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January 2015 Issue 2

PUNJAB & HARYANA HIGH COURT

CWP-1753-2012

GODREJ & BOYCE MFG. CO. LTD
Vs.
STATE OF PUNJAB AND OTHERS

RAJIVE BHALLA AND DR.BHARAT BHUSHAN PARSOON JJ.
5th December, 2014

HF ▶ Assessee

EXEMPTION – EXEMPTED UNIT - NOTIONAL TAX LIABILITY – SCOPE OF RULE 2 (xxi) OF PGST RULES – WHETHER CALCULATION OF NOTIONAL TAX LIABILITY ON BRANCH TRANSFER LEADS TO ACTUAL PAYMENT OF TAX WHEN THEY STAND EXEMPTED UNDER PARENT ACT – CERTIFICATE GRANTED FOR DEFERRED PAYMENT OF TAX – DEFERMENT PARAMETER FIXED UPTO 2007 OR A PREVIOUSLY FIXED AMOUNT, WHICHEVER EARLIER – LIABILITY CLEARED OFF TO THE SATISFACTION OF DEPARTMENT AS ALLEGED – IN 2007 NOTIONAL SALE TAX LIABILITY CALCULATED FOR DEFERRED PERIOD AND DEMAND FOR SALE TAX ON BRANCH TRANSFER OUTSIDE STATE DEMANDED IN VIEW OF RULE 2 (xxi) – ORDER AFFIRMED IN APPEALS BY TRIBUNAL - WRIT FILED ALLEGING NO ACTUAL LIABILITY IS FASTENED BY RULES AS BRANCH TRANSFER EXEMPTED UNDER THE ACT – HELD IF TAX IS NOT LEVIABLE AS PER PARENT STATUTE 1948, A RULE CANNOT BE INTERPRETED TO IMPOSE TAX – 'NOTIONAL' WORD IN RULE 2 (xxi) SIGNIFIES FICTIONAL CHARACTER AND IS NOT ACTUAL CHARGING PROVISION TO CALCULATE FRESH LIABILITY – ONLY METHODOLOGY FOR CALCULATING NOTIONAL TAX IS PROVIDED TO DETERMINE WHETHER QUANTUM OF DEFERMENT LIMIT IS REACHED – WRIT ALLOWED – MATTER REMITTED TO DECIDE AFRESH – *RULE 2 (xxi) OF PGST RULES.*

The petitioner had received an eligibility certificate from the Government of Punjab for deferment of sale tax liability upto 9 years i.e. upto 2005 or for maximum amount of Rs. 127,12,57,500/- whichever is earlier. The period was extended for 2 more years i.e. upto 2007. After expiry of the period of deferment, despite entire deposit of deferred sale tax liability, demand for sales tax on branch transfers for years 2004-05 was raised as per 'Notional Sales Tax Liability' in view of Rule 2(xxi) of the Rules and the order was affirmed in appeal before Tribunal . Aggrieved by the orders of the authorities below, a writ is filed on the ground that Rule 2 only provides for a methodology for calculating whether an assessee has reached the quantum of deferred tax. Allowing the writ, it is held that liability to pay tax on branch transfer is not set out in parent Act, therefore, a rule, policy or instruction can not be interpreted to impose a tax. A notional liability is fictional and does not become a charging provision to create fresh liability to pay tax. Sub Rule (i) of Rule 2(xxi) and proviso of the Rule in question are only to calculate notional liability to determine whether assessee has attained the amount of deferment. Hence, writ is allowed and matter is remitted to assessing officer to decide afresh.

Present: Mr.M.L.Sarin, Senior Advocate, with
Mr.Vikas Suri, Advocate, and Ms.Ankita Sambyal, Advocate, for the petitioner.

Ms.Radhika Suri, Addl.A.G., Punjab, for the respondents.

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RAJIVE BHALLA, J.

1. By way of this order, we shall decide CWP-1753-2012 and VATAP-64-2011. For the sake of convenience, facts are being taken from CWP-1753-2012.

2. The petitioner prays for issuance of a writ in the nature of certiorari to quash Rule 2 (xxi) of the Punjab General Sales Tax (Deferment & Exemption) Rules, 1991 (hereinafter referred to as the 'Rules') by holding that it ultra vires, or in the alternative, to read down the provision or to clarify that "notional sale's tax liability" referred to in Rule 2(xiii) of the Rules does not fasten actual liability. The petitioner also prays that orders dated 31.03.2009, 06.05.2010 and 28.04.2011, passed by the Excise & Taxation Officer-cum-Assessing Authority, SAS Nagar, Mohali, the Deputy Excise & Taxation Commissioner (Appeals) and the Value Added Tax Tribunal, Punjab, Chandigarh, respectively, may be quashed.

3. Before referring to the diametrically opposing stands of the parties, it would be appropriate to delimit the facts. Admittedly, in accordance with the Package of Incentives, 1992, the Government of Punjab, through the Industries Department and M/s Godrej-GE Appliances Limited (the original name of the petitioner), entered into a memorandum of understanding, dated 08.03.1994, agreeing to defer sales tax liability for nine years, subject to a fixed capital investment of 150%. Admittedly, the petitioner set up a manufacturing unit at Mohali and commenced production on The State of Punjab notified an amendment, dated to Clause 7 of the Package of Incentives, 1992 and Rule 8 of the Punjab Industrial Incentive Code, 1992, granting sales tax deferment to the petitioner. Accordingly, an eligibility certificate dated 20.02.1998 was issued to the petitioner granting deferment for nine years or for a maximum amount of Rs.127,12,57,500/- whichever is earlier, to be calculated from 22.03.1996. The petitioner in the meanwhile had deposited Rs.5,80,00,000/- towards sales tax from 22.03.1996 upto 31.03.1998 (the date of issuance of the eligibility certificate). The State of Punjab notified the Package of Incentives, 1996 and included incentives granted under the Package of Incentives, 1992, in the new policy. The petitioner was also informed on 18.10.2003 that the empowered committee had in its meeting dated 11.09.2003, decided that the period of sales tax deferment shall be extended by two years or till Rs.5.48 crores of sales tax exemption whichever is achieved earlier.

4. The Punjab Value Added Tax Act, 2005 came into force on 06.04.2005. The Punjab Value Added Tax, 2005 incorporates benefits of sales tax deferment already granted. The petitioner was required to file an application in form VAT (D and E)-I for issuance of an entitlement certificate to continue availing benefits of deferment upto 30.04.2005. The petitioner filed the requisite application and was issued an entitlement certificate valid from 22.03.2005 to 21.03.2007. The petitioner's period for availing deferment of sales tax expired on 21.03.2007.

5. The petitioner claims that despite deposit of the entire deferred sales tax liability it was served with notices for assessment years 2004-05 and 2005-06, both dated 10.08.2007, demanding sale tax on branch transfers by pointing out that the expression "notional sale tax liability" requires it to pay sale tax on branch transfers and consignment sales made outside the State of Punjab.

6. Aggrieved by the aforesaid notices, the petitioner filed representations, dated 17.08.2007 to the Chief Secretary, Government of Punjab, Principal Secretary Industries and Commerce, Government of Punjab and the Financial Commissioner Taxation, Punjab, objecting to the tax demanded on branch transfers by asserting that branch transfers are exempted from sale tax and "notional sales tax" is to be calculated only to determine whether the amount of deferment has been achieved. The Government of Punjab, however, did not take any decision in the matter. The Excise and Taxation Officer, vide order dated 31.03.2009, demanded Rs.8,44,16,501/- as tax on branch transfers by relying upon Rule 2(xxi)(ii) of the Rules.

7. The petitioner filed an appeal before the Deputy Excise and Taxation Commissioner (Appeals) which was dismissed on 06.05.2010. The petitioner filed another appeal before the Value Added Tax Tribunal, Punjab, Chandigarh, which was dismissed by holding that as vires of Rule 2(xxi)(ii) of the Rules have been impugned, the Tribunal does not have jurisdiction to record an opinion thereon.

8. VATAP-64-2011 has been filed to challenge order dated 22.03.1996, passed by the Value Added Tax Tribunal, Punjab, Chandigarh whereas the writ petition has been filed to challenge the vires of the Rules.

9. Counsel for the petitioner/appellant submits that liability to pay sales tax was deferred by fixing the quantum of deferment and providing for an outer period of deferment whichever is achieved earlier. The latter period was nine years and the former amount was Rs.137 crores. The period of deferment, including the extended period expired on 21.03.2007. The petitioner has deposited the entire deferred sales tax liability to the satisfaction of authorities but the respondents have demanded sales tax on branch transfers made outside the State of Punjab by asserting that the explanation to Rule 2(xxi) of the Rules and the proviso appended thereto provide that branch transfers outside the State shall be liable to tax. Counsel for the petitioner contends that Rule 2(xxi) of the Rules provides a methodology for calculating "notional sales tax" liability for the purpose of calculating whether an assessee has achieved the quantum of deferred tax. Rule 2(xxi) of the Rules does not fasten a liability to pay tax on branch transfers which are exempted under the Punjab General Sales Tax Act, 1948 (hereinafter referred to as the '1948 Act'). Rule 2 (xxi) cannot, in the absence of any taxing provision in the Act fasten liability to pay tax. The words used in the Rule, the explanation and the proviso are "tax payable" i.e. tax payable under the Act.

10. Counsel for the State of Punjab submits that as the explanation and the proviso clearly provide that notional sales tax liability shall be calculated on branch transfers, these transfers are exigible to sale tax. The State is, therefore, statutorily empowered to demand sales tax on branch transfers.

11. We have heard counsel for the parties, perused the impugned orders, averments in the appeal as well as in the writ petition and appraised the statutory provisions.

12. The question, that calls for an answer, is whether Rule 2 (xxi) (ii) of the Rules which provides for calculation of "notional sale tax liability" by including branch transfers, fastens a liability to pay tax on branch transfers or merely provides a methodology for calculating notional tax liability for the purpose of achieving the amount of deferred tax?

13. Admittedly, the payment of sales tax was deferred by reference to two parameters namely achieving a specified amount of sales tax or the period of deferment, whichever is earlier. The State of Punjab, however, relies upon the proviso to Rule 2(xxi) (ii) of the Rules to contend that as the proviso unequivocally provides that the petitioner shall be liable to pay sales tax on branch transfers or consignments sales outside the State of Punjab, the petitioner is liable to pay tax on branch transfers made outside the State of Punjab. The petitioner, on the other hand, contends that as branch transfers are exempted under the Act from payment of sales tax, Rule 2(xxi) (ii) of the Rules or the proviso cannot be read to fasten a liability to pay tax on branch transfers and merely prescribes a methodology for calculating "notional tax" so as to determine expiry of the quantum of deferment.

Rule 2(xxi) of the Rules, reads as follows: -

" (xxi) "Notional sales tax liability" shall mean: -

(i) the amount of tax payable under the Act on estimated sales of finished products and estimated purchase of raw material otherwise liable to purchase, of the eligible unit during the year for the purpose of deferment of, or, exemption from, tax computed at the rates specified under the Act; and,

EXPLANATION - The sales made on consignment basis within the State of Punjab, or branch transfer within the State of Punjab, shall be deemed to be sales made with the State and liable to tax.

(ii) the amount of tax payable under the Central Sales Tax Act, 1956 on the sale of finished products of the eligible units made in the course of inter-State trade of commerce computed at the rate of tax applicable under the aforesaid Act;

PROVIDED THAT on branch transfer or consignment sales outside the state of Punjab, *notional sales tax liability shall be computed at the rate of four per cent on the production of the certificate in Form "F" and at the rate of ten per cent in the event of non-production of certificate in Form "F" specified in the Central Sales Tax Act, 1956 on the presumption* that these transactions are eligible to tax under the aforesaid Act.

14. Admittedly, branch transfers outside the State of Punjab are exempted from the payment of sales tax. The State of Punjab has from time to time, notified schemes for deferment and exemption from payment of sales tax and for the said purpose, has enacted Section 10-A of the 1948 Act. A perusal of Section 10-A of the 1948 Act, reveals that the State Government may defer the payment of "tax due" if it is necessary or expedient to do so

in the interest of industrial development subject to such conditions as may be prescribed. Admittedly, branch transfers outside the State of Punjab are not exigible to sales tax. A taxing statute imposes tax by enacting a taxing provision that sets out the taxing event. The exigibility of a transaction to tax must flow from the statute and, therefore, requires legislature to enact a specific provision setting out the contours of the event/transaction that would invite tax. If liability to pay tax is not set out in the parent statute, a rule, a policy, an instruction or a clarification cannot whether by intent or by interpretation, be used to impose a tax. The words "subject to such conditions" used in Section 10-A of the Act while referring to the deferment, cannot be construed to confer power to prescribe a fresh tax by way of a rule.

15. Rule 2(xxi) (i) of the Rules defines "Notional sale tax liability" to mean the amount of "tax payable under the Act", thereby, in our considered opinion leaving no ambiguity as to its intent and purpose i.e. tax as payable and set out under the Act. Rule 2(xxi) of the Rules commences with the words "Notional" thereby inhering a fictional amount to be calculated for attaining the quantum of the deferment limit as prescribed in the deferment certificate. A notional liability is always fictional and must retain its fictional character without transforming into a reality as a charging provision to create a fresh liability to pay tax. The word "notional" used in the title of Rule 2 (xxi) of the Rules and the words "shall be deemed" and "on the presumption that these transactions are eligible to tax under the aforesaid Act" clarify the word "notional". This notional calculation of sales tax liability cannot possibly be read to confer a fresh liability to pay tax. Even otherwise, Section 10-A of the 1948 Act places an obligation upon the party granted a deferment certificate to pay "tax due" i.e. tax as determined by the statue and, therefore, the stand taken by the State that Rule 2(xxi) of the Rules, the proviso and the explanation thereto requires the petitioner to pay tax on branch transfers, can neither be countenanced nor do the words and expressions used in the explanation and the proviso lend themselves to such an interpretation.

16. The explanation to sub Rule (i) which clarifies that branch transfers within the State of Punjab shall be deemed to be sales made within the State of Punjab and liable to tax does appear to suggest that branch transfers shall be deemed to be sales under the Act and liable to tax. The proviso to sub rule (ii), which sets out the rate of "notional tax liability" on branch transfers or consignment sales outside the State of Punjab clarifies that sale tax liability on branch transfers shall be sales under the Act, by raising a presumption that these transactions are "eligible to tax under the aforesaid Act". The sub rule and the proviso, in our considered opinion, merely enable the State to include branch transfers while calculating a "notional liability" to determine whether the assessee has attained the amount of deferment. The sub rule or the proviso to Rule 2 (xxi) of the Rules cannot, in our opinion, by reference to the presumption be read as imposing a tax on branch transfers outsideestimated purchase of raw material otherwise liable to purchase, of the eligible unit during the year for the purpose of deferment of, or, exemption from, tax computed at the rates specified under the Act; and,

> *EXPLANATION- The sales made on consignment basis within the State of Punjab, or branch transfer within the State of Punjab, shall be deemed to be sales made with the State and liable to tax.*

(ii) the amount of tax payable under the Central Sales Tax Act, 1956 on the sale of finished products of the eligible units made in the course of inter-State trade of commerce computed at the rate of tax applicable under the aforesaid Act;

PROVIDED THAT on branch transfer or consignment sales outside the state of Punjab, *notional sales tax liability shall be computed at the rate of four per cent on the production of the certificate in Form "F" and at the rate of ten per cent in the event of non-production of certificate in Form "F" specified in the Central Sales Tax Act, 1956 on the presumption that these transactions are eligible to tax under the aforesaid Act*.

17. Admittedly, branch transfers outside the State of Punjab are exempted from the payment of sales tax. The State of Punjab has from time to time, notified schemes for deferment and exemption from payment of sales tax and for the said purpose, has enacted Section 10-A of the 1948 Act. A perusal of Section 10-A of the 1948 Act, reveals that the State Government may defer the payment of "tax due" if it is necessary or expedient to do so in the interest of industrial development subject to such conditions as may be prescribed. Admittedly, branch transfers outside the State of Punjab are not exigible to sales tax. A taxing statute imposes tax by the State of Punjab or setting out a taxing event beyond the terms of the statue. As referred to before branch transfers are exempted from payment of sale. Rule 2(xxi) of the Rules, therefore, only provides for the methodology for calculating notional tax in cases of deferment and cannot be construed as a charging provision foisting a fresh liability upon an assessee, dehors any provision in the statue or in derogation to the exemption granted to such transfers. An exigibility to tax must flow from the statute and not from any provision whether direct or presumptive in a Rule and, therefore, we cannot construe the proviso to Rule 2 (xxi) of the Rules as imposing an obligation to pay sales tax on branch transfers outside the State of Punjab dehors the Act.

18. It would also be appropriate to point out that the words "and liable to tax" used in the explanation and the words "on the presumption that these transactions are exigible to tax under the aforesaid Act" used do not lend themselves to an interpretation that raises them to the status of a charging provision thereby imposing a fresh charge or tax rendering an assessee exigible to a tax that is not imposed by the parent statue. It is, therefore, apparent that Rule 2(xxi) of the Rules is a provision that aids and assists the assessee and the State in calculating notional tax liability for deferment and empowers the State Government while calculating the limit of deferment to include sale tax on branch transfers outside the State of Punjab on a presumption that they shall be deemed to be taxable but only for the purpose of calculating the quantum of deferred tax achieved by the assessee. The proviso cannot whether by interpretation or by reference to the presumption be assigned the status of a taxing provision rendering an assessee liable for a taxing event which is exempted under the parent statute i.e. the 1948 Act. Consequently, we allow the writ petition as well as the appeal, set aside the impugned orders and remit the matter to the assessing officer to decide the matter afresh and in accordance with law.

PUNJAB & HARYANA HIGH COURT

CWP No. 9566 of 2001

ODEAN RESTAURANT
Vs.
STATE OF PUNJAB AND OTHERS

AJAY KUMAR MITTAL. AND FATEH DEEP SINGH, JJ
4th August, 2014

HF ▶ Petitioner

SALE TAX – LEVY OF – FOOD SUPPLY BY RESTAURANT / EATING HOUSE – PETITIONER RUNNING RESTAURANT – FOOD SUPPLIED NOT CONSIDERED SALE AS PER PGST ACT 1948 – W.E.F. 1987 MEALS SUPPLIED BY RESTAURANT MADE TAXABLE AS PER AMENDMENT – HOWEVER, NO TAX PAYABLE FOR PERIOD UPTO DATE OF AMENDMENT IF TAX NOT COLLECTED BY DEALER FOR THAT PERIOD – ASSESSMENT FRAMED FOR YEAR 1985-86 – BASED ON RECORD PRODUCED DECLARATION BY DEPARTMENT THAT NO TAX FOUND COLLECTED BY DEALER FOR THE YEAR IN QUESTION – THEREFORE, NO TAX LEVIED ON PETITIONER – TAX AND INTEREST LEVIED IN REVISIONAL PROCEEDINGS – ORDER UPHELD BY TRIBUNAL ON GROUNDS OF DEALER'S FAILURE TO PROVE THAT TAX WAS NOT COLLECTED BY IT FOR PERIOD PRIOR TO AMENDMENT – HELD BY HIGH COURT THAT FINDING BY ASSESSING AUTHORITY REGARDING NO TAX BEING COLLECTED BY DEALER FOR THE YEAR IN QUESTION IGNORED BY TRIBUNAL – LIABILITY TO BE FASTENED FOR PERIOD PRIOR AMENDMENT ONLY IF TAX STOOD COLLECTED BY DEALER – SURRENDERING OF REGISTRATION CERTIFICATE BY PETITIONER IN 1985 TAKEN INTO ACCOUNT – ONUS THUS STOOD ALREADY DISCHARGED – LEVY OF TAX AND INTEREST SET ASIDE - WRIT PETITION ALLOWED – SECTION 2 (h) OF PGST ACT 1987; SECTION 4(2) (a) OF PGST ACT 1987 .

The petitioner was running a restaurant and was not liable to tax as per section 2(h) of PGST Act, 1948 as supply of food by eating houses was not considered as sale. In 1987, vide amendment, supply of foods by eating place was made taxable. However, any dealer who had not been collecting tax from its customers for the period upto date of amendment was not liable to pay tax if it could discharge the onus to prove the same. The petitioner was assessed for the period of 1985-86 whereby no tax was levied by the assessing authority declaring that based on books of accounts shown, it was proved that the dealer had charged no tax for the year in question from its customers. The revisional authority levied tax and interest which was upheld by Tribunal holding that the petitioner had failed to discharge the onus to prove that he had not charged tax for the period prior amendment. Allowing the writ, the High Court has held that the assessing authority has already given a finding based on material record regarding nil collection of tax from customers by the dealer during assessment year. Therefore, the onus stands discharged. Also, registration certificate was surrendered in 1985 by the dealer which was corroborated with the fact recorded by the assessing authority. Therefore writ is allowed.

Present: Mr. K.L. Goyal, Senior Advocate with
Mr. Naveen Rattan, Advocate for the petitioner.

Mr. Piyush Kant Jain, Additional Advocate General, Punjab.

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AJAY KUMAR MITTAL, J.

1. In this petition filed under Articles 226/227 of the Constitution of India, the petitioner has prayed for issuance of a writ of certiorari for quashing the orders dated 29.5.1992 (Annexure P-5) passed by respondent No.3 and dated 30.3.1994 (Annexure P-6) passed by respondent No.2.

2. The facts, in brief, necessary for adjudication of the instant appeal as narrated therein are that the petitioner is a partnership firm running a restaurant at Amritsar. The petitioner was registered as a dealer under the Punjab General Sales Tax Act, 1948 (hereinafter referred to as "1948 Act") with registration No. AMR/556 during the year 1985-86. It claimed exemption from payment of tax under the 1948 Act for the receipts on account of meals served to the customers in view of the judgments of the Hon'ble Supreme Court in **Northern Indian Caterers (India) Ltd. v. Lt. Governor of Delhi (1978) 42 STC 386** and **State of Himachal Pradesh and others v. Associated Hotels India Ltd. (1972) 29 STC 474** wherein it was observed that the transactions in question are not 'sales' as defined in Section 2(h) of the 1948 Act. The Parliament by way of 46th Amendment, inserted Clause (29-A) in Article 366 defining the term 'sale'. It came into force w.e.f. 2.2.1983 and the States were empowered to impose tax on the transactions relating to meals served to the customers in the restaurants as 'sales'. The State of Punjab vide notification dated 13.4.1987 (Annexure P-2) amended the 1948 Act by enacting Punjab General Sales Tax (Amendment and Validation) Act, 1987 (in short "the Act") and changed the definition of sale given in Section 2(h) therein. Vide Section 4(2)(a) of the amending Act, it was provided that no tax shall be payable for the period upto the date on which the amended Act had come into force if the dealer had not collected any tax from the customers. The assessing authority vide order dated 5.5.1989 (Annexure P-4) framed the assessment of the dealer for the year 1985-86 declaring the transactions as not liable to payment of tax as no tax had been collected by the dealer from the customers. Therefore, in view of the Section 4(2)(a) of the amended Act, the assessing authority had not levied any tax despite the amendment of the 1948 Act. Respondent No.3 initiated ***suo motu*** revisional proceedings on the ground that even after the amendment of the Act, the dealer was liable to pay tax and vide order dated 29.5.1992 (Annexure P-5) not only assessed the tax amounting to ' 56,237/- but also levied interest to the tune of ' 69,688/- on the dealer. Feeling aggrieved, the dealer filed revision before the Tribunal. The Tribunal vide order dated 30.3.1994 (Annexure P-6) upheld the order of respondent No.3 and dismissed the revision holding that the onus to prove that the tax was not collected from the dealer was upon him which he had failed to do. Aggrieved by the order dated 30.3.1994 (Annexure P-6), the dealer filed reference under Section 22(1) of the Act for referring certain questions of law to this Court for opinion. During the pendency of the reference application, the dealer moved rectification application regarding interest. However, the Tribunal vide order dated 3.11.1998 (Annexure P-8) dismissed the said application being time barred. The Tribunal vide exparte order dated 30.9.1999 (Annexure P-9) dismissed the reference application. Thereafter, the dealer filed restoration application for recalling the order dated 30.9.1999 (Annexure P-9). The Tribunal vide order dated 19.10.2000 (Annexure P-10) dismissed the said application. Hence, the present writ petition.

3. Upon notice of motion having been issued, written statement was filed by respondents No.1 and 3. It was pleaded therein that the petitioner was charging tax and depositing the same. The revisional authority took up the case of the petitioner and after examination of the record,

the petitioner was assessed under Section 21 of the 1948 Act and an additional demand of ' 1,25,925/- was created because the petitioner had failed to discharge its onus to show that as to why it stopped charging tax when there was no change in the law between 1983 to 1985. It was further pleaded that the order of the revisional authority was upheld by the Tribunal and the reference application as well as rectification application regarding interest filed by the petitioner were also dismissed by the Tribunal. The other averments made in the writ petition were denied and a prayer for dismissal of the same was made.

4. The averments made in the written statement were controverted and that of the writ petition were reiterated by the petitioner by filing replication.

5. Learned counsel for the petitioner submitted that the Parliament by 46th Constitutional Amendment had sought to bring within the tax net the restaurants and the food etc. sold by them w.e.f. 2.2.1983. However, the State Legislature by virtue of the Amendment Act made effective from 3.3.1987 had levied sales tax on the food articles sold by the restaurants. However, by virtue of Section 4 (2)(a) of the amended Act, it was stipulated that the dealer-restaurant owners shall not be liable to pay tax where the said tax has not been collected on supply on the ground that no such tax could have been levied or collected at that time. It was urged that the Assessing Officer in the order had categorically recorded a finding that after perusal of the books of account produced by the dealer, it was noticed that no tax was collected during the year under assessment. Reference was also made to the letter dated 21.5.1985, Annexure P-1, whereby the petitioner had surrendered registration certificate w.e.f. 21.5.1985. It was argued that the revisional authority and the Tribunal had without any material recorded a finding that the assessee had failed to show that no tax was collected which was not borne out from the record. The levy of interest was also challenged in view of judgment of the Hon'ble Apex Court in **J.K. Synthetics Ltd. v. Commercial Taxes Officer, 94 STC 422 (SC)**.

6. On the other hand, learned State counsel supported the orders passed by the revisional authority and the Tribunal.

7. After hearing learned counsel for the parties, we find substance in the submission of learned counsel for the petitioner. It would be advantageous to refer to Section 4(2) of the Act amended Act which reads thus:-

> *"4(2) Notwithstanding anything contained in subsection (1), any supply of the nature referred to therein shall be exempt from the aforesaid tax,-*
>
> *Where such supply has been made by any restaurant or eating house (by whatever name called) at any time on or after the 7th day of September, 1978 and before the commencement of the Punjab General Sales Tax (Amendment) Act, 1987 and the aforesaid tax has not been collected on such supply on the ground that no such tax could have been levied or collected at that time; or*
>
> *Where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or after the 4th day of January,1972, and before such commencement and the aforesaid tax has not been collected on such supply on the ground that no such tax have been levied or collected at that time:*
>
> *Provided that the burden of providing that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or, as the case may be, clause (b), shall be on the person claiming the exemption under this sub-section.*

8. Section 4(2) of the amended Act specifically provides that before the commencement of the Punjab General Sales Tax (Amendment) Act, 1987, the dealer-restaurant owner was not liable to pay tax on the supply of goods where no such tax had been collected on such supply by him on the ground that no such tax could have been levied or collected at that time. In other words, for the period prior thereto, liability could only be fastened where the dealer had collected the tax. The Assessing Officer on the basis of material and after examining the books of account had recorded a categorical finding that no tax was collected during the assessment year in question. This fact was corroborated by the petitioner with reference to letter dated 21.5.1985 (Annexure P-1) where the dealer had surrendered the registration certificate w.e.f. 21.5.1985. The onus upon the dealer had, thus, been discharged. The findings recorded by the revisional authority and the Tribunal to the contrary are not borne out from the record and, thus, cannot legally be sustained.

9. In view of the above, no liability could be fastened on the petitioner for the period in question. As a necessary corollary, the levy of interest is also unsustainable.

10. Writ petition stands disposed of in the aforesaid terms.

PUNJAB & HARYANA HIGH COURT

VATAP No. 173 of 2013

STATE OF HARYANA
Vs.
HARI KEWAL VANASPATI MILLS

RAJIVE BHALLA AND B.S. WALIA, JJ
5th December, 2014

HF ▶ Assessee

NATURAL JUSTICE – REASSESSMENT – OPPORTUNITY OF CROSS-EXAMINATION – VIOLATION OF SECTION 31 OF HGST ACT – REASSESSMENT PROCEEDINGS CONCLUDED WITH RAISING OF ADDITIONAL DEMAND ON ACCOUNT OF SUPPRESSED PURCHASES – INFORMATION POINTING TOWARDS SUPPRESSED PURCHASES NOT TESTED FOR GENUINENESS – VIOLATION OF NATURAL JUSTICE OBSERVED BY TRIBUNAL – APPEAL BY REVENUE - C-FORMS AND DRAFTS BEING ISSUED BY ASSESSEE HIMSELF CONTENDED TO HAVE NEGATED THE NEED TO ALLOW CROSS-EXAMINATION - HELD BY HIGH COURT THAT RELEVANT INFORMATION THAT FORMED THE BASIS OF ADVERSE ORDER NOT CONFRONTED TO ASSESSEE – AUTHORITY NOT ABSOLVED OF THE OBLIGATION TO ALLOW CROSS-EXAMINATION EVEN IF CERTAIN DOCUMENTS PRODUCED BY ASSESSEE – VIOLATION OF NATURAL JUSTICE AND SECTION 31 OF HGST ACT – APPEAL DISMISSED - *SECTION 31 OF HGST ACT, 1973.*

An additional demand on account of suppressed purchases was raised during reassessment. On appeal before Tribunal it was held that the information gathered from the third party and relied upon by the Assessing Authority for reassessment needed to be tested through a detailed enquiry to ascertain the genuineness of the purchases alleged to have been suppressed. Violation of principals of natural justice was observed and the matter was remanded. The revenue appealed before the Hon'ble High Court that since the assessee itself had issued bank draft and C-forms without asserting to the contrary, there was no need to allow any further cross-examination. The High Court, dismissing the appeal, has held that the assessee was not confronted with the relevant information that formed the foundation of the reassessment order. The question whether C-forms and drafts were issued by the assessee or not, did not absolve the assessing officer of its obligation to grant an opportunity to cross examine the source of this information. As per Sec. 31 of HGST Act 1973 'reasonable opportunity' has to be provided before an adverse order is passed against assessee on reassessment. Appeal filed by State was dismissed.

Present: Ms. Mamta Singhal, AAG, Haryana,
for the appellant.

Mr. Avnish Jhingan, Advocate, for the respondent.

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RAJIVE BHALLA, J.

1. The State of Haryana is surprisingly before us advancing a plea that adequate opportunity should not be granted to the assessee or in the alternative as adequate opportunity has been granted, the impugned order dated 3.10.2012, passed by a Full Bench of the Tribunal may be set aside.

2. The Assessing authority concluded reassessment proceedings against the assessee by holding that the assessee has suppressed purchases of Rs. 2,36,40,414/- and, therefore, assessed a gross-profit @ 8.33%, enhanced the gross turn over to Rs.2,60,00,000/- and raised an additional demand of Rs.18,20,000/-. The assessee filed an appeal before the Joint Excise and Taxation Commissioner(Appeals), Hisar, which was disposed of by marginally reducing the additional demand. The assessee, thereafter, filed an appeal before the Haryana Tax Tribunal. A difference of opinion between members of the Tribunal led to the matter being placed before a Full Bench of the Tribunal, which by majority, passed order dated 3.10.2012 holding as follows:-

> *"Hence, from the legal position as discussed, it would follow that it is not mandatory in every case that the crossexamination of the third party should invariably be allowed by the Assessing Authority. Decidedly, the assessment proceedings are quasi judicial proceedings and subject to observance of the principles of natural justice. Whether crossexamination of a person providing information is required or not will depend on the facts and circumstances of the case under assessment. However, in the present case as pointed out in paras 8, 10 and 14 above, there was deficiency in the observance of the principles of natural justice amounting to violation thereof. The information gathered from the third party and relied upon by the Assessing Authority for reassessment needed to be tested through a detailed enquiry to ascertain the genuineness of the purchases alleged to have been suppressed. Therefore, in view thereof and in view of the ratio of the judgments cited by the appellant, we hold that the cross-examination of the third party was warranted in this case. "*

3. Counsel for the State of Haryana submits that as the Tribunal has itself held that an opportunity to cross-examine a person who provides information need not be allowed in each and every case, it has erred in holding that the assessing authority did not observe the principles of natural justice. Counsel for the State of Haryana further contends that as the dealer himself issued the bank drafts etc., there was no need for granting any further opportunity. It is also argued that as C-Forms, relied by the Assessing Officer were issued by the assessee and the assessee had not asserted to the contrary, findings recorded by the Tribunal are contrary to the evidence on record and, therefore, may be set aside.

4. Counsel for the assessee, however, submits that a perusal of findings recorded by the Tribunal prove that the assessee was not confronted with relevant material, that formed the foundation of the reassessment order. The question whether the C-Forms and drafts were issued by the assessee or not, did not absolve the Assessing Officer of its obligation to confront the assessee with relevant material and to grant an opportunity to cross-examine the source of this information.

5. A fundamental principle that governs all quasi judicial determinations is strict adherence to principles of natural justice. Thus, where an Assessing Authority collects material against an assessee and then proceeds to nullify an already concluded assessment to fasten additional lability, the Assessing Authority would be required to confront the assessee with all relevant material that is likely to form the basis of his consideration. The question whether documents relied by the Assessing Authority were prepared by the assessee or that the assessee did not ask for an opportunity, are questions relating to the final order to be passed and therefore, do not absolve an Assessing Authority of its obligation to confront the assessee with relevant material. The Tribunal has recorded a clear finding that the assessee was not granted adequate opportunity to rebut material collected by the authority. Section 31 of the Haryana General Sales Tax, 1973, itself requires grant of a "reasonable opportunity" thereby requiring adherence to principles of natural justice, before an adverse order of reassessment is passed against an assessee.

6. As a consequence, we find no reason to interfere with the impugned order and dismiss the appeal.

PUNJAB & HARYANA HIGH COURT

VATREF No. 7 of 2010

PREM NARAIN AND COMPANY
Vs.
STATE OF PUNJAB

RAJIVE BHALLA AND B.S. WALIA, JJ
15th December, 2014

HF ▶ Appellant

PENALTY – CHECK POST – EVASION – INGENUINE DOCUMENTS – CANCELLATION OF AGENCY OF APPELLANT BY PRINCIPAL COMPANY - CONSEQUENTLY GOODS RETURNED BY AGENT APPELLANT – VOLUNTARY REPORTING AT ICC - GOODS DETAINED ON GROUNDS THAT BILLS PRODUCED NOT ISSUED FROM REGULAR BILL BOOK – STOCK SUSPECTED TO BE MEANT FOR TRADE – PENALTY U/S 14(B)(7) OF PGST ACT IMPOSED – ASSESSMENT ORDER DECLARING THE BILLS IN QUESTION DULY VERIFIED AND ACCEPTED TAKEN INTO ACCOUNT BY TRIBUNAL – CREDIT NOTE ISSUED TO AGENT BY PRINCIPAL ON RECEIVING GOODS BROUGHT ON RECORD – HELD BY HIGH COURT THAT ONCE ASSESSING AUTHORITY HAD FINALISED ASSESSMENT AND ACCEPTED THOSE BILLS AS VERIFIED AND RECORDED A FINDING THAT GOODS RETURNED AS PER BILLS IN QUESTION WERE ONLY ON ACCOUNT OF TERMINATION OF AGENCY, NO LIABILITY TO PAY TAX AROSE – PENALTY DELETED AND REFUND ALONGWITH INTEREST GRANTED – *SEC. 14(B)(7) OF PGST ACT.*

After the cancellation of agency in the year 2000, the goods were returned by the appellant to its principal company M/s Escorts Ltd, Faridabad. The goods in transit were voluntarily reported at the ICC and documents were produced. Suspecting the goods to be meant for trade on the basis of the bills produced not being issued from the regular bill book, penalty u/s 14(b)(7) was imposed. For the year 2001-02 an assessment order was passed whereby the authority clearly laid down that the bills in question were duly verified with books of accounts and that the goods returned were due to cancellation of agency between the appellant and M/s Escorts Ltd and as such no tax is payable on these goods. Therefore, the Hon'ble High Court deleted the penalty and has set aside the impugned order on the basis of the order passed by the Assessing Authority. It is held that once the assessing authority has finalized the assessment proceedings by accepting that the assessee had returned the goods to M/s Escorts Ltd through the bills in question on cancellation of agency and the bills were duly verified with the books of accounts, there is no liability to pay tax on such goods. Hence, the penalty was deleted and refund of the amount deposited by the appellant was allowed alongwith interest from the date of deposit.

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

Mr. Jagmohan Bansal, Advocate for the respondent.

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B.S. WALIA, J.

1. Vide order dated 24.9.2010, VAT Tribunal, Punjab, Chandigarh, has referred the following question of law to this Court for its opinion :-

> "Whether in the facts and circumstances of the case where the contention of the appellant/assessee that the goods had been returned by the dealer i.e. the present applicant/appellant to M/s Escorts Ltd. Faridabad, on cancellation of the agency and the bills had been duly verified with books of accounts by the assessing authority at the time of assessment, then penalty under Section 14-B(7)(ii) of PGST Act on the ground that the goods were not accompanied by proper and genuine documents shall be sustainable."

2. Brief facts of the case are that truck No. PLS-9349 carrying goods while leaving the State of Punjab was intercepted and checked by the ETO at ICC Shambhu on 06.05.2001. The truck driver reported at the ICC while leaving the State of Punjab. On production of documents relating to the goods i.e. tractor parts the detaining officer observed that the documents were not proper and genuine. A representation was made on behalf of the dealer before the detaining officer and bill book from which bill Nos. 1655, 1656 to 1681 had been issued was produced. However the same was found to be not from the current bill books. The same was also found to be not mentioned in the account books. The matter was reported to the authorized officer, who after going through the facts of the case and hearing counsel for the appellant imposed a penalty of Rs.1,65,000/- u/s 14-B(7)(ii) of the Punjab General Sales Tax Act, 1948 (in short "the Act") vide order dated 27.11.2001. An appeal filed against order dated 27.11.2001 was dismissed by the Joint Director (Enforcement), Patiala, vide order dated 06.08.2002. A further appeal before the Value Added Tax Tribunal, Punjab, Chandigarh (for short 'Tribunal'), was dismissed vide order dated 07.04.2003. Thereafter an application u/s 22 (1) of the Act was filed for referring the matter for the opinion of the High Court on 9 questions of law. The Tribunal vide its order dated 21.08.2008 referred only the below mentioned composite question of law for the opinion of the High Court :

> *"Whether in the facts and circumstances of the case where the contention of the appellant/assessee that the goods had been returned by the dealer i.e. the present applicant/appellant to M/s Escorts Ltd. Faridabad, on cancellation of the agency and the bills had been duly verified with books of accounts by the assessing authority at the time of assessment, then penalty under Section 14-B(7)(ii) of PGST Act on the ground that the goods were not accompanied by proper and genuine documents shall be sustainable."*

3. The High Court, vide its order dated 30.04.2010 in VATREF No. 2 of 2008 held that the reference made needed further examination by the Tribunal, therefore, remitted the case to the Tribunal for a fresh statement of case and questions to be framed on the basis of facts given in the first order of the Tribunal. It is in the aforementioned circumstances that the brief facts of the case, as have been referred to above, were prepared.

4. The order of reference further mentions that as per argument of the counsel for the appellant, the appellant was agent of M/s Escorts Ltd. Faridabad. The agency was cancelled vide letter dated 18.07.2000 and goods being carried were not for sale, but were being returned to M/s Escorts Ltd. Faridabad. A declaration at the ICC had been duly generated and even a written statement was filed before the AETC, explaining the factual as well as legal position. It is in the aforementioned circumstances that the question referred to the High Court for its opinion was formulated and as has been referred to at the outset.

5. We have heard learned counsel for the parties and perused the paper book, as also the orders attached therein and are of the view that the reference has to be answered in favour of the assessee for the reasons mentioned hereunder.

6. A perusal of the paper book (order of the VAT Tribunal, Punjab dated 21.08.2008) reveals that the appellant was an agent of M/s Escorts Ltd. Faridabad and that its agency was cancelled vide letter dated 18.07.2000. The goods being carried were not for sale and were being carried for being returned to M/s Escorts Ltd. Faridabad. Information regarding this fact was duly generated at the ICC and even a written statement was filed before the AETC explaining the factual and legal position. Assessment for the year 2001-02 had been completed by the assessing authority and all books and documents had been produced and the assessing authority, after duly verifying the documents relating to return of goods of the value of Rs.5,58, 557/- against bill Nos. 1655 and 1656 to 1681 had accepted the position as taken by the appellant and framed assessment vide order dated 05.05.2008. A copy of the assessment order dated 05.05.2008 has been produced before us. A relevant extract of the same is reproduced below :-

> *" The books produced by the firm have examined at length and during the course of examination of books of accounts it was noticed that the dealer has made goods returned to Escorts Ltd., Faridabad on cancellation of agency/dealership through bill Nos. 1655, 1656 to 1681 are in continuation and the same are for Rs.558557/-. These bills were duly cross verified with books of accounts. The goods returned as mentioned above is only on account of termination of dealership as such no tax is payable on these goods."*

7. It would be relevant to mention here that against the order of the Tribunal dated 07.04.2003, CWP No.6435 of 2005 had been filed in the High Court, which was dismissed as withdrawn vide order dated 13.12.2006, granting permission to the petitioner to avail remedy of reference, where after reference was filed.

8. A penalty of Rs.1,65,000/- had been imposed under Section 14-B(7) (ii) of the Act, in view of the conclusion of AETC, ICC, (Export), Mehmoodpur that the goods were meant for trade as they were not covered by proper and genuine documents and an attempt to evade tax is proved. A perusal of the order of Tribunal dated 21.08.2008 reveals that during the course of arguments, the BANu/appellant had produced record i.e. credit note issued by M/s. Escorts Ltd., Faridabad, for goods so received, on cancellation of agency, as also assessment proceedings as finalized and bill books and contention of the appellant having been accepted by the assessing authority that the goods of the value of Rs.5,58,557/- against bill Nos. 1655 and 1656 to 1681, had been returned on cancellation of the agency.

9. On the other hand, the sole argument on behalf of the department was that the AETC, ICC, (Export), Mehmoodpur, had come to the conclusion that bills were not from the regular bill books and therefore goods were meant for trade and reflected an attempt to evade

tax being not covered by proper and genuine documents. Likewise, perusal of order dated 06.08.2002 passed by the Joint Director (Enforcement), Patiala Division, Patiala, in appeal filed by the assessee, was on the basis that there was no mention of stock transfer in the bills accompanying the goods and the bills in question not having been issued from regular bill book and the appellant had failed to establish the bona fide of the documents, therefore, it was held to be an attempt had been made to evade tax. The AETC, ICC, (Export), Mehmoodpur, had imposed a penalty of Rs.1,65,000/- vide order dated 27.11.2001 by observing that bill No. 1661 to 1700 had been issued and that said bill book had been produced but the said bill book did not find mention in the current account books and further that bills prior to the date of transaction in issue in the instant case did not find place in any account books. The AETC, ICC, (Export), Mehmoodpur by referring the provisions of Section 6 (A) of the Central Sales Tax Act held that the burden was cast on the dealer to prove that the goods were transferred by him otherwise than by way of sale, but that the dealer had not produced any document to substantiate that it was a case of stock transfer of goods and that no account books, stock register for verification of accompanying bill was produced and that only document produced was bill book which conclusively proved that bills were not issued from the regular bill books. In the light of the above, the AETC, ICC, (Export), Mehmoodpur, held that the goods were meant for trade and were not covered by proper and genuine documents therefore there was an attempt to evade tax for which penalty of Rs.1,65,000/- under Section 14-B.7(ii) of the Act was imposed.

10. The question referred to this Court has to be answered in favour of the assessee for the reason that once the agency stood cancelled and M/s Escorts Ltd., Faridabad had given a credit note for the goods (facts that have gone unchallenged by the revenue), besides assessment having been framed, bill books and the stand of the appellant having been accepted by the assessing authority that the goods of the value of Rs.5,58,557/- against bill Nos. 1655 and 1656 to 1681, had been returned by the appellant to M/s Escorts Ltd., Faridabad, on cancellation of the agency, there was no question of there being any attempt to evade tax. A perusal of Section 14(B)7 (ii) of the Act reveals that the sine qua non for imposing penalty is a conclusion on the basis of an enquiry by the concerned officer that there has been an attempt to avoid or evade tax under the Act. The bill Nos. 1655, 1656 to 1681 were produced before the AETC, ICC, (Export), Mehmoodpur, alongwith bill books. However, the same was disbelieved on the ground that the bill book did not find place in the current account books. Once the assessing authority has finalized the assessment proceedings vide order dated 05.05.2008 by accepting the stand of the assessee that the appellant had returned the goods to M/s Escorts Ltd., Faridabad, through bill Nos. 1655, 1656 to 1681 dated 05.05.2001 to M/s Escorts Ltd., Faridabad on cancellation of its agency/dealership and the bills were duly cross verified with the books of accounts and finding was recorded that goods returned as per bill given were only on account of termination of dealership, there was no liability to pay tax on such goods. Therefore, there is no further scope to doubt the stand of the appellant or to impose penalty particularly when the documents produced by the assessee have not been proved to be incorrect.

11. Accordingly it is held that the penalty imposed on the appellant u/s 14- B(7)(ii) of PGST Act on the ground that the goods were not accompanied by proper and genuine documents despite the stand of the appellant/assessee that the goods had been returned by it to M/s Escorts Ltd. Faridabad, on cancellation of the agency and despite the bills having been duly verified with the books of accounts by the assessing authority at the time of assessment vide order dated 05.05.2008 is held to be legally unsustainable. The question of law is answered accordingly.

12. Resultantly, orders dated 27.11.2001 passed by AETC, ICC, (Export),

Mehmoodpur, order dated 06.08.2002 passed by the Joint Director (Enforcement), Patiala Division, Patiala, in the first appeal, as also order dated 07.04.2003 passed by the Tribunal in appeal u/s 20(2) of the Act, are unsustainable.

13. As a consequence thereof, the Assistant Excise & Taxation Commissioner, Information Collection Centre (Export), Mehmoodpur would take steps to refund the sum of Rs.1,65,000/- imposed by way of penalty to the appellant along with interest @ 12% p.a. w.e.f. the date of deposit of penalty amount by the appellant till date of refund, within a period of 3 months from the date of receipt of certified copy of this order.

PUNJAB VAT TRIBUNAL

VAT APPEAL NO. 47 OF 2013

SAMRAT PLYWOOD LTD
Vs.
STATE OF PUNJAB

JUSTICE A.N. JINDAL,(RETD.) CHAIRMAN

18th December, 2014

HF ▶ Assessee

PRE DEPOSIT – APPEAL – ENTERTAINMENT OF – REQUIREMENT OF 25% WAIVED OFF WHEN ASSESSMENT BARRED BY LIMITATION – ASSESSMENT FOR THE YEAR 2005-06 FRAMED IN 2010 – LEVY OF TAX, INTEREST AND PENALTY – DISMISSAL OF FIRST APPEAL ON GROUNDS OF NON COMPLIANCE OF SEC. 62(5) OF PVAT ACT – APPEAL FILED BEFORE TRIBUNAL – REQUIREMENT OF PRE DEPOSIT WAIVED OFF BY COURT WHEN ASSESSMENT IS CLEARLY TIME BARRED – NOTHING TO SHOW EXISTENCE OF CIRCUMSTANCES PREVENTING THE OFFICER TO PASS ORDER WITHIN TIME FRAME OF 3 YEARS – NO USEFUL PURPOSE WOULD BE SERVED BY COMPELLING FOR PRE DEPOSIT FOR ENTERTAINING OF APPEAL – APPELLATE AUTHORITY DIRECTED TO DECIDE AFRESH WITHOUT REQUISITE OF PRE DEPOSIT – APPEAL ALLOWED.

The appellant – assessee was assessed for the year 2005-06 and an order was passed in 2010. The first appeal was dismissed on the grounds that the petitioner had failed to deposit 25% of the amount levied as tax, interest and penalty as per the assessment order for the entertainment of appeal. However, on appeal before Tribunal it is held that since the assessment ought to have been framed within period of 3 years i.e. upto 2009, the assessment is clearly time barred and there is nothing to show that any circumstances existed that prevented the officer to pass an order within the time frame. Following the judgment delivered in the case of M/s Malwa Cotton Spinning Mills Ltd. it is held that no useful purpose would be served by requiring the Assessee to first deposit 25% of additional demand raised and then get the appeal decided before the Fist Appellate Authority. Therefore, allowing the appeal. Tribunal remanded the case back to Appellate Authority to decide afresh without requisite of deposit of 25%.

Present: K.L. Goyal, Sr. Advocate alongwith Mr. Sandeep Goyal, Advocate
counsel for the appellant.
Mr. N.D.S. Maan, AddL Advocate General for the State

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A.N. Jindal, J.

1. Counsel for the appellant has filed copy of the resolution of Sh. Rajiv Singhal which is placed on record.

2. This appeal is against the order dated 30.7,2010 passed by the Assistant Excise and

Taxation Commissioner-cum-Senior Auditor, SAS Nagar Mohali to frame the assessment qua the returns filed by the appellant for the year 2005-06 filed on 20.11.2006. On 30.7.2010 appeal was dismissed only on the ground that the petitioner had failed to comply with the provisions of section 62(5) of the PVAT, Act 2005. The order dated 22.12.2010 passed by the DETC has been challenged before me in appeal. The DETC(A) dismissed the appeal on the ground of non-compliance of the provisions of section 62(5) of the Act.

3. As per section 62(5) of the Act (prior to the amendment dated 17.8.2011), No appeal could be entertained without depositing of 25% of the tax, penalty and interest. The counsel for the appellant has contended that the assessment of the year 2005-06, though was filed within time, i.e. by 20.11.2006, yet the assessment was not framed within 3 years i.e. upto 20.11,2006, yet the assessment was not framed within 3 years i.e, upto 20.11,2009. However, the assessing authority framed the assessment on 30.7.2010. Therefore, in case, where the assessment was apparently time barred, no useful purpose would be served to compel the appellant to deposit 25% of the penalty and interest before entertaining the appeal and for hearing the appeal. Rather the appellant should have heard the appeal without such deposit. On the other hand, Sh. N.D.S. Maan, AAG for the State has submitted that irrespective of the question of limitation involved in the appeal, the condition deposit of 25% was mandatory. To support this contention, he has taken me through the judgment delivered in the case of National Sales Corporation and others CWP No. 16452 of 2010 decided on 14.9,2010. On the other hand, counsel for the respondent has referred to a judgment delivered in case VATAP 3i of 2009 State of Punjab and another V/S M/s Malwa Cotton Spinning Mills Ltd, decided on 20.7.2009.

4. After going through the judgment of National Sales Corporation, It transpires their the appeal was dismissed in limine without deciding the effect of the assessment, which is apparently time barred. Whereas, the judgment passed by M/s Malwa Cotton Spinning Mills Ltd. is applicable to the facts of the present case. It is not denied by Mr. Maan that the return of the year2005-06, is in question. He could not show such intervening the circumstances which prevented the Assessing Officer to pass the order after the period of 3 years, Of course, if the delay is on the part of the appellant for delayed decisions that could be excluded.

5. In any case, without going into the merits of the case, I am of the opinion that where there is serious question of limitation and the assessment framed is prima facie time barred, no useful purpose would be served for depositing tht'25% of the amount of tax before hearing the appeal. I find of support to my this now from the judgment delivered in case M/s Maiwa Cotton Spinning Mills Ltd. supra, wherein, their Lordships observed as under:-

> *Having heard learned counsel for the appellants and perusing the record, we are of he considered view that the first appellate authority like Deputy Excise and Taxation Commissioner was not competent to entertain the appeal without compliance of mandatory provisions of Section 62(5) of the Act yet it is equally true that the order dated 6.6.2008 granting extended period of limitation was set aside by the Tribunal on 20.11.2008(A.6). Therefore, in the facts and circumstances of this case, no useful purpose would be served by requiring the Assessee-respondent to first deposit 25% of additional demand raised,*

and then get the appeal decided before the Deputy Excise and Taxation Commissioner".

6. In these circumstances, this appeal is accepted, impugned order is set-aside and the Assessing Authority is directed to decide the appeal afresh without depositing requisite 25% of the amount of Tax, penalty and interest.

7. The parties be directed to appear before the DETC on 20.2.2015. Pronounced in the open court.
