



[2016] 68 taxmann.com 271 (Gujarat)

HIGH COURT OF GUJARAT

Laxmi Group of Agencies

Vs.

Deputy Commissioner of Commercial Tax

MS. HARSHA DEVANI AND G.R. UDHWANI, JJ.

SPECIAL CIVIL APPLICATION NO. 1667 OF 2016

MARCH 17, 2016

CASES REFERRED TO

Nestle India Limited v. Dy. CIT [2015] 59 taxmann.com 109 (Guj.) (para 4).

S.N. Soparkar, Sr. Adv. and **Amar N. Bhatt**, Adv. *for the Petitioner.* **Swapneshwar Goutam**, Asstt. Govt. Pleader *for the Respondent.*

JUDGMENT

Ms. Harsha Devani, J. - Rule. Mr. Swapneshwar Goutam, learned Assistant Government Pleader waives service of notice of rule on behalf of the respondents.

2. This petition under Articles 226 and 227 of the Constitution of India is directed against the order dated 30.11.2015 passed by the Joint Commercial Tax Commissioner, Appeal Division-2, Ahmedabad (Annexure "A" to the petition) whereby the appeal preferred by the petitioner against the order dated 23.03.2015 passed by the Deputy Collector of Commercial Tax, Corporate-2, Division-2, Ahmedabad (the first respondent herein) has been dismissed as well as the above order dated 23.03.2015 passed by the Deputy Commissioner of Commercial Tax (Annexure "B" to the petition).

3. By an assessment order dated 23.03.2015 in respect of assessment year 2010-11, the first respondent assessed the total liability of the petitioner for Value Added Tax for sale of Maggi Noodles of Rs.32,17,740/- plus interest and penalty at Rs.61,78,061/-. Being aggrieved, the petitioner went in appeal before the Joint Commissioner of Commercial Tax, Appeal Division-2, Ahmedabad, in Appeal No.40/15-16 under section 73 of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the GVAT Act"). Together with the appeal, the petitioner also moved an application seeking waiver of payment of tax for the purpose of entertaining the appeal. The petitioner also applied to the Commercial Tax Officer, Unit 22 on 11.05.2015 not to effect coercive recovery pursuant to the order dated 23.03.2015. The petitioner submitted an application dated 10.08.2015 to the Joint Commercial Tax Commissioner, Appeal -2 seeking total relief in the tax, interest and penalty charges as well as an

application 08.09.2015 to the said Joint Commissioner of Commercial Tax requesting him to entertain the appeal of the petitioner without requiring the petitioner to make any payment of tax and also produced a copy of a judgment of this court rendered in Special Civil Application No.15842 of 2012 and allied matters. The Joint Commissioner of Commercial Tax, Appeal Division-2, Ahmedabad (hereinafter referred to as "the first appellate authority"), however, summarily dismissed the appeal on the ground that the petitioner has failed to produce proof of payment pursuant to the assessment order and that in the last adjournment, the petitioner did not remain present. Being aggrieved, the petitioner has filed the present petition.

4. Mr. S. N. Soparkar, Senior Advocate, learned counsel with Mr. Amar Bhatt, learned advocate for the petitioner invited the attention of the court to the judgement and order dated 07.05.2015 passed by this court in the case of *Nestle India Ltd. v. Dy. CIT [2015] 59 taxmann.com 109 (Guj.)* rendered in Special Civil Application No.15842 of 2012 and allied matters wherein, the court had set aside the orders passed by the first respondent holding that the adjudicating authority/Assessing Officer cannot be permitted to ignore and/or cannot be permitted to pass a contrary order than the order passed by the higher forum, unless there are changed circumstances found in the subsequent assessment years. In the facts of the said case, the Tribunal by an order dated 09.09.1986 passed in Appeal No.11 of 1984, had held that Maggi Noodles would fall under Entry 9(3) of Schedule 1 to the VAT Act as the same is held to be "Sev" and therefore, is exempted from payment of sales tax. It was submitted that the attention of the first appellate authority was invited to the above order passed by this court and accordingly, in the order- sheet entry, it is clearly reflected that the same was brought to the notice of the first appellate authority. Referring to the impugned order, it was pointed out that though the first appellate authority has made reference to the judgment and order dated 07.05.2015 passed by this court, it has placed reliance upon the interim order passed by this court in the very same matter and has observed that the petitioner has not deposited any tax and has, accordingly, dismissed the appeal. It was submitted that the attention of the first appellate authority was invited to the above referred decision of this court and that a copy of the said decision was placed on the record. It was submitted that under the circumstances, the first appellate authority ought not to have dismissed the appeal on the ground that the petitioner had not remained present in view of the fact that the issue being squarely covered by the decision of this court, the petitioner was entitled to a total waiver of payment of tax and penalty for the purpose of entertaining the appeal. It was submitted that the first appellate authority having passed the impugned order by disregarding the above referred decision of this court, the same is required to be quashed and set aside and that the appeal is required to be restored with a direction to the appellate authority to entertain the appeal and decide the same without payment of any pre-deposit. The learned counsel submitted that in the light of the fact that the petitioner ought to have availed of an alternative remedy before the first appellate authority, the petitioner does not insist for quashing and setting aside the order impugned in the appeal.

5. Opposing the petition, Mr. Swapneshwar Goutam, learned Assistant Government Pleader for the respondents submitted that against the order passed by the first appellate authority, the petitioner has an efficacious alternative remedy by way of appeal before the Gujarat Value Added Tax Appellate

Tribunal and hence, the present petition under Articles 226 and 227 of the Constitution of India may not be entertained. Reiterating the contents of the affidavit-in-reply filed on behalf of the respondents, it was submitted that on 18.05.2015, the petitioner's Tax Practitioner attended the proceedings before the first appellate authority for preliminary hearing and that the authority had instructed the petitioner to deposit the amount and that the petitioner was aware of the fact that its request for payment of waiver of pre-deposit had been rejected. It was submitted that since on the date when the matter was posted for hearing, the petitioner had not made any payment by way of pre-deposit, the matter was, thereafter, adjourned to 27.08.2015. On that date also, the petitioner neither submitted proof of any pre-deposit, nor did he or his advocate remain present and hence, the matter, as a last chance, was adjourned to 30.11.2015 on which date also, the petitioner did not remain present and hence, the first appellate authority was left with no option but to dismiss the appeal not on merits, but on the ground of non-appearance and nonpayment of the amount of pre-deposit. It was submitted that having regard to the fact that the petitioner had not remained present before it, the first appellate authority was wholly justified in dismissing the appeal of the petitioner.

5.1 Mr. Goutam further submitted that the facts of the present case are distinguishable from the facts of the case before this court in the above referred decision on which reliance has been placed by the petitioner and that all these aspects can be gone into by the Tribunal. Under the circumstances, the petition does not deserve to be entertained. It was, accordingly, urged that the petitioner is, therefore, not entitled to any discretionary relief and is required to be relegated to avail of the alternative remedy before the Tribunal.

6. In rejoinder, Mr. Soparkar, learned counsel for the petitioner invited the attention of the court to the decision of this court in the case of *Nestle India Ltd.* (*supra*) rendered in Special Civil Application No.15842 of 2012 and allied matters, to point out that the said writ petitions had been filed directly against the assessment orders made by the Deputy Commissioner of Commercial Tax and that despite a plea having been raised by the learned Assistant Government Pleader that the petitions against the assessment orders should not be entertained, the court had, after giving detailed reasons, entertained the petitions and decided the same. It was submitted that having regard to the facts and circumstances of this case, there is no warrant for relegating the petitioner to avail of the alternative remedy.

7. The facts are not in dispute. Against the order dated 23.03.2015 passed by the Deputy Commissioner of Commercial Tax, the petitioner went in appeal under section 73 of the GVAT Act before first appellate authority. Before the first appellate authority, the petitioner moved application seeking waiver of payment of tax for the purpose of entertaining the appeal and placed reliance upon an interim order passed by this court in the case of *Nestle India Ltd.* (*supra*). Subsequently, during the pendency of the application, by a judgment and order dated 07.05.2015, this court finally decided the case of *Nestle India Ltd.* (*supra*), pursuant to which, the petitioner moved another application dated 10.08.2015 before the first appellate authority bringing to its notice the fact that the Gujarat High Court has decided the case in favour of Nestle India Limited, holding that the decision of the Sales Tax Tribunal is binding upon the lower authorities. A copy of the said decision was also annexed along with the application and it was, accordingly, prayed that complete waiver from payment of tax be granted

for the purpose of entertaining the appeal. Subsequently, another application dated 08.09.2015 came to be made to the first appellate authority informing him that the petitioner had filed an appeal on a single point regarding taxability of "Maggi Noodles", a product of Nestle India Limited and Glaxo Smithkline Consumer Healthcare Limited and that the said product was tax free and was not liable to VAT. It was further informed that the High Court in the case of *Nestle India Ltd. (supra)* has decided in favour of the dealer and according to the judgement, Maggi Noodles is not liable to tax and it is tax free. The request to admit the appeal without paying any payment of tax at the time of preliminary hearing was again reiterated. The fact regarding receipt of the application dated 10.08.2015 is borne out from the order-sheet of the first appellate authority which clearly reflects that the same was brought to its notice. Despite the aforesaid judgement of this court being brought to the notice of the first appellate authority, it appears that further notices were issued to the petitioner by observing that in terms of the assessment order, Rs.61,78,061/- was required to be paid and that no proof has been produced with regard to payment of such amount. Lastly, by the impugned order dated 30.11.2015, the first appellate authority has dismissed the appeal on the ground that the petitioner has not deposited the amount assessed by the Assessing Officer.

8. From the facts noted hereinabove, it is evident that despite the fact that the petitioner had moved an application before the first appellate authority seeking waiver of payment of assessed amount for the purpose of entertaining the appeal, however, in the said proceedings, the first appellate authority appears to have totally ignored the request of the petitioner seeking waiver of the pre-deposit. Despite the fact that the decision of this court in the case of *Nestle India Ltd. (supra)*, which clearly decided the controversy involved in the case in favour of the petitioner was brought to its notice, the first appellate authority has ignored the application for waiver of pre-deposit made by the petitioner and has dismissed the appeal on the ground that the petitioner has neither remained present before the authority, nor deposited the amount under the assessment order.

9. At this juncture, reference may be made to the provision of sub-section (4) of section 73 of the GVAT Act which provides that no appeal against an order of assessment shall ordinarily be entertained by an appellate authority, unless such appeal is accompanied by satisfactory proof of payment of the tax in respect of which an appeal has been preferred; provided that an appellate authority may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order - (a) without payment of tax with penalty (if any) or, as the case may be, of the penalty, or (b) on proof of payment of such smaller sum as it may consider reasonable, or (c) on the appellant furnishing in the prescribed manner, security for such amount as the appellate authority may direct.

10. Thus, while the main part of sub-section (4) of section 73 of the GVAT Act provides that no appeal against an order of assessment shall ordinarily be entertained by an appellate authority, unless such appeal is accompanied by satisfactory proof of payment of the tax in respect of which an appeal has been preferred, the proviso thereto vests in the appellate authority the discretion to entertain the appeal without payment of tax; or upon payment of such smaller sum as it considers reasonable; or upon the appellant furnishing security, as it may deem fit. In the facts of the present case, the petitioner invoked jurisdiction of the appellate authority under the proviso to sub-section (4) of section

73 of the GVAT Act seeking waiver of payment of tax and penalty as contemplated under clause (a) of sub-section (4) of section 73 of the GVAT Act. The first appellate authority was, therefore, duty bound to consider the application and give its reasons, either for allowing or rejecting the same. However, in the facts of the present case, the first appellate authority has completely disregarded the application made by the petitioner seeking waiver of payment of tax, and has dismissed the appeal on the ground of non-production of proof of payment of pre-deposit as contemplated in the main part of sub-section (4) of section 73 of the GVAT Act. In the opinion of this court, when the petitioner had brought to the notice of the first appellate authority the decision of this court in the case of *Nestle India Ltd. (supra)*, which squarely covers the controversy involved in the case, the first appellate authority ought to have taken the same into consideration while considering the question as to whether or not to grant waiver from payment of tax and penalty. The first appellate authority, however, has by totally disregarding such application, dismissed the appeal on the ground that the petitioner has not produced any proof of payment of assessed amount. This court is of the view that having regard to the above referred decision of this court in the case of *Nestle India Ltd. (supra)*, the petitioner had made out a *prima facie* case for grant of total waiver of the payment of tax and penalty as contemplated under clause (a) of the proviso to sub-section (4) of section 73 of the GVAT Act. Under the circumstances, the first appellate authority was not justified in dismissing the appeal on the ground of non-production of proof of payment of tax. The impugned order, therefore, cannot be sustained.

11. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned order dated 30.11.2015 passed by the Joint Commercial Tax Commissioner, Appeal Division-2, Ahmedabad (Annexure "A" to the petition) as well as the order dated 23.03.2015 passed by the Deputy Commissioner of Commercial Tax, Corporate-2, Division-2, Ahmedabad (Annexure "B" to the petition) are hereby quashed and set aside. Appeal No.40/15-16 is hereby restored to file. The application for waiver made by the petitioner under the proviso to sub-section (4) of section 73 of the Gujarat Value Added Tax Act, 2003 is hereby allowed and the appeal of the petitioner is ordered to be entertained without payment of tax with penalty (if any). Rule is made absolute accordingly to the aforesaid extent.