two years from the date of the order. As regards the initiation of revisional proceedings is concerned, the said power is circumscribed by the first proviso as well as third proviso to Section 40 (1) of HGST Act, 1973, in as much as that the order, which is sought to be revised, cannot be revised after the expiry of five years from the date of the order and in terms of third proviso to Section 40 (1) of HGST Act, 1973, the assessee or any other person shall have no right to invoke revisional power under this sub-section.

16. Concededly, the assessment of the appellant for the Assessment Year 1991-92 was framed, vide order dated 17.07.1992 (Annexure A-1) and the period of two years for rectification of the assessment order would expire on 17.07.1994 and similarly, the period of five years would expire on 17.07.1997. It is not disputed that the assessment order dated 17.07.1992 (Annexure A-1) was not challenged in appeal by the appellant herein. Rather, the appellant opted to make a representation to the Assessing Authority on 20.06.1995 for seeking rectification of the assessment order dated 17.07.1992. Apparently, the said request for rectification, which was in terms of Section 33 of HGST Act, 1973 was clearly beyond the period of two years, as provided under Section 33 of HGST Act, 1973.

17. As regards the scope and ambit of exercise of revisional jurisdiction under Section 40 of HGST Act, 1973 is concerned, same is no more *res integra* as the same was considered by a Division Bench of this Court in Mahabir Techno Limited Versus State of Haryana, 2016 (4) PLR 149 wherein the following observations were made :-

“9. In contrast to the aforesaid two provisions, Section 40 of the Act, which provides for revision, used the word, 'so revised'. Different words used by the Legislature in this section as compared to other two sections have to be given its true meaning. Plain reading of the language suggest that no order shall be revised after the expiry of a period of five years from the date of order. The only meaning which can be assigned to the language used is that the proceedings have to conclude with the passing of the order. It is not merely initiation of proceedings for revision. Second proviso to Section 40(1) of the Act enlarges the limitation, if the revision is a result of any decision of the Tribunal or Court.

10. To somewhat similar is the language used in Andhra Pradesh General Sales Tax Act. The relevant provisions of Sections [20\(1\)](#) and [20\(3\)](#) of the Andhra Pradesh General Sales Tax Act, are reproduced as under:-

"(1) The Commissioner of Commercial Taxes may suo motu call for and examine the record of any order passed or proceeding recorded by any authority, officer or person subordinate to it, under the provisions of this Act, including sub-section (2) of this section, and if such order or proceeding recorded is prejudicial to the interests of revenue, may make such enquiry, or cause such enquiry to be made and subject to the provisions of this Act, may initiate proceedings to revise, modify or set

aside such order or proceeding and may pass such order in reference thereto as it thinks fit.

xx xxxx (3) In relation to an order of assessment passed under this Act, the powers conferred by sub-sections (1) and (2) shall be exercisable only within such period not exceeding four years from the date on which the order was served on the dealer, as may be prescribed."

(emphasis supplied).

11. While interpreting the aforesaid provisions, a Division Bench of Andhra Pradesh High Court in Toshiba Anand Batteries Limited's case (supra) opined that exercise of power of revision should conclude before the end of four years from the date of passing of the order, which is sought to be revised. Relevant para from the judgment are extracted below:-

"According to our view the exercise of powers of revision must come to an end within a period of four years from the date of passing of the order by the subordinate authority. The effect of section [20](#)(3) of the APGST Act in our opinion, is that the revising authority is powerless beyond the period of four years to deal with the revision. The exercise of powers as a whole cannot extend beyond the period of four years from the date on which the order of subordinate authority was served on the dealer."

12. No judgment taking a contrary view was cited by learned counsel for the State.

13. If the facts of the case are read in the light of the enunciation of law, referred to above, the assessment of the petitioner for the year 1995-96 was framed on 28.3.2000 and for the year 1996-97, it was framed on 31.7.2000, the period of five years would expire on 28.3.2005 and 31.7.2005, for the

respective two years. It is not in dispute that by that time the proceedings had not been concluded. Even in the earlier round of litigation, the petitioner had challenged the notices issued on 22.1.2007. Prior to that it is not the case of either of the parties that in the matter before the Court any interim stay has been granted. The proceedings initiated for revision of the orders of assessment having not concluded within the period of five years from the date of order sought to be revised, as envisaged under Section 40 of the Act, the Revisional Authority now does not have any jurisdiction to pass the order...”

18. In view of aforesaid judgment rendered in the case of Mahabir Techno Limited (*supra*), it is manifest that in case the revisional proceedings are initiated by the Revisional Authority under Section 40 (1) of HGST Act, 1973, the same are required to be concluded within a period of five years from the date of the order sought to be revised and after the expiry of the said period of five years, the Revisional Authority does not have any jurisdiction to pass any order. Apparently, in the instant case, the Revisional Authority had initiated the revisional proceedings in respect of assessment order dated 17.07.1992 with regard to Assessment Year 1991-92, however, since revisional proceedings were not concluded within a period of five years i.e. upto 17.07.1997, the same were rightly dropped by the Revisional Authority, vide its order dated 20.03.2001 (Annexure A-5).

19. We have considered the contention of appellant that the Tribunal below has wrongly exercised its power of review as there was no error apparent on the record, however, we do not find any force in the same. The power to review was available with the Tribunal below in terms of Section 41 of HGST Act, 1973 and the errors apparent on the record have been culled

out by the Tribunal below in its order dated 28.08.2017 (Annexure A-13) in following terms :-

" We have carefully considered the matter. The review application is very much maintainable because there are two apparent errors of law in the impugned order as pointed out by the State Representative. There is categorical provision in third proviso to section 40 (1) of the HGST Act that the assessee or any other person shall have no right to invoke the revisional powers under the said sub-section. In spite thereof, the Tribunal has held in the impugned order that the revisional proceedings could be initiated under section 40 of the HGST Act even on the request of the dealer. Besides it, the Tribunal has held in the impugned order that the revisional proceedings initiated within limitation period of five years need not be completed within the said period and may be completed even after expiry of the said period. The said finding is also contrary to law. First proviso to section 40 (1) of the HGST Act categorically provides that no order shall be revised after the expiry of a period of five years from the date of the order. Consequently the final revisional order has to be passed within the said limitation period of five years. Mere initiation of revisional proceedings within limitation period of five years would not enable the Revisional Authority to pass final revisional order after expiry of the limitation period of five years. This Tribunal has consistently held in so many cases that revisional order passed after the expiry of limitation period is hit by the bar of limitation, even if the revisional proceedings had been initiated within the limitation period. It is thus evident that final revisional order has to be passed within the limitation period and mere initiation of revisional proceedings is not sufficient to enable the Revisional Authority to pass the revisional order even after expiry of the limitation period. Thus impugned order dated 05.12.2001 of the Tribunal suffers from both patent errors of law and, therefore, the same has to be reviewed and the review application is very much maintainable.

Revisional proceedings were rightly dropped as time barred by the Revisional Authority because the limitation period of five years for revising the impugned assessment orders had expired long ago. Consequently the impugned

revisional orders did not suffer from any infirmity, error or illegality so as to require interference in appeal.

The contention on behalf of the assessee-respondent that it should not suffer due to fault of Revisional Authority in not concluding the revisional proceedings expeditiously within limitation period, although apparently attractive, is completely devoid of merit. As already noticed above, the assessee had no right to invoke revisional powers under section 40 (1) of the HGST Act. Consequently the question of the assessee suffering loss due to non-conclusion of revisional proceedings within the limitation period by the Revisional Authority does not arise. On the other hand, it appears that the assessee indirectly managed to invoke revisional powers. The assessee had right of appeal to challenge the assessment orders. However, admittedly the assessee did not avail of the said right at all. The assessee also had right to file application for rectification of the assessment orders within two years under section 33 of the HGST Act. However, the assessee also did not avail of the said remedy within the limitation period. The assessee for the first time made application in the year 1995 (as submitted by State Representative) to the Assessing Authority regarding levying of CST at higher rate. Thus even the said application, which allegedly was forwarded by the Assessing Authority to the Revisional Authority resulting in initiation of the revisional proceedings, was moved long after expiry of limitation period for seeking rectification of the assessment order. Thus the assessee itself was at fault in not exercising the right of appeal against the assessment orders and also in not exercising the right of seeking rectification of the assessment orders within the limitation period. The assessee, therefore, cannot shift the blame to the Revisional Authority.

For the reasons aforesaid, this review-application is allowed. Impugned order dated 05.12.2001 of the Tribunal pertaining to appeal STA 85 of 2001-02 for assessment year 1991-92 only is set aside and the said appeal filed by the assessee against revisional order stands dismissed."

20. We have carefully gone through the above extracted observations/findings returned by learned Tribunal below and we are of

considered view that the Tribunal below has correctly appreciated the facts as well as law on the issue and the Tribunal below was fully justified in exercising its review jurisdiction in passing the order dated 28.08.2017 (Annexure A-13).

21. Considering the totality of circumstances, we do not find any illegality or perversity in the order dated 28.08.2017 (Annexure A-13), passed by the Tribunal below, which has been rendered after correctly appreciating the facts and as well as the law. Resultantly, there is no merit in this appeal and the same is accordingly dismissed.

22. All pending application (s), if any, shall also stand closed.

(SANJEEV PRAKASH SHARMA)
JUDGE

(HARSH BUNGER)
JUDGE

16.02.2024
sjks

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No