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SUPREME COURT OF INDIA

CIVIL APPEAL NO. 5167 OF 2008

QUEEN'S EDUCATIONAL SOCIETY
Vs.
COMMISSIONER OF INCOME TAX

T.S. THAKUR AND R.F. NARIMAN, JJ.

16th March, 2015

HF ▶ - Appellant

EXEMPTION – INCOME TAX ACT - EDUCATIONAL INSTITUTION – ASSESSEE CLAIMS TO BE AN EDUCATIONAL SOCIETY ESTABLISHED WITH SOLE OBJECT OF IMPARTING EDUCATION – EXEMPTION CLAIMED U/S 10 (23C) (iii ad) OF INCOME TAX ACT, 1961 – CLAIM REJECTED BY ASSESSING OFFICER HOLDING THAT WHENEVER PROFIT/ SURPLUS IS MADE BY EDUCATIONAL INSTITUTION, IT CEASES TO EXIST SOLELY FOR EDUCATIONAL PURPOSE AND BECOMES PROFIT MAKING ENTERPRISE – ORDER REVERSED BY COMMISSIONER – CLAIM ACCEPTED BY TRIBUNAL HOLDING THAT PROFIT EARNED HAS NOT BEEN USED FOR OWN BENEFIT OF MEMBERS OF SOCIETY AND PROFIT IS ONLY INCIDENTAL TO MAIN OBJECT – ORDER PASSED BY ASSESSING OFFICER UPHELD BY UTTARAKHAND HIGH COURT HOLDING THAT EVEN THOUGH EDUCATIONAL INSTITUTION PLOUGHS SUCH PROFITS BACK INTO PURCHASE OF ASSETS FOR EDUCATION, YET SUCH INSTITUTION CANNOT BE SAID TO EXIST ONLY FOR EDUCATION PURPOSE – APPEAL BEFORE SUPREME COURT – FOLLOWING EARLIER JUDGEMENTS, HELD THAT MAKING SURPLUS DOES NOT CONCLUDE THAT PURPOSE IS MAKING OF PROFIT – PREDOMINANT TEST SHOULD BE APPLIED – DISTINCTION TO BE DRAWN BETWEEN MAKING OF SURPLUS AND INSTITUTION BEING CARRIED FOR PROFIT – FURTHER ACTIVITIES OF SUCH UNITS SHOULD BE MONITORED AND EXEMPTION SHOULD BE WITHDRAWN IN CASE OF VIOLATION – REVENUE GRANTED LIBERTY TO DECIDE AFRESH IF NECESSARY – APPEAL DISPOSED OF – SEC 10 (23C) (iii ad); SEC 22; SEC 10(23C) (vi) OF INCOME TAX ACT, 1961

EXEMPTION –INCOME TAX ACT - EDUCATIONAL INSTITUTION – ASSESSEE CLAIMS TO BE AN EDUCATIONAL SOCIETY ESTABLISHED WITH SOLE OBJECT OF IMPARTING EDUCATION – EXEMPTION CLAIMED U/S 10 (23C) (vi) OF INCOME TAX ACT, 1961- EXEMPTION WITHDRAWN BY CHIEF COMMISSIONER FOLLOWING JUDGEMENT OF UTTARAKHAND HIGH COURT OBSERVING THAT ASSESSEE'S SUBSTANTIAL PROFITS WERE ARISING YEAR AFTER YEAR – ORDERS SET ASIDE BY PUNJAB & HARYANA HIGH COURT HOLDING THAT AS PER 13TH PROVISO TO SEC 10 (23C) (vi) , IT HAS TO BE ASCERTAINED WHETHER EDUCATION INSTITUTION IS

APPLYING PROFIT FOR THE OBJECT IT IS ESTABLISHED – MERE EARNING OF PROFIT NOT CONCLUSIVE THAT EDUCATIONAL INSTITUTION EXISTS FOR PROFIT – ASSESSING AUTHORITY CAN ENSURE COMPLIANCE AND WITHDRAW APPROVAL GRANTED IN CASE OF VIOLATION – CAPITAL EXPENDITURE TO BE WHOLLY MEANT FOR OBJECTS OF EDUCATION IS ENTITLED FOR EXEMPTION – ODER PASSED HIGH COURT APPROVED BY SUPREME COURT - FOLLOWING EARLIER JUDGEMENTS, HELD THAT MAKING SURPLUS DOES NOT CONCLUDE THAT PURPOSE IS MAKING OF PROFIT – PREDOMINANT TEST SHOULD BE APPLIED – DISTINCTION TO BE DRAWN BETWEEN MAKING OF SURPLUS AND INSTITUTION BEING CARRIED FOR PROFIT – FURTHER ACTIVITIES OF SUCH UNITS SHOULD BE MONITORED AND EXEMPTION SHOULD BE WITHDRAWN IN CASE OF VIOLATION- REVENUE GRANTED LIBERTY TO DECIDE AFRESH IF NECESSARY- SEC 10 (23C) (vi) OF INCOME TAX ACT, 1961

EXEMPTION – LIMITATION – DELAYED FILING OF APPLICATION – APPLICATION SEEKING EXEMPTION UNDER SEC 10 (23C) (vi) FOR ASSESSMENT YEAR 2008-09 FILED ON 23.9.08 – OUGHT TO HAVE BEEN FILED ON OR BEFORE 31.3.08 – CLAIM HELD TO BE RIGHTLY REJECTED BY CHIEF COMMISSIONER INCOME TAX – WRIT PETITION DISMISSED

The appellant filed its return showing net surplus for two consecutive years. It claimed exemption u/s 10(23C) (iii ad) of the income tax act 1961. The assessing officer rejected the claim holding that whenever profit/ surplus is made by educational institution, it ceases to exist solely for educational purpose and becomes profit making enterprise. The Commissioner of Income Tax allowed the appeal of the appellant. The ITAT, dismissed the appeal by the revenue holding that profit earned has not been used for own benefit of members of society and profit is only incidental to the main object. The order passed by the assessing officer was upheld by the High Court holding that even though educational institution ploughs such profits back into purchase of assets for education, yet such institution cannot be said to exist only for education purpose.

On appeal before the Supreme Court, *it is held that the fact that an educational institution makes a surplus does not leave to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit. The predominant object must be applied – the purpose of education should not be submerged by a profit making motive. If after meeting expenditure surplus arises incidentally from the activity carried on by the educational institution, it will not cease to be one existing solely for educational purposes. Setting aside the judgement of the Uttrakhand High Court, it is held that the correct tests which have been culled out in the three supreme court judgements namely Surat Art Silk cloth, Aditanar, and American Hotel and Lodging, would all apply to determine whether an educational institution exists solely for educational purposes or for profit. As per the 13th proviso to section 10(23C), the Assessing Authority must monitor with regard to application of income investment or deposit by such institutions. In case of violation such approval and exemption must be withdrawn. The revenue is at liberty to pass fresh orders if necessary considering provisions of law.*

Similarly, an appeal was filed by revenue against the orders passed by the Punjab and Haryana High Court whereby the Hon'ble Court had set aside the orders of the Chief Commissioner Income Tax for withdrawl of exemption under the Act in view of the Uttarakhand High court. The court had held that it has to be ascertained whether an educational society has been applying its profit wholly and exclusively to the object for which the institution is established. Merely because an institution has earned profit would not be deciding factor to conclude that the educational institution exists for profit. It has to be borne out that just because profits have resulted from the activity of imparting education would not result in change of character of the institution that it exists solely for educational purpose.

Thus on an application by an institution, the prescribed authority can grant approval subject to terms and conditions. The parameters of earning profit beyond 15% and its investment wholly for educational purposes may be expressly stipulated as per the statutory requirement. In case of violation exemption may be withdrawn by the prescribed authority. On appeal before Supreme Court, the orders of the High Court of Punjab and Haryana were upheld holding that that the correct tests which have been culled out in the three Supreme Court judgements namely Surat Art Silk cloth, Aditanar, and American Hotel and Lodging, would all apply to determine whether an educational institution exists solely for educational purposes or for profit. As per the 13th proviso to section 10(23C), the Assessing Authority must monitor with regard to application of income investment or deposit by such institutions. In case of violation such approval and exemption must be withdrawn. The revenue is at liberty to pass fresh orders if necessary considering provisions of law.

Also, an application seeking exemption had been filed by a petitioner assessee u/s 10 (23C)(vi) in respect of assessment years 2008-09 which could be filed during 2007-08 on or before 31.3.08. The application being filed after the prescribed period, it is held that the chief income tax commissioner has rightly rejected the claim. The court dismissed the writ petition finding no ground for interference.

Case followed:

CIT v. Surat Art Silk Cloth Manufacturers' Assn., (1980) 121 ITR 1

Aditanar Educational Institution v. Additional Commissioner of Income Tax, (1997) 224 ITR 310

American Hotel & Lodging Assn. Educational Institute v. CBDT, (2008) 301 ITR 86

Cases referred:

Pine Grove International Charitable Trust v. Union of India - (2010) 327 ITR 73 (P&H) *(Approved)*

CIT vs. Queen's Educational Society (2009) 319 ITR 160 (Uttarakhand HC) *(Reversed)*

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1. Leave granted in the special leave petitions.

2. The present appeals relate to a common judgment dated 24th September, 2007 passed by the High Court of Uttarakhand, Nainital in two income tax appeals, and a judgment of the Punjab and Haryana High Court dated 29th January, 2010 in **Pine Grove International Charitable Trust v. Union of India** - (2010) 327 ITR 73. Various other appeals (excepting Civil Appeal No.8962 of 2010) are filed by the Union of India/ Central Board of Direct Taxes in cases where the aforesaid judgment in Pine Grove has been followed.

3. The facts necessary to understand the controversy in the two income tax appeals before the Uttarakhand High Court, Nainital, may be gleaned from the facts of one of them, namely, the Queen's Educational Society case. The appellant filed its return for assessment years 2000-2001 and 2001-2002 showing a net surplus of Rs.6,58,862/- and Rs.7,82,632/- respectively. Since the appellant was established with the sole object of imparting education, it claimed exemption under Section 10(23C) (iiiad) of the Income Tax Act, 1961. The Assessing Officer vide its order dated 20th February, 2003 rejected the exemption claimed by the appellant. The CIT (Appeals) by its order dated 28th March, 2003 allowed the appellant's appeal, and the ITAT, Delhi, by its judgment dated 7th July,

2006 passed an order dismissing the appeal preferred by the revenue. In a reference to the High Court under Section 260A of the Income Tax Act, the High Court vide the impugned judgment set aside the judgment of the ITAT and affirmed the order of the Assessing Officer.

4. These appeals from the Uttarakhand High Court, Nainital, concern themselves with the provision of Section 10(23C) (iiiad) of the Act:

> *"Section 10- Incomes not included in total income.-In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-*
>
> *(23-C) any income received by any person on behalf of-*
>
> *(iii-ad) any university or other educational institution existing solely for educational purposes and not for purposes of profit if the aggregate annual receipts of such university or educational institution do not exceed the amount of annual receipts as may be prescribed"*

5. It will be noticed that the Section has three requirements - (a) the educational institution must exist solely for educational purposes (b) it should not be for purposes of profit and (c) the aggregate annual receipts of such institution should not exceed the amount or annual receipts as may be prescribed. Such prescription is to be found in Rule 2CA being an amount of Rs.1 crore.

6. The said Section was inserted by Finance Act No.2 of 1998 with effect from 1st April, 1999. Prior thereto, the Income Tax Act had a corresponding Section, namely, Section 10(22) which was as follows:-

> *"Section 10- Incomes not included in total income.-In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-*
>
> *22) any income of a university or other educational institution, existing solely for educational purposes and not for purposes of profit"*

7. We have heard learned counsel for the assessees as well as learned counsel for the revenue. The assessees argue that the impugned judgment is contrary to the law laid down by at least three Supreme Court judgments. Further, the wrong test has been adopted and followed, which is a test laid down by the Assessing Officer and not by any Supreme Court judgment - namely, that whenever a profit/surplus is made by an educational institution, it ceases to exist solely for educational purposes and becomes a profit making enterprise. In support of the Punjab and Haryana High Court judgment under appeal, counsel for the assessees argued that since the sole basis for not granting them exemption for the assessment years under question was the following of the Uttarakhand High Court judgment, if the said judgment is found to be incorrect, they are bound to succeed. For that reason, the revenue's appeal against the Punjab and Haryana High Court judgment should be dismissed. Counsel for the revenue, on the other hand, attempted to support the Uttarakhand High Court judgment by stating that the Section does not contemplate the making of large profits. If an educational institution in fact makes large profits then even though it may plough such profits back into the purchase of assets for education, yet such institution cannot be said to be existing solely for educational purposes. It would then become an institution which would really be for profit.

8. In **CIT v. Surat Art Silk Cloth Manufacturers' Assn.,** (1980) 121 ITR 1, this Court while construing the definition of "charitable purpose" in Section 2(15) of the Income Tax Act held:

> *"17. The next question that arises is as to what is the meaning of the expression "activity for profit". Every trust or institution must have a purpose for which it is established and every purpose must for its accomplishment involve the carrying on of an activity. The activity must, however, be for profit in order to attract the exclusionary clause and the question therefore is when can an activity be said to be one for profit? The answer to the question obviously depends on the correct connotation of the preposition "for". This preposition has many shades of meaning but when used with the active participle of a verb it means "for the purpose of" and connotes the end with reference to which something is done. It is not therefore enough that as a matter of fact an activity results in profit but it must be carried on with the object of earning profit. Profit-making must be the end to which the activity must be directed or in other words, the predominant object of the activity must be making a profit. Where an activity is not pervaded by profit motive but is carried on primarily for serving the charitable purpose, it would not be correct to describe it as an activity for profit. But where, on the other hand, an activity is carried on with the predominant object of earning profit, it would be an activity for profit, though it may be carried on in advancement of the charitable purpose of the trust or institution. Where an activity is carried on as a matter of advancement of the charitable purpose or for the purpose of carrying out the charitable purpose, it would not be incorrect to say as a matter of plain English grammar that the charitable purpose involves the carrying on of such activity, but the predominant object of such activity must be to subserve the charitable purpose and not to earn profit. The charitable purpose should not be submerged by the profit making motive; the latter should not masquerade under the guise of the former. The purpose of the trust, as pointed out by one of us (Pathak,J.) in Dharmadeepti v. CIT [(1978) 3 SCC 499 : 1978 SCC (Tax) 193] must be '"essentially charitable in nature" and it must not be a cover for carrying on an activity which has profit making as its predominant object. This interpretation of the exclusionary clause in Section 2 clause (15) derives considerable support from the speech made by the Finance Minister while introducing that provision. The Finance Minister explained the reason for introducing this exclusionary clause in the following words:*
>
> *"The definition of 'charitable purpose' in that clause is at present so widely worded that it can be taken advantage of even by commercial concerns which, while ostensibly serving a public purpose, get fully paid for the benefits provided by them namely, the newspaper industry which while running its concern on commercial lines can claim that by circulating newspapers it was improving the general knowledge of the public. In order to prevent the misuse of this definition in such cases, the Select Committee felt that the words 'not involving the carrying on of any activity for profit' should be added to the definition."*
>
> *It is obvious that the exclusionary clause was added with a view to overcoming the decision of the Privy Council in the Tribune case [AIR 1939 PC 208 : In Re the Trustees of the Tribune, (1939) 7 ITR 415] where it was held that the object of supplying the community with an organ of educated public opinion by publication of a newspaper was an object of general public utility and hence charitable in character, even though the activity of publication of the newspaper was carried on commercial lines with the object of earning profit. The publication of the newspaper*

was an activity engaged in by the trust for the purpose of carrying out its charitable purpose and on the facts it was clearly an activity which had profit making as its predominant object, but even so it was held by the Judicial Committee that since the purpose served was an object of general public utility, it was a charitable purpose. It is clear from the speech of the Finance Minister that it was with a view to setting at naught this decision that the exclusionary clause was added in the definition of "charitable purpose". The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. Where profit making is the predominant object of the activity, the purpose, though an object of general public utility, would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a charitable purpose merely because some profit arises from the activity. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditure balances the income and there is no resulting profit. That would not only be difficult of practical realisation but would also reflect unsound principle of management. We, therefore, agree with Beg, J., when he said in Sole Trustee, Loka Shikshana Trust case [(1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] that "if the profits must necessarily feed a charitable purpose under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter the charitable character of the trust. The test now is, more clearly than in the past, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on charity". The learned Judge also added that the restrictive condition "that the purpose should not involve the carrying on of any activity for profit would be satisfied if profit making is not the real object" (emphasis supplied). We wholly endorse these observations.

The application of this test may be illustrated by taking a simple example. Suppose the Gandhi Peace Foundation which has been established for propagation of Gandhian thought and philosophy, which would admittedly be an object of general public utility, undertakes publication of a monthly journal for the purpose of carrying out this charitable object and charges a small price which is more than the cost of the publication and leaves a little profit, would it deprive the Gandhi Peace Foundation of its charitable character? The pricing of the monthly journal would undoubtedly be made in such a manner that it leaves some profit for the Gandhi Peace Foundation, as, indeed, would be done by any prudent and wise management, but that cannot have the effect of polluting the charitable character of the purpose, because the predominant object of the activity of publication of the monthly journal would be to carry out the charitable purpose by propagating Gandhian thought and philosophy and not to make profit or in other words, profit making would not be the driving force behind this activity. But it is possible that in a given case the degree or extent of profit making may be of such a nature as to reasonably lead to the inference that the real object of the activity is profit making and not serving the charitable purpose. If, for example, in the illustration given by us, it is found that the publication of the monthly journal is carried on wholly on commercial lines and the pricing of the monthly journal is made on the same basis on which it would be made by a commercial organisation leaving a large margin of profit, it might be difficult to resist the inference that the activity of publication of the journal is carried on for profit and the purpose is non-charitable. We may take by way of illustration another example given by Krishna Iyer, J., in the Indian Chamber of Commerce case [(1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR

796] where a blood bank collects blood on payment and supplies blood for a higher price on commercial basis. Undoubtedly, in such a case, the blood bank would be serving an object of general public utility but since it advances the charitable object by sale of blood as an activity carried on with the object of making profit, it would be difficult to call its purpose charitable. Ordinarily there should be no difficulty in determining whether the predominant object of an activity is advancement of a charitable purpose or profit making. But cases are bound to arise in practice which may be on the borderline and in such cases the solution of the problem whether the purpose is charitable or not may involve much refinement and present real difficulty.

There is, however, one comment which is necessary to be made whilst we are on this point and that arises out of certain observations made by this Court in Sole Trustee, Loka Shikshana Trust case [(1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] as well as Indian Chamber of Commerce case [(1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796] . It was said by Khanna, J. in Sole Trustee, Loka Shikshana Trust case [(1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] :

"[I]f the activity of a trust consists of carrying on a business and there are no restrictions on its making profit, the court would be well justified in assuming in the absence of some indication to the contrary that the object of the trust involves the carrying on of an activity for profit."

And to the same effect, observed Krishna Iyer, J. in the Indian Chamber of Commerce case [(1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796] when he said:

> "An undertaking by a business organisation is ordinarily assumed to be for profit unless expressly or by necessary implication or by eloquent surrounding circumstances the making of profit stands loudly negatived .... A pragmatic condition, written or unwritten, proved by a prescription of profits or by long years, of invariable practice or spelt from some strong surrounding circumstances indicative of anti-profit motivation - such a condition will qualify for charitable purpose."

Now we entirely agree with the learned Judges who decided these two cases that activity involved in carrying out the charitable purpose must not be motivated by a profit objective but it must be undertaken for the purpose of advancement or carrying out of the charitable purpose. But we find it difficult to accept their thesis that whenever an activity is carried on which yields profit, the inference must necessarily be drawn, in the absence of some indication to the contrary, that the activity is for profit and the charitable purpose involves the carrying on of an activity for profit. We do not think the Court would be justified in drawing any such inference merely because the activity results in profit. It is in our opinion not at all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on no profit no loss basis or that profit shall be proscribed. Even if there is no such express provision, the nature of the charitable purpose, the manner in which the activity for advancing the charitable purpose is being carried on and the surrounding circumstances may clearly indicate that the activity is not propelled by a dominant profit motive. What is necessary to be considered is whether having regard to all the facts and circumstances of the case, the dominant object of the activity is profit making or carrying out a charitable purpose. If it is the former, the purpose would not be a charitable purpose, but, if it is the latter, the charitable character of the purpose would not be lost.

9. Coming closer to the section at hand, in **Aditanar Educational Institution v. Additional Commissioner of Income Tax,** (1997) 224 ITR 310, this Court while construing the predecessor Section, namely, Section 10(22) of the Income Tax act, held:

> "The High Court has made an observation that any income which has a direct relation or incidental to the running of the institution as such would qualify for exemption. We may state that the language of Section 10(22) of the Act is plain and clear and the availability of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purposes and not for the purposes of profit. After meeting the expenditure, if any surplus results incidentally from the activity lawfully carried on by the educational institution, it will not cease to be one existing solely for educational purposes since the object is not one to make profit. The decisive or acid test is whether on an overall view of the matter, the object is to make profit. In evaluating or appraising the above, one should also bear in mind the distinction/difference between the corpus, the objects and the powers of the concerned entity."

10. In **American Hotel & Lodging Assn. Educational Institute v. CBDT**, (2008) 301 ITR 86, this Court dealt with Section 10(23C)(vi) as follows:

> "29. In CIT v. Surat Art Silk Cloth Manufacturers' Assn. [(1980) 2 SCC 31 : 1980 SCC (Tax) 170 : (1980) 121 ITR 1] it has been held by this Court that test of predominant object of the activity is to be seen whether it exists solely for education and not to earn profit. However, the purpose would not lose its character merely because some profit arises from the activity. That, it is not possible to carry on educational activity in such a way that the expenditure exactly balances the income and there is no resultant profit, for, to achieve this, would not only be difficult of practical realisation but would reflect unsound principles of management. In order to ascertain whether the institute is carried on with the object of making profit or not it is the duty of the prescribed authority to ascertain whether the balance of income is applied wholly and exclusively to the objects for which the applicant is established.
>
> 30. In deciding the character of the recipient, it is not necessary to look at the profits of each year, but to consider the nature of the activities undertaken in India. If the Indian activity has no correlation with education, exemption has to be denied (see judgment of this Court in Oxford University Press [(2001) 3 SCC 359 : (2001) 247 ITR 658]). Therefore, the character of the recipient of income must have character of educational institution in India to be ascertained from the nature of the activities. If after meeting expenditure, surplus remains incidentally from the activity carried on by the educational institution, it will not cease to be one existing solely for educational purposes. In other words, existence of surplus from the activity will not mean absence of educational purpose (see judgment of this Court in Aditanar Educational Institution v. CIT [(1997) 3 SCC 346 : (1997) 224 ITR 310]). The test is-the nature of activity. If the activity like running a printing press takes place it is not educational. But whether the income/profit has been applied for non-educational purpose has to be decided only at the end of the financial year.
>
> 32. We shall now consider the effect of insertion of provisos to Section 10(23-C)(vi) vide the Finance (No. 2) Act, 1998. Section 10(23-C)(vi) is analogous to Section 10(22). To that extent, the judgments of this Court as applicable to Section 10(22) would equally apply to Section 10(23-C)(vi). The problem arises with the insertion of the provisos to Section 10(23- C)(vi). With the insertion of the provisos to

Section 10(23-C)(vi) the applicant who seeks approval has not only to show that it is an institution existing solely for educational purposes [which was also the requirement under Section 10(22)] but it has now to obtain initial approval from the PA, in terms of Section 10(23-C)(vi) by making an application in the standardised form as mentioned in the first proviso to that section. That condition of obtaining approval from the PA came to be inserted because Section 10(22) was abused by some educational institutions/universities. This proviso was inserted along with other provisos because there was no monitoring mechanism to check abuse of exemption provision. With the insertion of the first proviso, the PA is required to vet the application. This vetting process is stipulated by the second proviso. Under the twelfth proviso, the PA is required to examine cases where an applicant does not apply its income during the year of receipt and accumulates it but makes payment therefrom to any trust or institution registered under Section 12- AA or to any fund or trust or institution or university or other educational institution and to that extent the proviso states that such payment shall not be treated as application of income to the objects for which such trust or fund or educational institution is established. The idea underlying the twelfth proviso is to provide guidance to the PA as to the meaning of the words "application of income to the objects for which the institution is established". Therefore, the twelfth proviso is the matter of detail. The most relevant proviso for deciding this appeal is the thirteenth proviso. Under that proviso, the circumstances are given under which the PA is empowered to withdraw the approval earlier granted. Under that proviso, if the PA is satisfied that the trust, fund, university or other educational institution, etc. has not applied its income in accordance with the third proviso or if it finds that such institution, trust or fund, etc. has not invested/deposited its funds in accordance with the third proviso or that the activities of such fund or institution or trust, etc. are not genuine or that its activities are not being carried out in accordance with the conditions subject to which approval is granted then the PA is empowered to withdraw the approval earlier granted after complying with the procedure mentioned therein.

33. Having analysed the provisos to Section 10(23-C)(vi) one finds that there is a difference between stipulation of conditions and compliance therewith. The threshold conditions are actual existence of an educational institution and approval of the prescribed authority for which every applicant has to move an application in the standardised form in terms of the first proviso. It is only if the prerequisite condition of actual existence of the educational institution is fulfilled that the question of compliance with requirements in the provisos would arise. We find merit in the contention advanced on behalf of the appellant that the third proviso contains monitoring conditions/requirements like application, accumulation, deployment of income in specified assets whose compliance depends on events that have not taken place on the date of the application for initial approval.

34. To make the section with the proviso workable we are of the view that the monitoring conditions in the third proviso like application/utilisation of income, pattern of investments to be made, etc. could be stipulated as conditions by the PA subject to which approval could be granted."

11. Thus, the law common to Section 10(23C) (iiiad) and (vi) may be summed up as follows:

Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion

that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

The predominant object test must be applied - the purpose of education should not be submerged by a profit making motive.

A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be cease to be one existing solely for educational purposes.

The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons.

12. The Uttarakhand High Court in the impugned judgment dated 24th September, 2007 quoted the ITAT order in paragraph 7 as follows:

"The ITAT while granting exemption under Section 10(23C) (iiiad) recorded the following reasons:

"During the years relevant for asstt. Year 2000-01 and 2001-02, the excess of income over expenditure stood at Rs.6,58,862/- and Rs.7,82,632/- respectively. It was also noticed that the appellant society had made investment in fixed assets including building at Rs.9,52,010/- in F.Y. 1999- 2000 and Rs.8,47,742/- in FY 2000-01 relevant for Asstt. Years 2000-01 and 2001-02 respectively. Thus, if the amount of investment into fixed assets such as building, furniture and fixture etc. were also kept in view, there was hardly any surplus left..... The assessee society is undoubtedly engaged in imparting education and has to maintain a teaching and non teaching staff and has to pay for their salaries and other incidental expenses. It, therefore, becomes necessary to charge certain fee from the students for meeting all these expenses. The charging of fee is incidental to the prominent objective of the trust i.e. imparting education. The trust was initially running the school in a rented building and the surplus, i.e. the excess of the receipts over expenditure.

In the year under appeal (and in the earlier appeals) has enabled the appellant to acquire its own property, acquire computers, library books, sports equipments etc. for the benefit of the students. And more importantly the members of the society have not utilized any part of the surplus for their own benefit. The AO wrongly interpreted the resultant surplus as the main objective of the assessee trust. As held above, profit is only incidental to the main object of spreading education. If there is no surplus out of the difference between receipts and outgoings, the trust will not be able to achieve the objectives. Any education institution cannot be run in rented premises for all the times and without necessary equipment and without paying to the staff engaged in imparting education. The assessee is not getting any financial aid/assistance from the Government or other philanthropic agency and, therefore, to achieve the objective, it has to raise its own funds. But such surplus would not come within the ambit of denying exemption u/s 10(23C) (iiiad) of the Act."

13. Having set out the ITAT order, the Uttarakhand High Court held:

"Thus, in view of the established fact relating to earned profit, we do not agree with the reasoning given by the ITAT for granting exemption."

14. Having said this, the impugned judgment goes on to quote Aditanar Educational Institution v. CIT. as follows:-

> "After meeting the expenditure, if any surplus result incidentally from the activity lawfully carried on by the educational institution, it will not cease to be one existing solely for educational purpose since the object is not one to make profit. The decisive or acid test is whether on an overall view of the matter, the object is to make profit. In evaluating or appraising the above, one should also bear in mind the distinction difference between the corpus, the objects and powers of the concerned entity.
>
> If one looks at the object clause, there are other noble and pious objects but assessee society has done nothing to achieve the other objects except pursuing main object of providing education and earning profit. Further, with profit earned the society has strengthened or enhanced its capacity to earn more rather than to fulfill other noble objects for the cause of poor and needy people or advancement of religious purpose.
>
> Therefore, the law laid down by the Apex Court has rightly been applied and exemption has also rightly been refused by the Assessing Officer in the facts and circumstances of the case."

15. It is clear that the High Court did not apply its mind independently. What has been copied is one paragraph from the Supreme Court judgment in Aditanar followed by a paragraph of faulty reasoning by the Assessing Officer and the said faulty reasoning of the Assessing Officer has been wrongly said to be the law laid down by the Apex Court.

16. Further, the Supreme Court Judgment in Municipal Corpn. of Delhi v. Children Book Trust and Safdarjung Enclave Educational Society, (1992) 3 SCC 390 has then been followed. The aforesaid judgment dealt with a property tax provision, namely, Section 115 (4) of the Delhi Municipal Corporation Act, 1957. Three questions were raised in the said judgment as follows:-

> "56. In the present case, the questions which arise for our determination are:
>
> (i) Whether the society or body is occupying and using the land and building for a charitable purpose within the meaning of sub-section (4)?
>
> (ii) What is the meaning of the expression "supported wholly or in part by voluntary contribution"?
>
> (iii) Whether any trade or business is carried on in the premises within the meaning of sub-section (5)?"

17. In answering question one, the Court held that School Education would only come within an exemption if it involved public benefit. Having so held, the Court stated:

> "78. The rulings arising out of Income Tax Act may not be of great help because in the Income Tax Act "charitable purpose" includes the relief of the poor, education, medical relief and the advancement of any other object of general public utility. The advancement of any other object of general public utility is not found under the Delhi Municipal Corporation Act. In other words, the definition is narrower in scope. This is our answer to question No. 1."

18. Secondly, the extracted portion from the said judgment in the judgment of the Uttarakhand High Court concerned itself with question two, namely, whether the educational society is supported wholly or in part by voluntary contributions. It is part of

paragraph 80 of the said judgment. If the sentences after the quoted portion are also set out, it becomes clear that the passage relied upon by the High Court has absolutely nothing to do with the present case. The entirety of the passage is now set out herein below:

> "82. ...In other words, what we want to stress is, where a society or body is making systematic profit, even though that profit is utilised only for charitable purposes, yet it cannot be said that it could claim exemption. If, merely qualitative test is applied to societies, even schools which are run on commercial basis making profits would go out of the purview of taxation and could demand exemption. Thus, the test, according to us, must be whether the society could survive without receiving voluntary contributions, even though it may have some income by the activities of the society. The word "part" mean an appreciable amount and not an insignificant one. The "part" in other words, must be substantial part. What is substantial would depend upon the facts and circumstances of each case."

19. It is clear, therefore, that the Uttarakhand High Court has erred by quoting a non existent passage from an applicable judgment, namely, Aditanar and quoting a portion of a property tax judgment which expressly stated that rulings arising out of the Income Tax Act would not be applicable. Quite apart from this, it also went on to further quote from a portion of the said property tax judgment which was rendered in the context of whether an educational society is supported wholly or in part by voluntary contributions, something which is completely foreign to Section 10(23C) (iiiad). The final conclusion that if a surplus is made by an educational society and ploughed back to construct its own premises would fall foul of Section 10(23C) is to ignore the language of the Section and to ignore the tests laid down in the Surat Art Silk Cloth case, Aditanar case and the American Hotel and Lodging case. It is clear that when a surplus is ploughed back for educational purposes, the educational institution exists solely for educational purposes and not for purposes of profit. In fact, in S.RM.M.CT.M. Tiruppani Trust v. Commissioner of Income Tax, (1998) 2 SCC 584, this Court in the context of benefit claimed under Section 11 of the Act held:

> "9. In the present case, the assessee is not claiming any benefit under Section 11(2) as it cannot; because in respect of this assessment year, the assessee has not complied with the conditions laid down in Section 11(2). The assessee, however, is entitled to claim the benefit of Section 11(1)(a). In the present case, the assessee has applied Rs 8 lakhs for charitable purposes in India by purchasing a building which is to be utilised as a hospital. This income, therefore, is entitled to an exemption under Section 11(1). In addition, under Section 11(1)(a), the assessee can accumulate 25% of its total income pertaining to the relevant assessment year and claim exemption in respect thereof. Section 11(1)(a) does not require investment of this limited accumulation in government securities. The balance income of Rs 1,64,210.03 constitutes less than 25% of the income for Assessment Year 1970-71. Therefore, the assessee is entitled to accumulate this income and claim exemption from income tax under Section 11(1)(a)."

We set aside the judgment of the Uttarakhand High Court dated 24th September, 2007. The reasoning of the ITAT (set aside by the High Court) is more in consonance with the law laid down by this Court, and we approve its decision.

20. Revenue's appeals from the Punjab and Haryana High Court concern themselves with Sections 10(23C) (vi). A large number of writ petitions were heard in Civil Writ Petition No. 6031 of 2009 and disposed of on 29th January, 2010. By various impugned orders passed, the Chief, CIT, Chandigarh withdrew exemptions granted under Section 10(23C) (vi) of the Income Tax Act read with Rule 2CA of Income Tax Rules, 1961, for

various assessment years. The operative part of the order passed by the Chief, CIT in these cases is the same and reads as follows:

> "4. I have considered the submissions of the assessee. The decisions quoted in support of its contention are not relevant and are distinguishable on facts as well as issues. It is clear that the ratio of the decision of Hon'ble Uttarakhand High Court is squarely applicable in this case. 5. The Hon'ble Supreme Court has held, in the case of Aditanar Educational Institution etc. v. Addl. Commissioner of Income Tax [224 ITR 310 (SC)], that in the case of an educational institution, after meeting the expenditure, if any surplus results incidentally, then the institution will not cease to be one existing solely for educational purposes.
>
> 6. The crucial condition is that surplus should result only incidentally and should not be aimed for. If substantial profits are earned in one year if (it)?would be duty of the institution to lower its fees for the subsequent year so that such profits are not intentionally generated. If, however, profits continue year after year than it cannot be said that the surplus is arising incidentally.
>
> 7. In the present ease, the profits are substantial and are arising year alter year and therefore, the decision of the Apex Court in the case of Aditanar Education Institution v. Addl. Commissioner of Income Tax as well as the decision of the Hon'ble Uttrakhand High Court is applicable.
>
> 8. Exemption u/s 10(23C)(vi) is not available to the assessee under the law in view of the above facts and circumstances and therefore, exemption already granted vide order dated 4th June, 2007 is hereby withdrawn.
>
> 9. The assessee is at liberty to reduce the fees being charged and price of its services and apply afresh, in which case the application will be duly considered on merits."

21. It is these orders that were set aside by the judgment of the Punjab and Haryana High Court impugned by the Revenue before us.

22. Section 10(23C)(vi) read with the 3rd and 13th provisos thereto and Section 11(5) of the Income Tax Act are as follows:-

> "Section 10- Incomes not included in total income.-In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-
>
> (23-C) any income received by any person on behalf of-
>
> (vi) any university or other educational institution existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub-clause (iii-ab) or sub-clause (iii-ad) and which may be approved by the prescribed authority Provided also that the fund or trust or institution [or any university or other educational institution or any hospital or other medical institution] referred to in sub-clause (iv) or sub-clause (v)[or sub-clause (vi) or sub- clause (vi-a)]-[(a) applies its income, or accumulates it for application, wholly and exclusively to the objects for which it is established and in a case where more than fifteen per cent of its income is accumulated on or after the 1st day of April, 2002, the period of the accumulation of the amount exceeding fifteen per cent of its income shall in no case exceed five years; and;].
>
> [(b) does not invest or deposit its funds, other than-

(i) any assets held by the fund, trust or institution [or any university or other educational institution or any hospital or other medical institution] where such assets form part of the corpus of the fund, trust or institution [or any university or other educational institution or any hospital or other medical institution] as on the 1st day of June, 1973;

[(i-a) any asset, being equity shares of a public company, held by any university or other educational institution or any hospital or other medical institution where such assets form part of the corpus of any university or other educational institution or any hospital or other medical institution as on the 1st day of June, 1998;]

(ii) any assets (being debentures issued by, or on behalf of, any company or corporation), acquired by the fund, trust or institution [or any university or other educational institution or any hospital or other medical institution] before the 1st day of March, 1983;

(iii) any accretion to the shares, forming part of the corpus mentioned in sub-clause (i)[and sub-clause (i-a)], by way of bonus shares allotted to the fund, trust or institution[or any university or other educational institution or any hospital or other medical institution];

(iv) voluntary contributions received and maintained in the form of jewellery, furniture or any other article as the Board may, by notification in the Official Gazette, specify, for any period during the previous year otherwise than in any one or more of the forms or modes specified in sub-section (5) of Section 11:

Provided also that where the fund or institution referred to in sub- clause (iv) or trust or institution referred to in sub-clause (v) is notified by the Central Government or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (vi-a), is approved by the prescribed authority and subsequently that Government or the prescribed authority is satisfied that-

(i) such fund or institution or trust or any university or other educational institution or any hospital or other medical institution has not,-

(A) applied its income in accordance with the provisions contained in clause (a) of the third proviso; or

(B) invested or deposited its funds in accordance with the provisions contained in clause(b) of the third proviso; or

(ii) the activities of such fund or institution or trust or any university or other educational institution or any hospital or other medical institution,-

(A) are not genuine; or (B) are not being carried out in accordance with all or any of the conditions subject to which it was notified or approved, it may, at any time after giving a reasonable opportunity of showing cause against the proposed action to the concerned fund or institution or trust or any university or other educational institution or any hospital or other medical institution, rescind the notification or, by order, withdraw the approval, as the case may be, and forward a copy of the order rescinding the notification or withdrawing the approval to such fund or institution or trust or any university or other educational institution or any hospital or other medical institution and to the Assessing Officer;]

Section 11. Income from property held for charitable or religious purposes.-

(5) The forms and modes of investing or depositing the money referred to in clause (b) of sub-section (2) shall be the following, namely:-

(i) investment in savings certificates as defined in clause (c) of Section 2 of the Government Savings Certificates Act, 1959 (46 of 1959), and any other securities or certificates issued by the Central Government under the Small Savings Schemes of that Government;

(ii) deposit in any account with the Post Office Savings Bank;

(iii) deposit in any account with a scheduled bank or a cooperative society engaged in carrying on the business of banking (including a cooperative land mortgage bank or a cooperative land development bank).

Explanation.-In this clause, "scheduled bank" means the State Bank of India constituted under the State Bank of India Act, 1955 (23 of 1955), a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959), a corresponding new bank constituted under Section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970), or under Section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980), or any other bank being a bank included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934);

(iv) investment in units of the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963);

(v) investment in any security for money created and issued by the Central Government or a State Government;

(vi) investment in debentures issued by, or on behalf of, any company or corporation both the principal whereof and the interest whereon are fully and unconditionally guaranteed by the Central Government or by a State Government;

(vii) investment or deposit in any public sector company:

[Provided that where an investment or deposit in any public sector company has been made and such public sector company ceases to be a public sector company,-

(A) such investment made in the shares of such company shall be deemed to be an investment made under this clause for a period of three years from the date on which such public sector company ceases to be a public sector company;

(B) such other investment or deposit shall be deemed to be an investment or deposit made under this clause for the period up to the date on which such investment or deposit becomes repayable by such company;].

(viii) deposits with or investment in any bonds issued by a financial corporation which is engaged in providing long-term finance for industrial development in India and [which is eligible for deduction under clause (viii) of sub-section (1) of Section 36];

(ix) deposits with or investment in any bonds issued by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes and[which is eligible for deduction under clause (viii) of sub-section (1) of Section 36];

[(ix-a) deposits with or investment in any bonds issued by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for urban infrastructure in India.

Explanation.-For the purposes of this clause,-

(a) "long-term finance" means any loan or advance where the terms under which moneys are loaned or advanced provide for repayment along with interest thereof during a period of not less than five years;

(b) "public company" shall have the meaning assigned to it in Section 3 of the Companies Act, 1956;

(c) "urban infrastructure" means a project for providing potable water supply, sanitation and sewerage, drainage, solid waste management, roads, bridges and flyovers or urban transport;].

(x) investment in immovable property.

Explanation.-"Immovable property" does not include any machinery or plant (other than machinery or plant installed in a building for the convenient occupation of the building) even though attached to, or permanently fastened to, anything attached to the earth;

(xi) deposits with the Industrial Development Bank of India established under the Industrial Development Bank of India Act, 1964 (18 of 1964);

(xii) any other form or mode of investment or deposit as may be prescribed."

23. The Punjab and Haryana High Court, by the impugned judgment dated 29th January, 2010 expressed its dissatisfaction with the view taken by the Uttarakhand High Court in the case of Queen's Educational Society as follows:

"8.8 We have not been able to persuade ourselves to accept the view expressed by the Division Bench of the Uttrakhand High Court in the case of Queens Educational Society (supra). There are variety of reasons to support our opinion. Firstly, the scope of the third proviso was not under consideration, inasmuch as, the case before the Uttrakhand High Court pertained to Section 10(23C)(iiiad) of the Act. The third proviso to Section 10(23C)(vi) is not applicable to the cases falling within the purview of Section 10(23C)(iiiad). Secondly, the judgment rendered by the Uttarkhand High Court runs contrary to the provisions of Section 10(23C)(vi) of the Act including the provisos thereunder. Section 10(23C)(vi) of the Act is equivalent to the provisions of Section 10(22) existing earlier, which were introduced with effect from 1st April, 1999 and it ignores the speech of the Finance Minister made before the introduction of the said provisions, namely. Section 10(23C) of the Act [See observations in American Hotel and Lodging Association Educational Institute's case (supra)]. Thirdly, the Uttrakhand High Court has not appreciated correctly the ratio of the judgment rendered by Hon'ble the Supreme Court in the case of Aditanar Educational Institution(supra) and while applying the said judgment including the judgment which had been rendered by Hon'ble the Supreme Court in the case of Children Book Trust (supra), it lost sight of the amendment which had been carried out with effect from 1st April, 1999 leading to the introduction of the provisions of Section 10(23C) of the Act. Lastly, that view is not consistent with the law laid down by Hon'ble the Supreme Court in American Hotel and Lodging Association Educational Institute (surpa)."

It then summed up its conclusions as follows:

"8.13 From the aforesaid discussion, the following principles of law can be summed up:-

(1) It is obligatory on the part of the Chief Commissioner of Income Tax or the Director, which are the prescribed authorities, to comply with proviso thirteen (un-numbered). Accordingly, it has to be ascertained whether the educational institution has been applying its profit wholly and exclusively to the object for which the institution is established. Merely because an institution has earned profit would not be deciding factor to conclude that the educational institution exists for profit.

(2) The provisions of Section 10(23C)(vi) of the Act are analogous to the erstwhile Section 10(22) of the Act, as has been laid down by Hon'ble the Supreme Court in the case of American Hotel and Lodging Association (supra). To decide the entitlement of an institution for exemption under Section 10(23C)(vi) of the Act, the test of predominant object of the activity has to be applied by posing the question whether it exists solely for education and not to earn profit [See 5-Judges Constitution Bench judgment in the case of Surat Art Silk Cloth Manufacturers Association (supra)]. It has to be borne in mind that merely because profits have resulted from the activity of imparting education would not result in change of character of the institution that it exists solely for educational purpose. A workable solution has been provided by Hon'ble the Supreme Court in para 33 of its judgment in American Hotel and Lodging Association's case (supra). Thus, on an application made by an institution, the prescribed authority can grant approval subject to such terms and conditions as it may deems fit provided that they are not in conflict with the provisions of the Act. The parameters of earning profit beyond 15% and its investment wholly for educational purposes may be expressly stipulated as per the statutory requirement. Thereafter the Assessing Authority may ensure compliance of those conditions. The cases where exemption has been granted earlier and the assessments are complete with the finding that there is no contravention of the statutory provisions, need not be reopened. However, alter grant of approval if it comes to the notice of the prescribed authority that the conditions on which approval was given, have been violated or the circumstances mentioned in 13th proviso exists, then by following the procedure envisaged in 13th proviso, the prescribed authority can withdraw the approval.

(3) The capital expenditure wholly and exclusively to the objects of education is entitled to exemption and would not constitute part of the total income.

(4) The educational institutions, which are registered as a Society, would continue to retain their character as such and would be eligible to apply for exemption under Section 10(23C)(vi) of the Act. [See para 8.7 of the judgment-Aditanar Educational Institution case (supra)]

(5) Where more than 15% of income of an educational institution is accumulated on or after 1st April, 2002, the period of accumulation of the amount exceeding 15% is not permissible beyond five years, provided the excess income has been applied or accumulated for application wholly and exclusively for the purpose of education.

(6) The judgment of Uttrakhand High Court rendered in the case of Queens Educational Society (supra) and the connected matters, is not applicable to cases fall within the provision of Section 10(23C)(vi) of the Act. There are various reasons, which have been discussed in para 8.8 of the judgment, and the judgment of Allahabad High Court rendered in the case of City Montessori School (supra) lays down the correct law."

And finally held:

"8.15 As a sequel to the aforesaid discussion, these petitions are allowed and the impugned orders passed by the Chief Commissioner of Income Tax withdrawing the exemption granted under Section 10(23C)(iv) of the Act are hereby quashed. However, the revenue is at liberty to pass any fresh orders, if such a necessity is felt after taking into consideration the various propositions of law culled out by us in para 8.13 and various other paras.

8.16 The writ petitions stand disposed of in the above terms."

24. The view of the Punjab and Haryana High Court has been followed by the Delhi High Court in St. Lawrence Educational Society (Regd.) v. Commissioner of Income Tax & Anr., (2011) 53 DTR (Del) 130. Also in Tolani Education Society v. Deputy Director of Income Tax (Exemption) & Ors., (2013) 351 ITR 184, the Bombay High Court has expressed a view in line with the Punjab and Haryana High Court view, following the judgments of this Court in the Surat Art Silk Manufacturers Association Case and Aditanar Educational Institution case as follows:

".....The fact that the Petitioner has a surplus of income over expenditure for the three years in question, cannot by any stretch of logical reasoning lead to the conclusion that the Petitioner does not exist solely for educational purposes or, as that Chief Commissioner held that the Petitioner exists for profit. The test to be applied is as to whether the predominant nature of the activity is educational. In the present case, the sole and dominant nature of the activity is education and the Petitioner exists solely for the purposes of imparting education. An incidental surplus which is generated, and which has resulted in additions to the fixed assets is utilized as the balance-sheet would indicate towards upgrading the facilities of the college including for the purchase of library books and the improvement of infrastructure. With the advancement of technology, no college or institution can afford to remain stagnant. The Income-tax Act 1961 does not condition the grant of an exemption under Section 10(23C) on the requirement that a college must maintain the status- quo, as it were, in regard to its knowledge based infrastructure. Nor for that matter is an educational institution prohibited from upgrading its infrastructure on educational facilities save on the pain of losing the benefit of the exemption under Section 10(23C). Imposing such a condition which is not contained in the statute would lead to a perversion of the basic purpose for which such exemptions have been granted to educational institutions. Knowledge in contemporary times is technology driven. Educational institutions have to modernise, upgrade and respond to the changing ethos of education.

Education has to be responsive to a rapidly evolving society. The provisions of Section 10(23C) cannot be interpreted regressively to deny exemptions. So long as the institution exists solely for educational purposes and not for profit, the test is met."

25. We approve the judgments of the Punjab and Haryana, Delhi and Bombay High Courts. Since we have set aside the judgment of the Uttarakhand High Court and since the Chief CIT's orders cancelling exemption which were set aside by the Punjab and Haryana High Court were passed almost solely upon the law declared by the Uttarakhand High Court, it is clear that these orders cannot stand. Consequently, Revenue's appeals from the Punjab and Haryana High Court's judgment dated 29.1.2010 and the judgments following it are dismissed. We reiterate that the correct tests which have been culled out in the three Supreme Court judgments stated above, namely, Surat Art Silk Cloth, Aditanar, and

American Hotel and Lodging, would all apply to determine whether an educational institution exists solely for educational purposes and not for purposes of profit. In addition, we hasten to add that the 13th proviso to Section 10(23C) is of great importance in that assessing authorities must continuously monitor from assessment year to assessment year whether such institutions continue to apply their income and invest or deposit their funds in accordance with the law laid down. Further, it is of great importance that the activities of such institutions be looked at carefully. If they are not genuine, or are not being carried out in accordance with all or any of the conditions subject to which approval has been given, such approval and exemption must forthwith be withdrawn. All these cases are disposed of making it clear that revenue is at liberty to pass fresh orders if such necessity is felt after taking into consideration the various provisions of law contained in Section 10(23C) read with Section 11 of the Income Tax Act.

26. We now come to Civil Appeal No.8962 of 2010. Vide a judgment dated 29th January, 2010, the Punjab and Haryana High Court dismissed CWP No.7268 of 2009 in the following terms:

> "8. It is conceded position that the assessee-petitioner has filed the application on 23.9.2008 seeking exemption under Section 10(23C)(vi) in respect of assessment year 2008-09, which could have been filed during the financial year 2007-08 i.e. on or before 31.3.2008. It is, thus, evident that the application by the assessee petitioner has been filed after the prescribed period and the Chief Commissioner of Income Tax has rightly rejected the same being not maintainable.
>
> 9. As a sequel to the above discussion, we find no ground to interfere with the impugned order passed by the Chief Commissioner of Income Tax. There is no merit in the instant petition warranting its admission. Accordingly, the writ petition fails and the same is dismissed."

27. These being the facts, we see no reason to interfere. This appeal shall stand dismissed with no order as to costs.

SUPREME COURT OF INDIA

SLP NO. 14932 OF 2010

STATE OF HARYANA & ANR.
Vs.
JAI DURGA COTTON MILLS

THE CHIEF JUSTICE AND ARUN MISHRA, J

11th April, 2015

HF ▶ Petitioner - Assessee

EXEMPTED UNITS – RULE 28A – HGST RULES – TAX ON SALE TO REGISTERED DEALERS – WHETHER INCLUDIBLE IN THE NOTIONAL TAX LIABILITY FOR CALCULATION OF EXEMPTION LIMIT – HIGH COURT HELD THAT THE TAX ON SALE TO REGISTERED DEALERS IN NOT TO BE COUNTED FOR NOTIONAL TAX LIABILITY FOLLOWING JUDGEMENT OF LIBERTY ENTERPRISES – ON SLP BEFORE SUPREME COURT – HELD – THE MATTER IN THIS REGARD IS SETTLED BY THE JUDGMENT OF LIBERTY ENTERPRISES – SLP DISMISSED.

The High Court had held that tax on sale made to a registered dealer would not be taken into consideration while calculating notional tax liability for the purpose of Rule 28A in the case of exempted units following Supreme Court Judgment in "State of Haryana vs. Liberty Enterprises", (2009) 14 SCC 310. On SLP before Supreme Court, it was held that the matter is squarely covered by the aforesaid judgment and thus the SLP was dismissed.

Case referred

Jai Durga Cotton Mills vs. State of Haryana (2010) 29 VST 617: 36 PHT 571 (AFFIRMED)

Case followed

State of Haryana vs. Liberty Enterprises (2009) 14 SCC 310

For Petitioner(s): Mr. Shekhar Raj Sahrma, Adv.
Mr. Rajiv Singh, adv.

For Respondent(s) Mr. Sandeep Goyal, Adv.
Mr. Pawanshree Agrawal,Adv.
Mr. Vivek Gupta,Adv.
Mr. M. P. Devanath,Adv.
Mr. Vivek Sharma, Adv.
Mr. Ambrish Pandey, Adv.

Mr. Aditya Bhattacharya, Adv.

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Upon hearing the counsel the court made the following order:

ORDER

Learned counsel appearing for the parties to the lis would agree that the issues raised in the present special leave petitions are squarely covered by a decision of this Court in the case of "State of Haryana vs. Liberty Enterprises", (2009) 14 SCC 310.

In view the above, these special leave petitions are also dismissed on the same terms, conditions, observations and directions.

SGA
LAW OFFICES

SUPREME COURT OF INDIA

CIVIL APPEAL NO. 4367 OF 2004

M.P. STEEL CORPORATION

Vs.

COMMISSIONER OF CENTRAL EXCISE

R.F. NARIMAN AND A.K. SIKRI, JJ

23rd April, 2015

HF ▶ Assessee

APPEAL – LIMITATION – EXCLUSION OF TIME SPENT IN BONAFIDELY PURSING REMEDY BEFORE A WRONG FORUM – SECTION 14 OF LIMITATION ACT – CUSTOMS ACT - APPEAL AGAINST THE ORDER OF SUPERINTENDENT FILED BEFORE CEGAT – APPEAL ALLOWED – SUPREME COURT REVERSED THE DECISION HOLDING THAT APPEAL WAS MAINTAINABLE BEFORE COMMISSIONER AND CEGAT – FRESH APPEAL FILED BEFORE COMMISSIONER (APPEALS) U/S 128 OF CUSTOMS ACT – CONDONATION OF DELAY SOUGHT BY EXCLUSION OF TIME SPENT IN BONAFIDELY PURSING REMEDY BEFORE WRONG FORUM – APPEAL DISMISSED BEING NOT FILED WITHIN NINETY PLUS NINETY DAYS PRESCRIBED U/S 128 – CESTAT ALSO DISMISSED THE APPEAL HOLDING COMMISSIONER DOES NOT HAVE POWER TO CONDONE DELAY BEYOND THE PERIOD PRESCRIBED U/S 128 – ON APPEAL BEFORE SUPREME COURT – HELD – SECTION 14 OF LIMITATION ACT DOES NOT APPLY TO COMMISSIONER (APPEALS) BEING QUASI JUDICIAL AUTHORITY AND NOT COURT – NEVERTHELESS THE PRINCIPLES OF SECTION 14 WOULD APPLY SINCE IT IS FOR ADVANCEMENT OF JUSTICE – PERIOD BONAFIDELY SPENT IN PURSING REMEDY BEFORE WRONG FORUM – LIABLE TO BE EXCLUDED FOR CALCULATION OF LIMITATION PERIOD – ACCORDINGLY IT IS HELD THAT APPEAL FILED AFTER SUPREME COURT DECISION WAS IN TIME AND DESERVES TO BE HEARD ON MERITS – CASE REMANDED.

APPEAL – LIMITATION – PROCEDURAL LAW – AMENDMENT IN SECTION 128 OF CUSTOMS ACT – PRESCRIBED FOR SHORTER PERIOD – LAW AS APPLICABLE ON THE DATE OF FILING OF FIRST APPEAL BEFORE A WRONG FORUM WOULD BE APPLICABLE – AMENDMENT PROVIDES FOR SHORTER PERIOD CANNOT TAKE AWAY VESTED RIGHT OF APPEAL – APPEAL FILED AFTER SUPREME COURT ORDER HELD TO BE IN TIME AS PER UNAMENDED ACT – CASE REMANDED.

The appellant who had imported a vessel, filed a Bill of Entry on 7.2.1992. On a dispute being raised by Superintendent of Customs, the goods were got released after executing a Bank Guarantee. On 25.31992, the Collector of Customs directed the Asstt. Collector to encash the Bank Guarantee and information in this regard was sent by Superintendent of Customs on 2.4.1992 to the applicant indicating the decision of the Collector.

The appellant filed an appeal against the Superintendent's letter dated 2.4.1992 and Collector's order dated 25.3.1992 before the CEGAT. On 23.6.1998, the Tribunal allowed the appeal and set aside the order of Collector dated 25.3.1992. Revenue preferred an appeal before Supreme Court in the year 2000 which was allowed on 12.3.2003 holding that the appeal before the Tribunal was not maintainable as appeal against the order of Superintendent should have been filed before the Commissioner (Appeals) under Section 128. It was, however, open to the respondent (appellant in this case) to adopt such remedy as may be advised, if in law, they are entitled to do so.

After the Supreme Court judgment, the appellant filed an appeal before Commissioner (Appeals) on 23.5.2003 against the order passed by Superintendent, Customs dated 2.4.1992. On 4.8.2003, the application for condonation of delay was also filed seeking exclusion of the time spent in pursuing the remedy before another Forum. The appeal was dismissed by Commissioner of Customs (Appeals) on the ground of delay holding that appeal has been filed beyond the period of 60 days plus 30 days provided under Section 128 of Customs Act. CESTAT also dismissed the appeal of the appellant holding that Commissioner (Appeals) has no power to condone the delay beyond the period specified in Section 128. On appeal before the Hon'ble Supreme Court, it is:

HELD:

(i) Even though the appellant may not have taken a specific plea for exclusion of time on the basis of section 14 of Limitation Act, and the only plea being with regard to condonation of delay, the reasoning given in the application would be sufficient for the appellant to contend that section 14 of the Limitation Act or principles laid down under it would be attracted to the facts of this case.

(ii) Since the prior and subsequent proceedings were related to the same matter; were being prosecuted by the same party; were being prosecuted with due diligence and with good faith and the failure of the prior proceedings was due to defect of jurisdiction or other cause of like nature, the principles of section 14 would be squarely attracted;

(iii) However, the proceedings before the Commissioner of Customs (Appeals) are not before a court and therefore provisions of section 14 of Limitation Act, would not apply but the principles of Section 14 would still get attracted to the facts of the present case;

(iv) Since the provisions of Limitation Act would not apply to the appeals filed before a quasi-judicial Tribunal, such as Collector (Appeals), therefore, the same would not apply to Section 128 of Customs Act. However, even where section 14 does not apply, the principles on which section 14 is based being principles which advance the cause of justice, would nevertheless apply. The principles of section 14 are not excluded from the ambit of section 128 of Customs Act.

(v) The language of section 14 construed in the light of the object for which the provision has been made lends itself to the interpretation. So long as the plaintiff or application is bonafide pursuing a legal remedy which turns out to be abortive, the time beginning from the date of cause of action of an appellate proceedings is to be excluded if such appellate proceedings is from an order in an original proceeding instituted without jurisdiction or which has not resulted in an order on the merits of the case.

(vi) The period prior to institution of initiation of any abortive proceeding cannot be excluded for the simple reason that section 14 does not enable a litigant to get a benefit beyond what is contemplated by the section – i.e. to put the litigant in the same position as if the abortive proceeding had never taken place.

(vii) Though periods of limitation, being procedural law, are to be applied retrospectively, yet if a shorter period of limitation is provided by a later amendment to a statute, such period would render the vested right of action contained in the statute nugatory as such right of action would now become time barred under the amended provision.

(viii) Since in the present case, the appeal had been filed under section 128 on 3.4.1992, when the 1st appeal had been filed, the provisions of section 128 before amendment would be applicable. The right of appeal within a period of 180 days (which includes the discretionary period of 90 days) from the date of said order was a right, which vested in the appellant, and notwithstanding the amendment made in 2001, the period of limitation would be governed by Section 128 as it stood before the amendment.

Accordingly, the appeals are allowed and matter is remitted to Commissioner (Appeals) for decision on merits.

Present: For Appellant(s)

Mr. K. V. Vishwanathan, Sr. Adv.

Mr. B. Raghunath, Adv.

Mr. Gautam Bhardwaj, Adv.

Mr. Abhishek Kaushik, Adv.

Mr. Mehul M. Gupta, Adv.

Mr. Adeeba Mujahid, Adv.

Mr. S. R. Setia, Adv.

For Respondent(s)

Mr. A. K. Sanghi, Sr. Adv.

Ms. Sunita Rani Singh, Adv.

Mr. Ritesh Kumar, Adv.

Mr. B. Krishna Prasad, Adv.

*****

R.F. NARIMAN, J.

1. The facts giving rise to the present appeal are as follows. The appellant is engaged in ship breaking activity at Alang Ship Breaking Yard. The appellant imported a vessel, namely, M.V. Olinda, for the purpose of breaking the same, and filed a Bill of Entry when the vessel was imported on 7.2.1992. It declared in the said Bill of Entry that the Light Displacement Tonnage of the vessel was 7009 metric tons. On 19.2.1992, the appellant was informed by the Superintendent of Customs and Central Excise Alang that the Light Displacement Tonnage of the ship is actually 8570 tons and that customs duty was to be levied on this tonnage. On 3.3.1992, the appellant cleared the vessel on payment of customs duty on the basis of 7009 metric tons and executed a bank guarantee for Rs.19,90,275/- being the difference in customs duty on 1561 metric tons. On 25.3.1992, the Collector of Customs, Rajkot, directed the Assistant Collector, Bhavnagar to encash the bank guarantee furnished by the appellant. On 2.4.1992, the Superintendent of Customs and Central Excise sent a letter to the appellant communicating the decision of the Collector, as aforesaid. The bank guarantee was duly encashed on 3.4.1992. After protesting against the said illegal action of the Department in

encashing the bank guarantee, the appellant preferred an appeal against the Superintendent's letter dated 2.4.1992 and the Collector's order dated 25.3.1992 before CEGAT. On 23.6.1998, the Appellate Tribunal allowed the appeal and set aside the order of the Collector dated 25.3.1992. In the year 2000, the Department preferred an appeal before this Court. On 12.3.2003, this Court allowed the appeal holding:

> *"This appeal is against a judgment dated 23.6.1998 passed by the Customs, Excise And Gold (Control) Appellate Tribunal, West Regional Bench at Mumbai.*
>
> *Facts briefly stated are that the respondent filed a Bill of Entry in respect of ship M.V. Olinda imported by them for purposes of breaking. The respondent showed the light displacement tonnage (LDT) as 7009 metric tons. This declaration was not accepted by the Superintendent of Customs and Central Excise. The respondent, thus, approached the Assistant Collector. The question was how LDT was to be calculated. It appears that between the Assistant Collector and the Collector there was some internal correspondence on this aspect. The Collector took a policy decision on how LDT was to be calculated. The Collector conveyed this decision to the Assistant Collector by his letter dated 25.3.1992. Pursuant thereto the Superintendent of Customs and Central Excise passed an order dated 2nd April, 1992 in respect of vessel M.V. "Olinda". Of course the order dated 2nd April, 1992 is based on the decision of the Collector. However, the order remains that of the Superintendent of Customs and Central Excise.*
>
> *The respondent filed an appeal directly before CEGAT. CEGAT has disposed of this appeal by the impugned order. CEGAT negatived a contention that the appeal was not maintainable before them on the basis that the Superintendent's order is nothing more than a communication of the order passed by the Collector (Appeals). CEGAT held that the appeal was in fact against the Collector's order.*
>
> *In our view, the reasoning of CEGAT cannot be sustained. The decision taken by the Collector was not taken in his capacity as Collector (Appeals). Also the order by which respondent is aggrieved is the order passed by the Superintendent. An appeal against that order has to be filed before the Commissioner (Appeals) under Section 128. By virtue of Section 129-A, CEGAT has no jurisdiction to entertain such an appeal.*
>
> *It is clear that the impugned order is passed without any jurisdiction. Therefore, it cannot be sustained. We, thus, set aside the order. The appeal is accordingly allowed. There will be no order as to costs.*
>
> *We clarify that we have not gone into the merits of the matter and that it will be open to the respondent to adopt such remedy as they may be advised, if in law they are entitled to do so."*

2. After this judgment, on 23.5.2003, the appellant filed an appeal before the Commissioner (Appeals) against the order passed by the Superintendent, Customs dated 2.4.1992. On 4.8.2003, an application to condone delay in filing the appeal was made in the following terms:

> *"As appeal against the order of the Supdt. of Customs was filed by us within 60 days of the receipt of the certified true copy of the judgment of the Hon'ble Supreme Court. It is our respectful submission that since the appeal was filed by us before the correct forum with due dispatch after receipt of the Supreme Court's judgment, there has been no delay in filing the appeal. It is well settled now that the time taken for pursuing a remedy before another appellate Forum is to be excluded for the purpose of computing*

the period for filing an appeal. (Union Carbide India Ltd. Vs. CC 1998 (77) ECR 376, Karnataka Minerals & Mfg. Co. Ltd. Vs. CCE 1998 (101) ELT 627).”

3. By an order dated 27.10.2003, the Commissioner of Customs (Appeals) dismissed the appeal on the ground of delay stating that the appeal had been filed way beyond the period of 60 days plus 30 days provided for in Section 128 of the Customs Act. Against this order, CESTAT dismissed the appeal of the appellant stating that the Commissioner (Appeals) had no power to condone delay beyond the period specified in Section 128.

4. Shri Viswanathan, learned senior advocate appearing on behalf of the appellant argued before us that the entire period starting from 25.3.1992 up till 12.3.2003 ought to be excluded by applying Section 14 of the Limitation Act. According to him, Section 14 of the Limitation Act would apply to exclude this period from the period of 90 days allowed in filing an appeal filed to the Collector (Appeals) inasmuch as vide Section 29 (2) of the Limitation Act Section 14 of the Limitation Act would also apply to Tribunals set up under special or local Acts. According to him, the entire period with which he was prosecuting, with due diligence, the abortive appeal filed before CEGAT should be excluded, which would include the period even prior to 22.6.1992 when the abortive appeal was filed. As an alternative submission, on the assumption that Section 14 applied only to Courts and not to Tribunals, he submitted that the principle of Section 14 would then apply. According to him, Section 128 of the Customs Act before its amendment in 2001 would be attracted on the facts of this case giving him a period of 90 days plus an extended period of a further period of 90 days within which the present appeal could be filed. This being the case, on an application of Section 14, the appeal would be filed with no delay at all even if the period from 3.4.1992 to 22.6.1992 and 12.3.2003 to 23.5.2003 is to be taken into account, as that would be less than 180 days given to file the appeal under the old Section 128. He cited a number of authorities which we will deal with in the course of this judgment in support of all the aforesaid propositions.

5. Shri A.K. Sanghi, learned senior advocate appearing on behalf of the Department argued that Section 128 of the Customs Act excluded the application of Section 14 of the Limitation Act in that the scheme of the Section is that only a limited period should be given to an assessee beyond which the appeal would become time barred. In the present case, Section 128 as amended post 2001 would apply to the facts of this case and on the appellant’s own showing the appeal is out of time by eleven and a half years. Section 128 only gives the appellant 60 days plus another 30 days which have long gone. He also argued that Section 14 of the Limitation Act would not apply to Tribunals but only to Courts, and the Collector (Appeals) was at best a quasi-judicial Tribunal. Further, according to him, no question of any principle of section 14 would get attracted. In fact, according to him, there is no pleading qua Section 14 at all – the only pleading is for condonation of delay and not for exclusion of time. Section 14 requires that five necessary ingredients must be satisfied on facts before it can be attracted. The appellant has neither pleaded nor proved any of these ingredients. He also cited a number of authorities which we will refer to in the course of this judgment.

Ingredients of Section 14.

Section 14 of the Limitation Act reads as follows:

“14. Exclusion of time of proceeding bona fide in court without jurisdiction.*—(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a*

court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in Rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.—For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

6. Shri A.K. Sanghi, learned senior counsel appearing on behalf of the Department has stated that at no point of time has the appellant taken up a plea based on Section 14. Neither has the appellant met with any of the five conditions set out in paragraph 21 of **Consolidated Engg. Enterprises v. Principal secy., Irrigation Deptt., (2008) 7 SCC 169**, which reads as follows:-

"21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court."

7. Technically speaking, Shri A.K. Sanghi, may be correct. However, in an application for condonation of delay the appellant pointed out that they were pursuing a remedy before another appellate forum which ought to be excluded. We deem this averment sufficient for the appellant to contend that Section 14 of the Limitation Act or principles laid down under it would be attracted to the facts of this case.

We might also point out that conditions 1 to 4 mentioned in the Consolidated Engineering case have, in fact, been met by the appellant. It is clear that both the prior and subsequent proceedings are civil proceedings prosecuted by the same party. The prior proceeding had been prosecuted with due diligence and in good faith, as has been explained in Consolidated Engineering itself. These phrases only mean that the party who invokes Section 14 should not be guilty of negligence, lapse or inaction. Further, there should be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. On the facts of this case, as the earlier Supreme Court order dated 12.3.2003 itself points out, there was some confusion as to whether what was appealed against was the Superintendent's order or the Collector's order. The appellant bona fide believed that it was the Collector's order which was appealed against and hence an appeal to CEGAT would be maintainable. This contention, however, ran into rough weather in this Court. Further, the time taken between 3.4.1992 and 22.6.1992 to file an appeal cannot be said to be inordinately long. Thus, neither was there any negligence, lapse or inaction on facts nor did the appellant delay proceedings to harass the Department by pretending that there was a mistake. Condition (3) was also directly met – this Court in the order dated 12.3.2003 set aside CEGAT's order on the ground that it was without jurisdiction. It is indisputable that the earlier proceeding and the later proceeding relate to the same matter in issue and thus condition 4 is also met. Condition 5, however, has not been met as both the proceedings are before a quasi- judicial Tribunal and not in a Court. This, however, is not fatal to the present proceeding as what is being held by us in this judgment is that despite the fact that Section 14 of the Limitation Act may not apply, yet the principles of Section 14 will get attracted to the facts of the present case. It is in this way that we now proceed to consider the law on the subject.

Whether the Limitation Act applies only to Courts and not to Tribunals

8. A perusal of the Limitation Act, 1963 would show that the bar of limitation contained in the Schedule to the Act applies to suits, appeals, and applications. "Suit" is defined in Section 2(l) as not including an appeal or an application. The word "Court" is not defined under the Act. However, it appears in a number of its provisions (See: Sections 4,5,13,17(2),21). A perusal of the Schedule would show that it is divided into three divisions. The first division concerns itself with suits. Articles 1 to 113 all deal with "suits".

9. Sections 2(a),(e) and (i) are material in that they define what is meant by an applicant, a plaintiff and a defendant.

*"**2. Definitions.**—In this Act, unless the context otherwise requires,—*

(a) "applicant" includes—

(i) a petitioner;

(ii) any person from or through whom an applicant derives his right to apply;

(iii) any person whose estate is represented by the applicant as executor, administrator or other representative;

(e) "defendant" includes—

(i) any person from or through whom a defendant derives his liability to be sued;

(ii) any person whose estate is represented by the defendant as executor, administrator or other representative;

(i) "plaintiff" includes—

(i) any person from or through whom a plaintiff derives his right to sue;

(ii) any person whose estate is represented by the plaintiff as executor, administrator or other representative;"

10. Section 3(2) which is material states as follows:

"3(2) For the purposes of this Act-

a) A suit is instituted-

(i) In an ordinary case, when the plaint is presented to the proper officer;

(ii) In the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) In the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

b) Any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted –

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

c) *an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."*

11. A perusal of Section 3(2) shows that "suits" are understood as actions begun in courts of law established under the Constitution of India.

12. In the Schedule, the second division concerns itself with appeals. These appeals under Articles 114 to 117, are either under the Civil Procedure Code, the Criminal Procedure Code, or intra-court appeals so far as the High Courts are concerned. These appeals again are only to "Courts" established under the Constitution.

13. Equally, in the third division, all applications that are referred to are under Articles 118 to 137 only to "Courts", either under the Civil Procedure Code or under other enactments.

14. Sections 13, 21 and Articles 124, 130 and 131 of the Limitation Act are again important in understanding what is meant by the expression "Court". They are set out below:

"13. ***Exclusion of time in cases where leave to sue or appeal as a pauper is applied for.****—In computing the period of limitation prescribed for any suit or appeal in any case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded, and the court may, on payment of the court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the court fees had been paid in the first instance.*

21. ***Effect of substituting or adding new plaintiff or defendant.****—(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:*

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

Schedule

124.	*For a review of judgment by a court other than the Supreme Court*	*Thirty days*	*The date of the decree or order*
130.	*For leave to appear as a pauper -*		
	(a) to the High Court	*Sixty days*	*The date of decree appeared from*
	(b) to the other Court	*Thirty days*	*The date of decree appealed from*
131.	*To any court for the exercise of its power of revision under the Code of Civil Procedure, 1908 (5 of 1908), or the Code of Criminal Procedure, 1898 (5 of 1898).*	*Ninety days*	*The date of the decree or order or sentence sought to be revised.*

It will be seen that suits and appeals that are covered by the Limitation Act are so covered provided court fees prescribed for such suits or appeals are paid. Under Section 13, set out hereinabove, this becomes clear. That is why time is excluded in cases where leave to file a suit or an appeal as a pauper is granted in the circumstances mentioned in the Section. 'Courts' that are mentioned in this Section are therefore courts as understood in the strict sense of being part of the Judicial Branch of the State.

15. Section 21 also makes it clear that the suit that the Limitation Act speaks of is instituted only by a plaintiff against a defendant. Both plaintiff and defendant have been defined as including persons through whom they derive their right to sue and include persons whose estate is represented by persons such as executors, administrators or other representatives. This again refers only to suits filed in courts as is understood by the Code of Civil Procedure. In this regard, Section 26 of the CPC states:

"Section 26- Institution of suits

(1) Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

(2) In every plaint, facts shall be proved by affidavit."

16. When it comes to applications, again Articles 124, 130 and 131 throw a great deal of light. Only review of judgments by a "court" is contemplated in the Third Division in the Schedule. Further, leave to appeal as a pauper again can be made either to the High Court or only to any other court vide Article 130. And by Article 131, a revision petition filed only

before Courts under the Code of Civil Procedure Code or the Code of Criminal Procedure are referred to. On a plain reading of the provisions of the Limitation Act, it becomes clear that suits, appeals and applications are only to be considered (from the limitation point of view) if they are filed in courts and not in quasi- judicial bodies.

17. Now to the case law. A number of decisions have established that the Limitation Act applies only to courts and not to Tribunals. The distinction between courts and quasi-judicial decisions is succinctly brought out in **Bharat Bank Ltd. v. Employees of Bharat Bank Ltd., 1950 SCR 459.** This root authority has been followed in a catena of judgments. This judgment refers to a decision of the King's Bench **in Cooper v. Wilson**. The relevant quotation from the said judgment is as follows:-

> *"A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties, and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice."*

18. Under our constitutional scheme of things, the judiciary is dealt with in Chapter IV of Part V and Chapter V of Part VI. Chapter IV of Part V deals with the Supreme Court and Chapter V of Part VI deals with the High Courts and courts subordinate thereto. When the Constitution uses the expression "court", it refers to this Court system. As opposed to this court system is a system of quasi-judicial bodies called Tribunals. Thus, Articles 136 and 227 refer to "courts" as distinct from "tribunals". The question in this case is whether the Limitation Act extends beyond the court system mentioned above and embraces within its scope quasi-judicial bodies as well.

19. A series of decisions of this Court have clearly held that the Limitation Act applies only to courts and does not apply to quasi- judicial bodies. Thus, in **Town Municipal Council, Athani v. Presiding Officer, Labour Court**, (1969) 1 SCC 873, a question arose as to what applications are covered under Article 137 of the Schedule to the Limitation Act. It was argued that an application made under the Industrial Disputes Act to a Labour Court was covered by the said Article. This Court negatived the said plea in the following terms:-

> *"12. This point, in our opinion, may be looked at from another angle also. When this Court earlier held that all the articles in the third division to the schedule, including Article 181 of the Limitation Act of 1908, governed applications under the Code of Civil Procedure only, it clearly implied that the applications must be presented to a court governed by the Code of Civil Procedure. Even the applications under the Arbitration Act that were included within the third division by amendment of Articles 158 and 178 were to be presented to courts whose proceedings were governed by the Code of Civil Procedure. As best, the further amendment now made enlarges the scope of the third division of the schedule so as also to include some applications presented to courts governed by the Code of Criminal Procedure. One factor at least remains constant and that is that the applications must be to courts to be governed by the*

articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than courts, such as a quasi judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. We cannot, therefore, accept the submission made that this article will apply even to applications made to an Industrial Tribunal or a Labour Court. The alterations made in the article and in the new Act cannot, in our opinion, justify the interpretation that even applications presented to bodies, other than courts, are now to be governed for purposes of limitation by Article 137."

Similarly, in **Nityananda, M. Joshi & Ors. v. Life Insurance Corporation & Ors.,** (1969) 2 SCC 199, this Court followed the judgment in **Athani's** case and turned down a plea that an application made to a Labour Court would be covered under Article 137 of the Limitation Act. This Court emphatically stated that Article 137 only contemplates applications to courts in the following terms:

"3. In our view Article 137 only contemplates applications to Courts. In the Third Division of the Schedule to the Limitation Act, 1963 all the other applications mentioned in the various articles are applications filed in a court. Further Section 4 of the Limitation Act, 1963, provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is "when the court is closed." Again under Section 5 it is only a court which is enabled to admit an application after the prescribed period has expired if the court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act, 1963.'"

20. In **Kerala State Electricity Board v. T.P. Kunhaliumma,** (1976) 4 SCC 634, a 3-Judge Bench of this Court followed the aforesaid two judgments and stated:-

"22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-judge bench of this Court in Athani Municipal Council case [(1969) 1 SCC 873 : (1970) 1 SCR 51] and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act."

This judgment is an authoritative pronouncement by a 3-Judge Bench that the Limitation Act applies only to courts and not to quasi- judicial Tribunals. Athani's case was dissented from on a different proposition – that Article 137 is not confined to applications under the Code of Civil Procedure alone. So long as an application is made under any statute to a Civil Court, such application will be covered by Article 137 of the Limitation Act.

21. The stage is now set for a decision on which wide ranging arguments were made by counsel on both sides. In **Commissioner of Sales Tax, U.P., Lucknow v. Parson Tools and Plants, Kanpur,** (1975) 4 SCC 22, a 3-Judge Bench was confronted with whether Section 14 of the Limitation Act applied to the Sales Tax authorities under the U.P. Sales Tax Act. In no uncertain terms, this Court held:-

"8. Mr Karkhanis is right that this matter is no longer res Integra. In Shrimati Ujjam Bai v. State of U.P. [AIR 1962 SC 1621 : (1963) 1 SCR 778] Hidayatullah, J. (as he then was) speaking for the Court, observed:

"The Taxing authorities are instrumentalities of the State. They are not a part of the legislature, nor are they a part of the Judiciary. Their functions are the assessment and collection of taxes and in the process of assessing taxes, they follow a pattern of action which is considered judicial. They are not thereby converted into courts of civil judicature. They still remain the instrumentalities of the State and are within the definition of 'State' in Article 12."

9. The above observations were quoted with approval by this Court in Jagannath Prasad case [AIR 1963 SC 416 : (1963) 2 SCR 850 : 14 STC 536] and it was held that a Sales Tax Officer under U.P. Sales Tax Act, 1948 was not a court within the meaning of Section 195 of the Code of Criminal Procedure although he is required to perform certain quasi-judicial functions. The decision in Jagannath Prasad case it seems, was not brought to the notice of the High Court. In view of these pronouncements of this Court, there is no room for argument that the Appellate Authority and the Judge (Revisions) Sales tax exercising jurisdiction under the Sales Tax Act, are "courts". They are merely Administrative Tribunals and "not courts". Section 14, Limitation Act, therefore, does not, in terms apply to proceedings before such tribunals."

It then went on to discuss whether the general principle underlying Section 14 would be applicable and held:-

"12. Three features of the scheme of the above provision are noteworthy. The first is that no limitation has been prescribed for the suo motu exercise of its jurisdiction by the revising authority. The second is that the period of one year prescribed as limitation for filing an application for revision by the aggrieved party is unusually long. The third is that the revising authority has no discretion to extend this period beyond a further period of six months, even on sufficient cause shown. As rightly pointed out in the minority judgment of the High Court, pendency of proceedings of the nature contemplated by Section 14(2) of the Limitation Act, may amount to a sufficient cause for condoning the delay and extending the limitation for filing a revision application, but Section 10(3- B) of the Sales Tax Act gives no jurisdiction to the revising authority to extend the limitation, even in such a case, for a further period of more than six months.

13. The three stark features of the scheme and language of the above provision, unmistakably show that the legislature has deliberately excluded the application of the principles underlying Sections 5 and 14 of the Limitation Act, except to the extent and in the truncated form embodied in sub-section (3- B) of Section 10 of the Sales Tax Act. Delay in disposal of revenue matters adversely affects the steady inflow of revenues and the financial stability of the State. Section 10 is therefore designed to ensure speedy and final determination of fiscal matters within a reasonably certain time-schedule.

14. It cannot be said that by excluding the unrestricted application of the principles of Sections 5 and 14 of the Limitation Act, the legislature has made the provisions of Section 10 unduly oppressive. In most cases, the discretion to extend limitation, on sufficient cause being shown for a further period of six months only, given by sub-section (3-B) would be enough to afford relief. Cases are no doubt conceivable where an aggrieved party, despite sufficient cause, is unable to make an application for revision within this maximum period of 18 months. Such harsh cases would be rare.

Even in such exceptional cases of extreme hardship, the revising authority may, on its own motion, entertain revision and grant relief."

22. It is clear that this judgment clearly laid down two things – one that authorities under the Sales Tax Act are not "courts" and thus, the Limitation Act will not apply to them. It also laid down that the language of Section 10 (3-B) of the U.P. Sales Tax Act made it clear that an unusually long period of limitation had been given for filing a revision application and therefore said that the said Section as construed by the Court would not be unduly oppressive. Most cases would, according to the Court, be filed within a maximum period of 18 months but even in cases, rare as they are, filed beyond such period, the revising authority may on its own motion entertain the revision and grant relief. Given the three features of the U.P. Sales Tax Act scheme, the Court held that the legislature deliberately excluded the application of the principle underlying Section 14 except to the limited extent that it may amount to sufficient cause for condoning delay within the period of 18 months.

23. Close upon the heels of this judgment comes another 3-Judge Bench decision under the same provision of the U.P. Sales Tax Act. In this judgment, another 3-Judge Bench in **C.S.T. v. Madan Lal Das and Sons,** 1976 (4) SCC 464, without adverting to either Parson Tools or the three other judgments mentioned hereinabove went on to apply Section 12 (2) of the Limitation Act to proceedings under the U.P. Sales Tax Act. None of the aforesaid four decisions were pointed out to the court and it was not argued that the Limitation Act applies only to courts and not to Sales Tax authorities who are quasi-judicial Tribunals. This judgment, therefore, is not an authority for the proposition that the Limitation Act would apply to Tribunals as opposed to courts. Clearly the conclusion reached would be contrary to four earlier decisions three of which are 3-Judge Bench decisions.

24. In fact, even after this judgment, in **Officer on Special Duty (Land Acquisition) v. Shah Manilal Chandulal,** (1996) 9 SCC 414, this Court held that a Land Acquisition Officer under the Land Acquisition Act not being a court, the provisions of the Limitation Act would not apply. The court concluded, after adverting to some of the previous judgments of this Court as follows:-

"18. Though hard it may be, in view of the specific limitation provided under proviso to Section 18(2) of the Act, we are of the considered view that sub-section (2) of Section 29 cannot be applied to the proviso to sub-section (2) of Section 18. The Collector/LAO, therefore, is not a court when he acts as a statutory authority under Section 18(1). Therefore, Section 5 of the Limitation Act cannot be applied for extension of the period of limitation prescribed under proviso to sub-section (2) of Section 18. The High Court, therefore, was not right in its finding that the Collector is a court under Section 5 of the Limitation Act.

19. Accordingly, we hold that the applications are barred by limitation and the Collector has no power to extend time for making an application under Section 18(1) for reference to the court."

25. Two other judgments of this Court need to be dealt with at this stage. In **Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker,** (1995) 5 SCC 5, a 2-Judge Bench of this Court held that the Limitation Act would apply to the appellate authority constituted under Section 13 of the Kerala Buildings (Lease and Rent Control) Act , 1965. This was done by applying the provision of Section 29(2) of the Limitation Act. Despite referring to various earlier judgments of this Court which held that the Limitation Act applies only to courts and not to Tribunals, this Court in this case held to the contrary. In distinguishing the Parson Tools' case, which is a 3-Judge Bench binding on the Court that decided Mukri Gopalan's case, the Court held:-

> *"If the Limitation Act does not apply then neither Section 29(2) nor Section 14(2) of the Limitation Act would apply to proceedings before him. But so far as this Court is concerned it did not go into the question whether Section 29(2) would not get attracted because the U.P. Sales Tax Act Judge (Revisions) was not a court but it took the view that because of the express provision in Section 10(3)(B) applicability of Section 14(2) of the Sales Tax Act was ruled out. Implicit in this reasoning is the assumption that but for such an express conflict or contrary intention emanating from Section 10(3)(B) of the U.P. Sales Tax Act which was a special law, Section 29(2) would have brought in Section 14(2) of the Limitation Act even for governing period of limitation for such revision applications. In any case, the scope of Section 29(2) was not considered by the aforesaid decision of the three learned Judges and consequently it cannot be held to be an authority for the proposition that in revisional proceedings before the Sales Tax authorities functioning under the U.P. Sales Tax Act Section 29(2) cannot apply as Mr. Nariman would like to have it."*

It then went on to follow the judgment reported in **The Commissioner of Sales Tax, U.P. v. M/s. Madan Lal Das & Sons, Bareilly**, (1976) 4 SCC 464 which, as has been pointed out earlier, is not an authority for the proposition that the Limitation Act would apply to Tribunals. In fact, **Mukri Gopalan's** case was distinguished in **Om Prakash v. Ashwani Kumar Bassi**, (2010) 9 SCC 183 at paragraph 22 as follows:

> *"22. The decision in Mukri Gopalan case [(1995) 5 SCC 5] relied upon by Mr Ujjal Singh is distinguishable from the facts of this case. In the facts of the said case, it was the District Judges who were discharging the functions of the appellate authority and being a court, it was held that the District Judge, functioning as the appellate authority, was a court and not persona designata and was, therefore, entitled to resort to Section 5 of the Limitation Act. That is not so in the instant case where the Rent Controller appointed by the State Government is a member of the Punjab Civil Services and, therefore, a persona designata who would not be entitled to apply the provisions of Section 5 of the Limitation Act, 1963, as in the other case."*

The fact that the District Judge himself also happened to be the appellate authority under the Rent Act would have been sufficient on the facts of the case for the Limitation Act to apply without going into the proposition that the Limitation Act would apply to tribunals.

26. Quite apart from Mukri Gopalan's case being out of step with at least five earlier binding judgments of this Court, it does not square also with the subsequent judgment in **Consolidated Engg. Enterprises v. Principal secy., Irrigation Deptt.,** (2008) 7 SCC 169. A 3-Judge Bench of this Court was asked to decide whether Section 14 of the Limitation Act would apply to Section 34(3) of the Arbitration and Conciliation Act, 1996. After discussing the various provisions of the Arbitration Act and the Limitation Act, this Court held:

> *"23. At this stage it would be relevant to ascertain whether there is any express provision in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act. On review of the provisions of the Act of 1996 this Court finds that there is no provision in the said Act which excludes the applicability of the provisions of Section 14 of the Limitation Act to an application submitted under Section 34 of the said Act. On the contrary, this Court finds that Section 43 makes the provisions of the Limitation Act, 1963 applicable to arbitration proceedings. The proceedings under Section 34 are for the purpose of challenging the award whereas the proceeding referred to under Section 43 are the original proceedings which can be equated with a suit in a court. Hence, Section 43 incorporating the Limitation Act will apply to the proceedings in the arbitration as it applies to the proceedings of a suit in the court.*

Sub-section (4) of Section 43, inter alia, provides that where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted. If the period between the commencement of the arbitration proceedings till the award is set aside by the court, has to be excluded in computing the period of limitation provided for any proceedings with respect to the dispute, there is no good reason as to why it should not be held that the provisions of Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act of 1996, more particularly where no provision is to be found in the Act of 1996, which excludes the applicability of Section 14 of the Limitation Act, to an application made under Section 34 of the Act. It is to be noticed that the powers under Section 34 of the Act can be exercised by the court only if the aggrieved party makes an application. The jurisdiction under Section 34 of the Act, cannot be exercised suo motu. The total period of four months within which an application, for setting aside an arbitral award, has to be made is not unusually long. Section 34 of the Act of 1996 would be unduly oppressive, if it is held that the provisions of Section 14 of the Limitation Act are not applicable to it, because cases are no doubt conceivable where an aggrieved party, despite exercise of due diligence and good faith, is unable to make an application within a period of four months. From the scheme and language of Section 34 of the Act of 1996, the intention of the legislature to exclude the applicability of Section 14 of the Limitation Act is not manifest. It is well to remember that Section 14 of the Limitation Act does not provide for a fresh period of limitation but only provides for the exclusion of a certain period. Having regard to the legislative intent, it will have to be held that the provisions of Section 14 of the Limitation Act, 1963 would be applicable to an application submitted under Section 34 of the Act of 1996 for setting aside an arbitral award."

While discussing Parson Tools, this Court held:

"25……In appeal, this Court held that (1) if the legislature in a special statute prescribes a certain period of limitation, then the Tribunal concerned has no jurisdiction to treat within limitation, an application, by excluding the time spent in prosecuting in good faith, on the analogy of Section 14(2) of the Limitation Act, and (2) the appellate authority and the revisional authority were not "courts" but were merely administrative tribunals and, therefore, Section 14 of the Limitation Act did not, in terms, apply to the proceedings before such tribunals.

26. From the judgment of the Supreme Court in CST [(1975) 4 SCC 22 : 1975 SCC (Tax) 185 : (1975) 3 SCR 743] it is evident that essentially what weighed with the Court in holding that Section 14 of the Limitation Act was not applicable, was that the appellate authority and the revisional authority were not "courts". The stark features of the revisional powers pointed out by the Court, showed that the legislature had deliberately excluded the application of the principles underlying Sections 5 and 14 of the Limitation Act. Here in this case, the Court is not called upon to examine scope of revisional powers. The Court in this case is dealing with Section 34 of the Act which confers powers on the court of the first instance to set aside an award rendered by an arbitrator on specified grounds. It is not the case of the contractor that the forums before which the Government of India undertaking had initiated proceedings for setting aside the arbitral award are not "courts". In view of these glaring distinguishing features, this Court is of the opinion that the decision rendered in CST [(1975) 4 SCC 22 : 1975 SCC (Tax) 185 : (1975) 3 SCR 743] did not decide the issue which falls for

consideration of this Court and, therefore, the said decision cannot be construed to mean that the provisions of Section 14 of the Limitation Act are not applicable to an application submitted under Section 34 of the Act of 1996."

In a separate concurring judgment Justice Raveendran specifically held:

"44. It may be noticed at this juncture that the Schedule to the Limitation Act prescribes the period of limitation only to proceedings in courts and not to any proceeding before a tribunal or quasi-judicial authority. Consequently Sections 3 and 29(2) of the Limitation Act will not apply to proceedings before the tribunal. This means that the Limitation Act will not apply to appeals or applications before the tribunals, unless expressly provided.

While dealing with Parson Tools, the learned Judge held:

"56. In Parson Tools [(1975) 4 SCC 22] this Court did not hold that Section 14(2) was excluded by reason of the wording of Section 10(3-B) of the Sales Tax Act. This Court was considering an appeal against the Full Bench decision of the Allahabad High Court. Two Judges of the High Court had held that the time spent in prosecuting the application for setting aside the order of dismissal of appeals in default, could be excluded when computing the period of limitation for filing a revision under Section 10 of the said Act, by application of the principle underlying Section 14(2) of the Limitation Act. The minority view of the third Judge was that the revisional authority under Section 10 of the U.P. Sales Tax Act did not act as a court but only as a Revenue Tribunal and therefore the Limitation Act did not apply to the proceedings before such Tribunal, and consequently, neither Section 29(2) nor Section 14(2) of the Limitation Act applied. The decision of the Full Bench was challenged by the Commissioner of Sales Tax before this Court, contending that the Limitation Act did not apply to tribunals, and Section 14(2) of the Limitation Act was excluded in principle or by analogy. This Court upheld the view that the Limitation Act did not apply to tribunals, and that as the revisional authority under Section 10 of the U.P. Sales Tax Act was a tribunal and not a court, the Limitation Act was inapplicable. This Court further held that the period of pendency of proceedings before the wrong forum could not be excluded while computing the period of limitation by applying Section 14(2) of the Limitation Act. This Court, however, held that by applying the principle underlying Section 14(2), the period of pendency before the wrong forum may be considered as a "sufficient cause" for condoning the delay, but then having regard to Section 10(3-B), the extension on that ground could not extend beyond six months. The observation that pendency of proceedings of the nature contemplated by Section 14(2) of the Limitation Act, may amount to a sufficient cause for condoning the delay and extending the limitation and such extension cannot be for a period in excess of the ceiling period prescribed, is in the light of its finding that Section 14(2) of the Limitation Act was inapplicable to revisions under Section 10(3-B) of the U.P. Sales Tax Act. These observations cannot be interpreted as laying down a proposition that even where Section 14(2) of the Limitation Act in terms applied and the period spent before wrong forum could therefore be excluded while computing the period of limitation, the pendency before the wrong forum should be considered only as a sufficient cause for extension of period of limitation and therefore, subjected to the ceiling relating to the extension of the period of limitation. As we are concerned with a proceeding before a court to which Section 14(2) of the Limitation Act applies, the decision in Parson Tools [(1975) 4 SCC 22 : 1975 SCC (Tax) 185 : (1975) 3 SCR 743] which related to a proceeding before a Tribunal to which Section 14(2) of the Limitation Act did not apply, has no application."

27. Obviously, the ratio of Mukri Gopalan does not square with the observations of the 3-Judge Bench in Consolidated Engineering Enterprises. In the latter case, this Court has unequivocally held that Parson Tools is an authority for the proposition that the Limitation Act will not apply to quasi-judicial bodies or Tribunals. To the extent that Mukri Gopalan is in conflict with the judgment in the Consolidated Engineering Enterprises case, it is no longer good law.

28. The sheet anchor in Mukri Gopalan was Section 29(2) of the Limitation Act. Section 29(2) states:-

> *"29.* ***Savings.—***
>
> *(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law."*

A bare reading of this Section would show that the special or local law described therein should prescribe for any suit, appeal or application a period of limitation different from the period prescribed by the schedule. This would necessarily mean that such special or local law would have to lay down that the suit, appeal or application to be instituted under it should be a suit, appeal or application of the nature described in the schedule. We have already held that such suits, appeals or applications as are referred to in the schedule are only to courts and not to quasi-judicial bodies or Tribunals. It is clear, therefore, that only when a suit, appeal or application of the description in the schedule is to be filed in a court under a special or local law that the provision gets attracted. This is made even clearer by a reading of Section 29(3). Section 29(3) states:-

> *"29.* ***Savings.—***
>
> *(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law."*

29. When it comes to the law of marriage and divorce, the Section speaks not only of suits but other proceedings as well. Such proceedings may be proceedings which are neither appeals nor applications thus making it clear that the laws relating to marriage and divorce, unlike the law of limitation, may contain proceedings other than suits, appeals or applications filed in courts. This again is an important pointer to the fact that the entirety of the Limitation Act including Section 29(2) would apply only to the three kinds of proceedings mentioned all of which are to be filed in courts.

30. It now remains to consider the decision of a 2-Judge Bench reported in **P. Sarathy v. State Bank of India**, (2000) 5 SCC 355. This judgment has held that an abortive proceeding before the appellate authority under Section 41 of the Tamil Nadu Shops and Establishment Act would attract the provisions of Section 14 of the Limitation Act inasmuch as the appellant in this case had been prosecuting with due diligence another civil proceeding before the appellate authority under the Tamil Nadu Shops and Establishment Act, which appeal was dismissed on the ground that the said Act was not applicable to nationalized banks and that, therefore, such appeal would not be maintainable. This Court made a distinction between "Civil Court" and "court' and expanded the scope of Section 14 stating that any authority or Tribunal having the trappings of a Court would be a "court" within the meaning of Section 14.

It must be remembered that the word "Court" refers only to a proceeding which proves to be abortive. In this context, for Section 14 to apply, two conditions have to be met. First, the primary proceeding must be a suit, appeal or application filed in a Civil Court. Second, it is only when it comes to excluding time in an abortive proceeding that the word "Court" has been expanded to include proceedings before tribunals.

31. This judgment is in line with a large number of authorities which have held that Section 14 should be liberally construed to advance the cause of justice – see: **Shakti Tubes Ltd. v. State of Bihar,** (2009) 1 SCC 786 and the judgments cited therein. Obviously, the context of Section 14 would require that the term "court" be liberally construed to include within it quasi-judicial Tribunals as well. This is for the very good reason that the principle of Section 14 is that whenever a person bonafide prosecutes with due diligence another proceeding which proves to be abortive because it is without jurisdiction, or otherwise no decision could be rendered on merits, the time taken in such proceeding ought to be excluded as otherwise the person who has approached the Court in such proceeding would be penalized for no fault of his own. This judgment does not further the case of Shri Viswanathan in any way. The question that has to be answered in this case is whether suits, appeals or applications referred to by the Limitation Act are to be filed in courts. This has nothing to do with "civil proceedings" referred to in Section 14 which may be filed before other courts or authorities which ultimately do not answer the case before them on merits but throw the case out on some technical ground. Obviously the word "court" in Section 14 takes its colour from the preceding words "civil proceedings". Civil proceedings are of many kinds and need not be confined to suits, appeals or applications which are made only in courts *stricto sensu*. This is made even more clear by the explicit language of Section 14 by which a civil proceeding can even be a revision which may be to a quasi-judicial tribunal under a particular statute.

Whether the Principle of Section 14 would apply to an appeal filed under Section 128 Customs Act.

> *"128.* ***Appeals to Commissioner (Appeals)****.—(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within [sixty days] from the date of the communication to him of such decision or order:*
>
> *[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]*
>
> *[(1-A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :*
>
> *Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]*
>
> *(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."*

Prior to its amendment in 2001, the said Section read as under:-

> *"128.* ***Appeals to Collector (Appeals).****—(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Collector of Customs may appeal to the Collector (Appeals) within three months from the date of the communication to him of such decision or order:*

Provided that the Collector (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months, allow it to be presented within a further period of three months.

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

We have already held that the Limitation Act including Section 14 would not apply to appeals filed before a quasi-judicial Tribunal such as the Collector (Appeals) mentioned in Section 128 of the Customs Act. However, this does not conclude the issue. There is authority for the proposition that even where Section 14 may not apply, the principles on which Section 14 is based, being principles which advance the cause of justice, would nevertheless apply. We must never forget, as stated in **Bhudan Singh & Anr. v. Nabi Bux & Anr.**, (1970) 2 SCR 10, that justice and reason is at the heart of all legislation by Parliament. This was put in very felicitous terms by Hegde,J. as follows:

"Before considering the meaning of the word "held" in Section 9, it is necessary to mention that it is proper to assume that the lawmakers who are the representatives of the people enact laws which the society considers as honest, fair and equitable. The object of every legislation is to advance public welfare. In other words as observed by Crawford in his book on Statutory Constructions the entire legislative process is influenced by considerations of justice and reason. Justice and reason constitute the great general legislative intent in every piece of legislation. Consequently where the suggested construction operates harshly, ridiculously or in any other manner contrary to prevailing conceptions of justice and reason, in most instances, it would seem that the apparent or suggested meaning of the statute, was not the one intended by the law-makers. In the absence of some other indication that the harsh or ridiculous effect was actually intended by the legislature, there is little reason to believe that it represents the legislative intent."

32. This is why the principles of Section 14 were applied in **J. Kumaradasan Nair v. Iric Sohan,** (2009) 12 SCC 175 to a revision application filed before the High Court of Kerala. The Court held:

"16. The provisions contained in Sections 5 and 14 of the Limitation Act are meant for grant of relief where a person has committed some mistake. The provisions of Sections 5 and 14 of the Limitation Act alike should, thus, be applied in a broad based manner. When sub-section (2) of Section 14 of the Limitation Act per se is not applicable, the same would not mean that the principles akin thereto would not be applied. Otherwise, the provisions of Section 5 of the Limitation Act would apply. There cannot be any doubt whatsoever that the same would be applicable to a case of this nature.

17. There cannot furthermore be any doubt whatsoever that having regard to the definition of "suit" as contained in Section 2(l) of the Limitation Act, a revision application will not answer the said description. But, although the provisions of Section 14 of the Limitation Act per se are not applicable, in our opinion, the principles thereof would be applicable for the purpose of condonation of delay in filing an appeal or a revision application in terms of Section 5 thereof.

18. It is also now a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not. The court will not apply the beneficent provisions like Sections 5 and 14 of the Limitation Act in a pedantic manner. When the provisions are meant to apply and in

fact found to be applicable to the facts and circumstances of a case, in our opinion, there is no reason as to why the court will refuse to apply the same only because a wrong provision has been mentioned. In a case of this nature, sub-section (2) of Section 14 of the Limitation Act per se may not be applicable, but, as indicated hereinbefore, the principles thereof would be applicable for the purpose of condonation of delay in terms of Section 5 thereof."

The Court further quoted from Consolidated Engineering Enterprises an instructive passage:

"21. In Consolidated Engg. Enterprises v. Irrigation Deptt. [(2008) 7 SCC 169] this Court held: (SCC p. 181, para 22)

"22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded. See Shakti Tubes Ltd. v. State of Bihar [(2009) 1 SCC 786]."

33. Various provisions of the Limitation Act are based on advancing the cause of justice. Section 6 is one such. It reads as follows:-

*"6. **Legal disability.**—(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.*

(2) Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so specified.

(3) Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.

(4) Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

(5) Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died.

Explanation.—For the purposes of this section, 'minor' includes a child in the womb."

On the assumption that Section 6 does not apply on the facts of a given case, can it be said that the principles on which it is based have no application? Suppose, in a given case, the person entitled to institute a proceeding not governed by the Limitation Act were a minor, a lunatic or an idiot, would he not be entitled to institute such proceedings after such disability has ceased, for otherwise he would be barred by the period of limitation contained in the particular statute governing his rights. This Section again is a pointer to the fact that courts always lean in favour of advancing the cause of justice where a clear case is made out for so doing.

34. However, it remains to consider whether Shri Sanghi is right in stating that Section 128 is a complete code by itself which necessarily excludes the application of Section 14 of the Limitation Act. For this proposition he relied strongly on Parson Tools which has been discussed hereinabove. As has already been stated, Parson Tools was a judgment which turned on the three features mentioned in the said case. Unlike the U.P. Sales Tax Act, there is no provision in the Customs Act which enables a party to invoke *suo moto* the appellate power and grant relief to a person who institutes an appeal out of time in an appropriate case. Also, Section 10 of the U.P. Sales Tax Act dealt with the filing of a revision petition after a first appeal had already been rejected, and not to a case of a first appeal as provided under Section 128 of the Customs Act. Another feature, which is of direct relevance in this case, is that for revision petitions filed under the U.P. Sales Tax Act a sufficiently long period of 18 months had been given beyond which it was the policy of the legislature not to extend limitation any further. This aspect of Parson Tools has been explained in Consolidated Engineering in some detail by both the main judgment as well as the concurring judgment. In the latter judgment, it has been pointed out that there is a vital distinction between extending time and condoning delay. Like Section 34 of the Arbitration Act, Section 128 of the Customs Act is a Section which lays down that delay cannot be condoned beyond a certain period. Like Section 34 of the Arbitration Act, Section 128 of the Customs Act does not lay down a long period. In these circumstances, to infer exclusion of Section 14 or the principles contained in Section 14 would be unduly harsh and would not advance the cause of justice. It must not be forgotten as is pointed out in the concurring judgment in Consolidated Engineering that:

"Even when there is cause to apply Section 14, the limitation period continues to be three months and not more, but in computing the limitation period of three months for the application under Section 34(1) of the AC Act, the time during which the applicant was prosecuting such application before the wrong court is excluded, provided the proceeding in the wrong court was prosecuted bona fide, with due diligence. Western Builders [(2006) 6 SCC 239] therefore lays down the correct legal position."

35. Merely because Parson Tools also dealt with a provision in a tax statute does not make the ratio of the said decision apply to a completely differently worded tax statute with a much shorter period of limitation – Section 128 of the Customs Act. Also, the principle of Section 14 would apply not merely in condoning delay within the outer period prescribed for condonation but would apply *de hors* such period for the reason pointed out in Consolidated Engineering above, being the difference between exclusion of a certain period altogether under

Section 14 principles and condoning delay. As has been pointed out in the said judgment, when a certain period is excluded by applying the principles contained in Section 14, there is no delay to be attributed to the appellant and the limitation period provided by the concerned statute continues to be the stated period and not more than the stated period. We conclude, therefore, that the principle of Section 14 which is a principle based on advancing the cause of justice would certainly apply to exclude time taken in prosecuting proceedings which are bona fide and with due diligence pursued, which ultimately end without a decision on the merits of the case.

36. Shri Sanghi also cited **Ranbaxy Laboratories Ltd. v. Union of India,** (2011) 10 SCC 292. He relied upon paragraph 14 of this judgment which reads as follows:-

> *"14. It is a well-settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision; there is nothing to be read in; nothing to be implied and there is no room for any intendment. (See Cape Brandy Syndicate v. IRC [(1921) 1 KB 64] and Ajmera Housing Corpn. v.CIT [(2010) 8 SCC 739] .)".*

37. We do not see how this judgment furthers the argument of Shri Sanghi. This is only reiteration of the classic statement of law contained in the Cape Brandy Syndicate case. Further, the context of this paragraph is that a literal meaning has to be given to a charging Section in a tax statute. When it comes to machinery provisions in tax statutes and provisions which provide for appeals and the limitation period within which such appeals have to be filed, it is clear that the aforesaid observations would have no application whatsoever.

38. Shri Sanghi then referred us to **Sree Balaji Nagar Residential Assn. v. State of Tamil Nadu,** (2015) 3 SCC 353 and read out paragraphs 10 and 11 from the said judgment. What was held by this Court in that case was that Section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 does not exclude any period during which a land acquisition proceeding which might have remain stayed on account of an injunction granted by any Court. This was so held by contrasting the language of section 24(2) with the language of Section 19 and Section 69 of the same Act. This judgment again would have no direct bearing on the proposition canvassed by Shri Sanghi that Section 128 of the Customs Act forms a complete code by itself.

What periods are to be excluded under Section 14

39. Shri Viswanathan, learned senior counsel appearing for the appellant, placed before us a judgment of the Andhra Pradesh High Court in which it was held that even prior to the institution of a particular proceeding, time taken in steps taken for prosecuting such proceedings should also be excluded. In **Tirumareddi Rajarao & Ors. v. The State of Andhra Pradesh & Ors.,** AIR 1965 A.P. 388, the Andhra Pradesh High Court held that the period taken for preparatory steps before instituting proceedings should also be excluded. It said:

> *"13. We may now turn to the Chambers Twentieth Century Dictionary for the meanings of the expression "to prosecute". It means: To follow onwards or pursue in order to reach or accomplish; to engage in practise to follow up to pursue, chase, to pursue by law; to bring before a Court.*
>
> *14. These meanings do not vouch the construction of the section advanced by the learned Government Pleader. In our opinion, the section does not render it essential that the prosecution of the proceedings should be continued exclusively in the Court, i.e. the actual proceeding in the Court. There is justification for the view that it is only the actual period between the presentation of a proceedings and the disposal of that*

particular proceeding should be allowed under the sub-section. The time during which a party has been taking the indispensable and necessary steps preparatory to initiate the proceedings in a court should also be regarded as the time during which he has been prosecuting the civil proceeding. It is also to be borne in mind that sub-section (1) makes no reference to the pendency of the suit, appeal or other proceeding in a Court of law. The legislature had used words of general import and of widest amplitude. So, we do not find any justification for reading a restriction into that sub-section and to hold that the time during which a party was engaged in taking steps for invoking the aid of the Court falls outside the contemplation urged on behalf of the respondents, while the pendency of a proceeding in a Court could be deducted in computing the period of limitation, the time occupied in obtaining certified copies of the judgment which is an essential requisite for the filing of an appeal or revision in the higher Court has to be disregarded for purposes of S. 14. We do not think that the legislature would have contemplated such a situation. It would certainly result in an anomaly to hold that the time covered by taking the steps absolutely necessary for initiating proceedings in a Court should be included in calculating the period of limitation while the time during which a former suit or application was pending in a Court should be excluded. In our considered judgment the section does not make any distinction between the steps which a litigant has to take to initiate proceedings in a Court and the actual pendency of those proceedings in the Court."

40. In **Mst. Duliyabai & Ors. v. Vilayatali & Ors.,** AIR 1959 MP 271, a Division Bench of the High Court held:-

"What would be the time during which the plaintiff has been prosecuting with due diligence another civil proceeding in a Court of appeal? Certainly the time requisite for obtaining the certified copies under Section 12 of the Limitation Act would be included within the meaning of the section. Also the limitation prescribed for the filing of an appeal would be included, if the appeal be filed on the last day of limitation.

But if the appeal be filed earlier, the time from the date of the order impugned upto the actual date of filing of the appeal would certainly be the time during which the plaintiff can be said to be prosecuting another civil proceeding in a court of appeal. We are unable to endorse the view of the learned trial Judge on this point. A Division Bench of this Court consisting of Sir Gilbert Stone, C. J. and Niyogi, J., in the case of Kasturchand v. Wazir Begum' : (AIR 1937 Nag 1) : ILR (1937) Nag 291, held with reference to Article 11 (1) of the Limitation Act as follows:

"Then it is said that the plaintiff is out of time owing to the operation of Article 11 (1) of the Limitation Act which, in the case of a suit by a person against whom an order is passed on his objection in execution proceedings, fixes one year. The dates are as follows: the objection order was passed on 5-3- 1928. The plaint was presented in one Court on 15-9-1928, of course in time. That was returned by that Court on 14-12-1928, for presentation to what that Court held to be the proper Court. The plaintiff challenging the correctness of that order appealed on 6-2-1929 and the appeal was dismissed on 2-9-1929, and the plaint was presented to the Court as decided by die first Court, on 25-11-1929. In our opinion the plaintiff has been litigating the matter in a Court which she bona fide believed to be the correct tribunal, believing, to the extent of incurring costs of an appeal against the decision that it was not the correct tribunal, for something like 10 months.

Those 10 months must be taken into account in considering the period that has elapsed between the date of suit and the date when the plaint was eventually filed in the correct

Court, and if this is so taken into account the time that has expired is less than a year. The limitation point, therefore, in our opinion, fails."

In the case of Abdul Sattar v. Abdul Husan, AIR 1936 Cal 400, the plaintiffs had applied for execution of their decree. The judgment-debtors raised objections to the execution on the ground of adjustment of the decree. The question of adjustment was fought in appeals upto the highest Court. Ultimately it was decided against the plaintiffs by the final appellate Court. The learned Judges constituting the Division Bench held that the plaintiffs were entitled to exclude the entire period from the date of the order recording the adjustment upto the date of the final order of the highest appellate Court. We feel that this interpretation of Section 14 is in consonance with the wording of the Section. Therefore, differing from the learned trial Judge, we hold that the appellants were entitled to exclude the period from 18-9-1948 to 15-12-1948."

41. The language of Section 14, construed in the light of the object for which the provision has been made, lends itself to such an interpretation. The object of Section 14 is that if its conditions are otherwise met, the plaintiff/applicant should be put in the same position as he was when he started an abortive proceeding. What is necessary is the absence of negligence or inaction. So long as the plaintiff or applicant is bonafide pursuing a legal remedy which turns out to be abortive, the time beginning from the date of the cause of action of an appellate proceeding is to be excluded if such appellate proceeding is from an order in an original proceeding instituted without jurisdiction or which has not resulted in an order on the merits of the case. If this were not so, anomalous results would follow. Take the case of a plaintiff or applicant who has succeeded at the first stage of what turns out to be an abortive proceeding. Assume that, on a given state of facts, a defendant – appellant or other appellant takes six months more than the prescribed period for filing an appeal. The delay in filing the appeal is condoned. Under explanation (b) of Section 14, the plaintiff or the applicant resisting such an appeal shall be deemed to be prosecuting a proceeding. If the six month period together with the original period for filing the appeal is not to be excluded under Section 14, the plaintiff/applicant would not get a hearing on merits for no fault of his, as he in the example given is not the appellant. Clearly therefore, in such a case, the entire period of nine months ought to be excluded. If this is so for an appellate proceeding, it ought to be so for an original proceeding as well with this difference that the time already taken to file the original proceeding, i.e. the time prior to institution of the original proceeding cannot be excluded. Take a case where the limitation period for the original proceeding is six months. The plaintiff/applicant files such a proceeding on the ninetieth day i.e. after three months are over. The said proceeding turns out to be abortive after it has gone through a chequered career in the appeal courts. The same plaintiff/applicant now files a fresh proceeding before a court of first instance having the necessary jurisdiction. So long as the said proceeding is filed within the remaining three month period, Section 14 will apply to exclude the entire time taken starting from the ninety first day till the final appeal is ultimately dismissed. This example also goes to show that the expression "the time during which the plaintiff has been prosecuting with due diligence another civil proceeding" needs to be construed in a manner which advances the object sought to be achieved, thereby advancing the cause of justice.

42. Section 14 has been interpreted by this Court extremely liberally inasmuch as it is a provision which furthers the cause of justice. Thus, in **Union of India v. West Coast Paper Mills Ltd.,** (2004) 3 SCC 458, this Court held:

"14. ... In the submission of the learned Senior Counsel, filing of civil writ petition claiming money relief cannot be said to be a proceeding instituted in good faith and secondly, dismissal of writ petition on the ground that it was not an appropriate remedy for seeking money relief cannot be said to be 'defect of jurisdiction or other cause of a

like nature' within the meaning of Section 14 of the Limitation Act. It is true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Limitation Act is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is applicable also to cases where the prior proceedings have failed on account of other causes of like nature. The expression 'other cause of like nature' came up for the consideration of this Court in ***Roshanlal Kuthalia v. R.B. Mohan Singh Oberoi****[(1975) 4 SCC 628] and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right."*

Similarly, in **India Electric Works Ltd. v. James Mantosh,** (1971) 1 SCC 24, this Court held:

"7. It is well settled that although all questions of limitation must be decided by the provisions of the Act and the courts cannot travel beyond them the words 'or other cause of a like nature' must be construed liberally. Some clue is furnished with regard to the intention of the legislature by Explanation III in Section 14(2). Before the enactment of the Act in 1908, there was a conflict amongst the High Courts on the question whether misjoinder and non-joinder were defects which were covered by the words 'or other cause of a like nature'. It was to set at rest this conflict that Explanation III was added. An extended meaning was thus given to these words. Strictly speaking misjoinder or non-joinder of parties could hardly be regarded as a defect of jurisdiction or something similar or analogous to it."

43. As has been already noticed, **Sarathy's** case i.e. (2000) 5 SCC 355 has also held that the court referred to in Section 14 would include a quasi-judicial tribunal. There appears to be no reason for limiting the reach of the expression "prosecuting with due diligence" to institution of a proceeding alone and not to the date on which the cause of action for such proceeding might arise in the case of appellate or revisional proceedings from original proceedings which prove to be abortive. Explanation (a) to Section 14 was only meant to clarify that the day on which a proceeding is instituted and the day on which it ends are also to be counted for the purposes of Section 14. This does not lead to the conclusion that the period from the cause of action to the institution of such proceeding should be left out. In fact, as has been noticed above, the explanation expands the scope of Section 14 by liberalizing it. Thus, under explanation (b) a person resisting an appeal is also deemed to be prosecuting a proceeding. But for explanation (b), on a literal reading of Section 14, if a person has won in the first round of litigation and an appeal is filed by his opponent, the period of such appeal would not be liable to be excluded under the Section, leading to an absurd result. That is why a plaintiff or an applicant resisting an appeal filed by a defendant shall also be deemed to prosecute a proceeding so that the time taken in the appeal can also be the subject matter of exclusion under Section 14. Equally, explanation (c) which deems misjoinder of parties or a cause of action to be a cause of a like nature with defect of jurisdiction, expands the scope of the section. We have already noticed that the India Electric Works Ltd. judgment has held that strictly speaking misjoinder of parties or of causes of action can hardly be regarded as a defect of jurisdiction or something similar to it. Therefore properly construed, explanation (a) also confers a benefit and does not by a side wind seek to take away any other benefit that a purposive reading of Section 14 might give. We, therefore, agree with the decision of the Madhya Pradesh High Court that the period from the cause of action till the institution of

appellate or revisional proceedings from original proceedings which prove to be abortive are also liable to exclusion under the Section. The view of the Andhra Pradesh High Court is too broadly stated. The period prior to institution of the initiation of any abortive proceeding cannot be excluded for the simple reason that Section 14 does not enable a litigant to get a benefit beyond what is contemplated by the Section - that is to put the litigant in the same position as if the abortive proceeding had never taken place.

What applies to the facts of this case: the limitation period in Section 128 pre-amendment or post amendment

44. Shri A.K. Sanghi, learned senior counsel appearing on behalf of the revenue, has strongly contended before us that the present appeal must attract the limitation period as on the date of its filing. That being so, it is clear that the present appeal having been filed before CESTAT only on 23.5.2003, it is Section 128 post amendment that would apply and therefore the maximum period available to the appellant would be 60 plus 30 days. Even if time taken in the abortive proceedings is to be excluded, the appeal filed will be out of time being beyond the aforesaid period.

45. It is settled law that periods of limitation are procedural in nature and would ordinarily be applied retrospectively. This, however, is subject to a rider. In **New India Insurance Co. Ltd. v. Shanti Misra,** (1975) 2 SCC 840, this Court held:

> *"5. On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well- established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective."*

46. In answering a question which arose under Section 110A of the Motor Vehicles Act, this Court held:

> *"7....."(1) Time for the purpose of filing the application under Section 110-A did not start running before the constitution of the tribunal. Time had started running for the filing of the suit but before it had expired the forum was changed. And for the purpose of the changed forum, time could not be deemed to have started running before a remedy of going to the new forum is made available.*
>
> *(2) Even though by and large the law of limitation has been held to be a procedural law, there are exceptions to this principle. Generally the law of limitation which is in vogue on the date of the commencement of the action governs it. But there are certain exceptions to this principle. The new law of limitation providing a longer period cannot revive a dead remedy. Nor can it suddenly extinguish a vested right of action by providing for a shorter period of limitation."*

47. This statement of the law was referred to with approval in **Vinod Gurudas Raikar v. National Insurance Co. Ltd.**, (1991) 4 SCC 333 as follows:-

> *"7. It is true that the appellant earlier could file an application even more than six months after the expiry of the period of limitation, but can this be treated to be a right which the appellant had acquired. The answer is in the negative. The claim to compensation which the appellant was entitled to, by reason of the accident was certainly enforceable as a right. So far the period of limitation for commencing a legal*

proceeding is concerned, it is adjectival in nature, and has to be governed by the new Act — subject to two conditions. If under the repealing Act the remedy suddenly stands barred as a result of a shorter period of limitation, the same cannot be held to govern the case, otherwise the result will be to deprive the suitor of an accrued right. The second exception is where the new enactment leaves the claimant with such a short period for commencing the legal proceeding so as to make it unpractical for him to avail of the remedy. This principle has been followed by this Court in many cases and by way of illustration we would like to mention New India Insurance Co. Ltd. v.Smt Shanti Misra [(1975) 2 SCC 840 : (1976) 2 SCR 266] . The husband of the respondent in that case died in an accident in 1966. A period of two years was available to the respondent for instituting a suit for recovery of damages. In March, 1967 the Claims Tribunal under Section 110 of the Motor Vehicles Act, 1939 was constituted, barring the jurisdiction of the civil court and prescribed 60 days as the period of limitation. The respondent filed the application in July, 1967. It was held that not having filed a suit before March, 1967 the only remedy of the respondent was by way of an application before the Tribunal. So far the period of limitation was concerned, it was observed that a new law of limitation providing for a shorter period cannot certainly extinguish a vested right of action. In view of the change of the law it was held that the application could be filed within a reasonable time after the constitution of the Tribunal; and, that the time of about four months taken by the respondent in approaching the Tribunal after its constitution, could be held to be either reasonable time or the delay of about two months could be condoned under the proviso to Section 110- A(3)."

Both these judgments were referred to and followed in **Union of India v. Harnam Singh,** (1993) 2 SCC 162, see paragraph 12.

48. The aforesaid principle is also contained in Section 30(a) of the Limitation Act, 1963.

"30. ***Provision for suits, etc., for which the prescribed period is shorter than the period prescribed by the Indian Limitation Act, 1908.****—Notwithstanding anything contained in this Act,—*

(a) any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of [seven years] next after the commencement of this Act or within the period prescribed for such suit by the Indian Limitation Act, 1908, whichever period expires earlier:"

49. The reason for the said principle is not far to seek. Though periods of limitation, being procedural law, are to be applied retrospectively, yet if a shorter period of limitation is provided by a later amendment to a statute, such period would render the vested right of action contained in the statute nugatory as such right of action would now become time barred under the amended provision.

50. This aspect of the matter is brought out rather well in **Thirumalai Chemicals Ltd. v. Union of India,** (2011) 6 SCC 739 as follows:

"22. Law is well settled that the manner in which the appeal has to be filed, its form and the period within which the same has to be filed are matters of procedure, while the right conferred on a party to file an appeal is a substantive right. The question is, while dealing with a belated appeal under Section 19(2) of FEMA, the application for condonation of delay has to be dealt with under the first proviso to sub-section (2) of Section 52 of FERA or under the proviso to sub-section (2) of Section 19 of FEMA. For answering that question it is necessary to examine the law on the point.

Substantive and procedural law

> *23. Substantive law refers to a body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.*
>
> *24. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and an aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.*
>
> *25. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to a few of those decisions. This Court in Garikapati Veeraya v. N. Subbiah Choudhry [AIR 1957 SC 540], New India Insurance Co. Ltd. v. Shanti Misra [(1975) 2 SCC 840], Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602 : 1994 SCC (Cri) 1087], Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar [(1999) 8 SCC 16] and Shyam Sunder v. Ram Kumar [(2001) 8 SCC 24] , has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This Court has held that the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.*
>
> *26. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective."*

51. This judgment was strongly relied upon by Shri A.K. Sanghi for the proposition that the law in force on the date of the institution of an appeal, irrespective of the date of accrual of the cause of action for filing an appeal, will govern the period of limitation. Ordinarily, this may well be the case. As has been noticed above, periods of limitation being procedural in nature would apply retrospectively. On the facts in the judgment in the Thirumalai case, it was held that the repealed provision contained in the Foreign Exchange Regulation Act, namely, Section 52 would not apply to an appeal filed long after 1.6.2000 when the Foreign Exchange Management Act came into force, repealing the Foreign Exchange Regulation Act. It is significant to note that Section 52(2) of the repealed Act provided a period of limitation of 45 plus 45 days and no more whereas Section 19(2) of FEMA provided for 45 days with no cap thereafter provided sufficient cause to condone delay is shown. On facts, in that case, the appeal was held to be properly instituted under Section 19, which as has been stated earlier, had no cap to condonation of delay. It was, therefore, held that the Appellate Tribunal in that case could entertain the appeal even after the period of 90 days had expired provided sufficient cause for the delay was made out.

52. The present case stands on a slightly different footing. The abortive appeal had been filed against orders passed in March- April, 1992. The present appeal was filed under Section 128, which Section continues on the statute book till date. Before its amendment in 2001, it

provided a maximum period of 180 days within which an appeal could be filed. Time began to run on 3.4.1992 under Section 128 pre amendment when the appellant received the order of the Superintendent of Customs intimating it about an order passed by the Collector of Customs on 25.3.1992. Under Section 128 as it then stood a person aggrieved by a decision or order passed by a Superintendent of Customs could appeal to the Collector (Appeals) within three months from the date of communication to him of such decision or order. On the principles contained in Section 14 of the Limitation Act the time taken in prosecuting an abortive proceeding would have to be excluded as the appellant was prosecuting bona fide with due diligence the appeal before CEGAT which was allowed in its favour by CEGAT on 23.6.1998. The Department preferred an appeal against the said order sometime in the year 2000 which appeal was decided in their favour by this court only on 12.3.2003 by which CEGAT's order was set aside on the ground that CEGAT had no jurisdiction to entertain such appeal. The time taken from 12.3.2003 to 23.5.2003, on which date the present appeal was filed before the Commissioner (Appeals) would be within the period of 180 days provided by the pre amended Section 128, when added to the time taken between 3.4.1992 and 22.6.1992. The amended Section 128 has now reduced this period, with effect from 2001, to 60 days plus 30 days, which is 90 days. The order that is challenged in the present case was passed before 2001. The right of appeal within a period of 180 days (which includes the discretionary period of 90 days) from the date of the said order was a right which vested in the appellant. A shadow was cast by the abortive appeal from 1992 right upto 2003. This shadow was lifted when it became clear that the proceeding filed in1992 was a proceeding before the wrong forum. The vested right of appeal within the period of 180 days had not yet got over. Upon the lifting of the shadow, a certain residuary period within which a proper appeal could be filed still remained. That period would continue to be within the period of 180 days notwithstanding the amendment made in 2001 as otherwise the right to appeal itself would vanish given the shorter period of limitation provided by Section 128 after 2001.

53. We, therefore, set aside the order dated 25.2.2004 and remand the case to ***jurisdictional Commissioner (Appeals)**** for a decision on merits. The appeal is allowed in the aforesaid terms. There will be no order as to costs.

*Corrected as jurisdictional Commissioner (Appeals) instead of CESTAT as per order dated 24-4-15.

SUPREME COURT OF INDIA

CIVIL APPEAL NO. 1906 OF 2007

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COCHIN PORT TRUST

Vs.

STATE OF KERALA

H.L. DATTU, CJI, R.K. AGARWAL AND ARUN MISHRA, JJ

22nd April, 2015

HF ▶ Revenue

DEALER – PORT TRUST – STATUTORY AUTHORITY – PORT SERVICES RENDERED BY APPELLANT TRUST – DEMAND RAISED ON ASSESSMENT FOR SALE OF SCRAP – CONTENTION RAISED THAT APPELLANT NOT A 'DEALER' AND NOT EXIGIBLE TO TAX – PLEA OF PERFORMING STATUTORY FUNCTIONS AND NOT BEING ENGAGED IN TRADING TAKEN UP – DISMISSAL OF APPEALS BEFORE 1ST APPELLATE AUTHORITY AND TRIBUNAL – ORDER UPHELD BY HIGH COURT HOLDING APPELLANT TO BE A 'DEALER' – APPEAL BEFORE SUPREME COURT CONTENDING THAT TRANSACTIONS IN QUESTION BEING INCIDENTAL AND AUXILIARY NOT TO QUALIFY AS BUSINESS SO AS TO DEEM ASSESSEE AS 'DEALER' – HELD DEFINITION OF DEALER AS PER ACT WIDE ENOUGH TO INCLUDE SALE OR TRANSFER CONDUCTED IN COURSE OF BUSINESS OR OTHERWISE – NECESSITY FOR A PERSON TO CARRY ON BUSINESS TO BE PLACED UNDER DEFINITION OF DEALER ABSENT IN THE ACT –PORT TRUST TO FALL WITHIN THE AMBIT OF 'DEALER' UNDER SECTION 2(iii) OF THE ACT AND CONSEQUENTLY ASSESSABLE TO TAX – APPEAL DISMISSED.

The appellant Trust, a statutory authority, constituted for rendering Port services under the Major Port Trusts Act, 1963 was assessed and a demand was raised for the sale of scrap items effected by the assessee. An appeal was filed contending that since the appellant was not engaged in trading and only discharging its statutory functions, it was not a dealer and could not be exigible to tax. However, the appeal was dismissed and appellant was held to be a dealer. The orders of the lower authorities were upheld by the High Court. An appeal before Supreme Court was filed pleading that the assessee is only discharging the statutory functions and is not engaged in any business or trade. The transactions in question being incidental and auxiliary would not qualify as business under the Act so as to deem the assessee as dealer. Also, it was pleaded that in Madras Port Trust case, the Supreme Court has held that the said Port Trust carrying on statutory functions was not exigible to sales tax under Tamil Nadu General Sales Tax Act and as the provisions of TN Act were pari materia with that of the Act, the Major Port Trusts case would apply to the assessee – Cochin Port Trust.

1. *It is held that the definition of dealer in the Act is wide enough to include transactions conducted in the course of business or otherwise and not restricted as perceived in common parlance.*

2. Distinguishing the judgment passed in the case of Madras Port Trust, it is observed that the definition of dealer in that case is restricted as it lays emphasis on 'carrying on business' whereas as per the Act, it is not mandatory that the person should be engaged in business for effecting sale/transfer for being exigible to tax. Therefore, the assessee Port is held to be a dealer under Section 2(8) of the Act and is assessable to tax under the Act. The appeal is dismissed.

Case distinguished:

Madras Port Trust case, 4 SCC 630

CST vs Sai Publication Fund, (2002) 4 STC 57.

Present: For the Petitioner: Mr. V. Giri, Senior Advocate, and

Mr. C.N. Sree Kumar

For the Respondent: Ms. Liz Mathew

****

H.L. DATTU, CJI.

1. This appeal is directed against the judgment and order passed by the High Court of Kerala at Ernakulam in TRC No. 412 of 2002 and Sales Tax Revision Nos. 321 and 326 of 2005, dated 23.12.2005, whereby and whereunder, the High Court has held that the appellant-assessee is a dealer under the Kerala General Sales Tax Act, 1963 (for short, "the Act") and dismissed the tax revision preferred by the appellant-assessee.

2. The question that arises for consideration in this appeal is whether the appellant-Trust is a dealer under the Act and liable to pay sales tax under the Act on account of certain activities in the nature of sale transactions carried on by it besides its statutory functions. For the sake of convenience and brevity, we would only notice the facts relevant to the discussion with respect to the question(s) before us in this appeal.

3. Brief factual matrix of the case is as follows: The appellant-Trust is a statutory authority constituted for rendering port services under the Major Port Trusts Act, 1963. The appellant-Trust is a registered dealer under the Act and an assessee on the rolls of the Assistant Commissioner (Assessment), Commercial Taxes, Special Circle, Mattancherry. The assessee's specific activity of dealing in scrap items (sales of water to ships, tender forms, firewood, waste paper and disposal of unserviceable equipment) is the subject matter of assessments in the instant appeal for the assessment years 1990-91, 1994-95 and 1997-98.

4. For the aforesaid assessment years, the assessing authority had raised demand notices under the Act for the sales of scrap items effected by the assessee vide assessment orders dated 18.11.1995, 31.03.1999 and 24.10.2001, respectively.

5. The assessee aggrieved by the said assessment orders had approached the Deputy Commissioner (Appeals) in first statutory appeal. The assessee had assailed the assessment orders as illegal and unauthorised on the ground, inter alia, that it is not engaged in any trading activity and only discharging its statutory functions under the Major Port Trust Act, 1963 and hence, it is not a "dealer" under the Act and cannot be exigible to tax thereunder. The first appellate authority has disposed of the said appeal by separate orders dated 16.01.1998, 28.10.1999 and 25.04.2002 for each assessment year 1990-91, 1994-95 and 1997-98, respectively. The appellate authority has considered the definition of "dealer"

under the Act and rejecting the plea of the assessee, held that it is a "dealer" under the provisions of the Act.

6. Aggrieved by the aforesaid order(s), the assessee had preferred T.A. No. 479 of 1998 for the assessment year 1990-91 before the Kerala Sales Tax Appellate Tribunal (for short, "the Tribunal"). The assessee had contended that in the instant case the assessee-Trust is a statutory body merely discharging its functions of rendering port activities and not engaged in any trading activity or "business". The transactions herein are merely causal and incidental sale transactions which only attract sales tax if the registered dealer is otherwise carrying on business under the Act, which is not the case herein and therefore, the assessee cannot be classified as a "dealer" under Section 2(viii) of the Act. Reliance was placed by the assessee on the dictum of this Court in State of T.N. v. Board of Trustees of the Port of Madras, (1999) 4 SCC 630 (Madras Port Trust case). By the order dated 24.09.2001, the Tribunal rejected the aforesaid stand adopted by the assessee and held that the assessee is a "dealer" engaged in activities of sale under the Act and thus, exigible to sales tax.

7. Further, the assessee has approached the Tribunal in T. A. No. 1 of 2000 and T. A. No. 143 of 2003 questioning the orders passed by the first appellate authority for assessment years 1994-95 and 1997-98. The Tribunal has considered the definitions of "dealer" under the Tamil Nadu General Sales Tax Act, 1959 (for short, "the TN Act") and the Act and concluded that since the two definitions are not pari materia, the observations of this Court in Madras Port Trust case would not be applicable to the assessee-Port Trust. The Tribunal has held that the definition of "dealer" under the Act is wide and in light of the activities performed by the assessee, it can be placed in the ambit of "dealer" under the Act and hence be liable to pay sales tax under the Act.

8. Dissatisfied by the orders passed by the Tribunal, the assessee approached the High Court in TRC No. 412 of 2002 and Sales Tax Revision Nos. 321 and 326 of 2005. The question as to whether the assessee is a "dealer" under the Act which was the cardinal issue before the Tribunal was agitated before the High Court as the main issue by both parties to the lis. The High Court has delved into the said question and also considered whether the Madras Port Trust case decided in the context of the TN Act apply to the assessee-Trust which is governed by the Act. The High Court, in its conclusion, has approved the findings of the Tribunal and dismissed the tax revision(s) filed by the appellant-assessee.

9. Aggrieved by the aforesaid, the assessee is before us in this appeal.

Shri V. Giri, learned senior counsel appearing for the appellant-assessee would submit that the assessee does not fall under the ambit of under Section 2(viii) of the Act and cannot be termed as a "dealer". He would submit that the assessee is only discharging the statutory functions and is not engaged in any "business" or trade. Further, that the transactions in question being incidental and auxiliary would not qualify as business under the Act so as to deem the assessee as "dealer" under the Act. He would draw support from the observations of this Court in Madras Port Trust case wherein this Court has held that the said Port Trust constituted under the Major Port Trust Act, 1963 and carries on statutory functions, is not exigible to sales tax under the Tamil Nadu General Sales Tax Act, 1959 (for short, "the TN Act"). He would further contend that since the provisions of the TN Act are pari materia with that of the Act, the Madras Port Trust case would squarely apply to the assessee-Cochin Port Trust also.

10. Per contra, Smt. Liz Mathew, learned counsel appearing for the respondent-Revenue would support the judgment and order passed by the High Court and contend that the assessee herein is a "dealer" under the Act engaged in sale of scrap material and therefore, exigible to sales tax under the Act. She would submit that the provisions of the TN

Act and the Act are not pari materia and the claim of the assessee requires to be examined in the context of the Act only and not on the basis of the provisions of the TN Act. She would urge that the observations of this Court in Madras Port Trust case would not be applicable to the instant case in light of material difference between the definitions of "dealer" under the provisions of TN Act and the Act.

11. The issue that arises for our consideration and decision in the instant case is whether the assessee-Trust is a dealer under the Act and thus, liable to pay sales tax levied thereunder. At the outset, it is pertinent to notice Section 2(viii) of the Act which defines the term "dealer". The said definition is extracted hereunder:

> *"2(viii) "Dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, executing works contract, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes:*
>
> *(a)...*
>
> *(b)...*
>
> *(c)...*
>
> *(d)...*
>
> *(e) a person who, whether in the course of business or not, sells; (i) goods produced by him by manufacture, agriculture, horticulture or otherwise; or (ii) trees which grow spontaneously and which are agreed to be severed before sale or under the contract of sale;*
>
> *(f) a person who whether in the course of business or not: (1) transfers any goods, including controlled goods whether in pursuance of a contract or not, for cash or deferred payment or other valuable consideration; (2) transfers property in goods (whether as goods or in some other form) involved in the execution of a works contract; (3) delivers any goods on hire-purchase or any system of payment by instalments; (4) transfers the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration; (5) supplies, by way of or as part of any service or in any other manner whatsoever, goods, being food or any other articles for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;*
>
> *Explanation.-(1) & (2) ...*
>
> *(g) a bank or a financing institution which, whether in the course of its business or not, sells any gold or other valuable article pledged with it to secure any loan, for the realisation of such loan amount;..." (emphasis supplied)*

12. A perusal of the aforesaid definition would indicate that definition of dealer under the Act is an inclusive definition whereby wide range of persons has been placed under the ambit of "dealer". It includes persons involved in carrying on any business or trading activity and transactions effected by them whether in the course of business or not. It is profitable to refer to the decision of this Court in Assistant Commissioner, Ernakulam v. Hindustan Urban Infrastructure Ltd. and Ors., (2015) 3 SCC 735 where this Court has interpreted the said provision. This Court has examined the scope and ambit of the definition

of dealer under the Act. The question before this Court was whether an "Official Liquidator" is a "dealer" within the meaning of section 2 (viii) of the Act. This Court in paragraph 26 of the judgment has observed:

> *"…The definition of "dealer" has also been given a wide ambit. It includes any person carrying on business of, inter alia, buying, selling, supply or distribution of goods, whether directly or otherwise. All modes of payment whether by way of cash, commission, remuneration or other valuable consideration have been included therein. It also includes, inter alia, a casual trader, a non-resident dealer, a commission agent, a broker, an auctioneer and other mercantile agents. Sub-section (f) of the definition further expands the scope of the provision by including within its ambit, an array of transactions, which may or may not be in the course of business. Section 2(viii)(f)(1) expressly includes, within the definition of a "dealer", a person who whether in the course of business or not transfers any goods, whether in the pursuance of a contract or not, for cash or deferred payment."*

13. Therein, this Court has noticed the definition of dealer under various fiscal legislations and observed that the widest scope and ambit provided to the "dealer" under the definition clause of the Act is in consonance with the legislative intent to place the persons engaged in activities of sale and trade which would not otherwise fall in the restricted definition of "business". This Court has observed as under:

> *"34. Section 2(viii)(f) further expands the definition of "dealer" enabling a far wider class of persons to fall within its ambit. It includes any person who transfers any goods, transfers property in goods involved in the execution of a works contract, delivers any goods on hire purchase or any system of payment by installments, transfers the right to use any goods for any purpose and lastly, any food or beverage supplier or service provider, fit for human consumption. The Explanation 1 to sub-clause (f) includes a society, club, firm or an association or body of persons, whether incorporated or not. Explanation 2 includes the Central Government, State Government and any of its apparatus within the scope of this section.*
>
> *35. Therefore, given the exceptionally wide scope of the definition, prima facie, it can be concluded that any person or entity that carries on any activity of selling goods, could be categorized as a "dealer" under the Act, 1963. To test the aforesaid conclusion in the context of the issue at hand, we would delve into the interpretation ascribed by this Court to the term "dealer". A careful reading of the definition of "dealer" under the Act, 1963, would make it evident that the legislature intended to provide for an inclusive criterion and broaden the ambit of the said classification. The legislature did not propose to restrict the scope of the term as perceived in common parlance."*

14. Here, since the definition of "dealer" is wide to include transactions conducted in the course of business or otherwise, to answer the question posed before us, we do not deem it necessary to examine the nature of activity carried out by the assessee-Port Trust in as much as whether it falls under the definition of "business" under the Act or not.

15. In the instant case, the appellant-assessee would place reliance on the decision of this Court in Madras Port Trust case, draw similarity between the provisions of TN Act and the Act and therefore, submit that the observations of the Madras Port Trust would be applicable to the instant case. Therein, the question before this Court was whether the Madras Port Trust is a "dealer" under the TN Act or not. The definition clauses contained in the TN Act under Section 2(g) and 2(d) have been dealt with to examine the

aforesaid question. For the sake of clarity, we would refer to Section 2(g) and 2(d) of the TN Act as under:

> *"Section 2(g) 'dealer' means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes- (i) a local authority... which carries on such business;*
>
> *(ii) . . .*
>
> *(iii) a factor, ... or an auctioneer, or any other mercantile agent by whatever name called, ... who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal, or through whom the goods are bought, sold, supplied or distributed;*
>
> *(iv) to (ix) ...*
>
> *Explanation (1) ...*
>
> *Explanation (2).-The Central Government or any State Government which, whether or not in the course of business, buy, sell, supply or distribute goods, directly or otherwise, for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act;"*
>
> ***
>
> *"Section 2(d) 'business' includes,- (i) any trade, or commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern; and*
>
> *(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern."*

16. This Court in the said decision has elaborately considered various provisions of the TN Act in the context of the Major Port Trusts Act, 1963. This Court has noticed that port trusts are not established for carrying on business and thereafter, referred to the various activities of the Madras Port Trust and observed that its activities and services only indicate that the activity in question, that is, the sales of unserviceable or unclaimed goods is infinitesimal as compared to the very large range of the activities and services it is supposed to render. This Court has therefore concluded that the Madras Port Trust is not involved in any activity of "carrying on business" as provided for under Section 2 (g) read with Section 2(d) of the TN Act and therefore, it is not a "dealer' within the meaning of Section 2(g) of the TN Act.

17. In our considered view, the aforesaid decision of this Court would not enure to the benefit of the assessee in the instant case. The said decision was rendered on the basis of the question whether the Port Trust is carrying on "business" under the TN Act and if it is a "dealer" under the TN Act so as to be exigible to tax thereunder. The aforesaid conclusion emanates from the stark distinction of definition of "dealer" under the TN Act and the Act. The definition under the Act is a wider definition while the TN Act as it then stood, provides for a very restricted meaning of the term "dealer". A comparison of the definition clauses in the Act and the TN Act would show that the requirement of "carrying on business" by buying, selling, supplying or distributing goods directly or otherwise whether for cash or deferred payment or for commission, remuneration or other valuable consideration was a

necessary ingredient of a dealer under the TN Act, but clauses like (e), (f) and (g) of Section 2(viii) of the Act were absent in the TN Act. Thus, the said definitions are not pari materia.

18. In the Madras Port Trust case, this Court has laid emphasis on the expression "carrying on business" in the context of the TN Act, and it is in that context it has reached the conclusion that the Madras Port Trust is not engaged in any business which is a necessary prerequisite under the definition of a "dealer" under the TN Act. In the Act herein, the necessity of a person carrying on business to be placed under the definition of "dealer" is absent. The definition expressly includes the persons who whether in course of business or not engage in the sale or transfer of goods and thus, does not mandate the requirement of conducting business for a person to be exigible under the Act. The contradistinction between the definition of "dealer" under the TN Act and the Act makes it abundantly clear that the observations of this Court in Madras Port Trust case, which refer to the definition of TN Act and interprets it to reach the conclusion of the Trust not being exigible to tax, cannot be accepted in the instant case.

19. Further, it is brought to our notice that in Madras Port Trust case the applications were preferred by the Port Trusts of Cochin, Kandla and Calcutta before this Court for intervention. However, this Court has only permitted them to support the submissions of the Madras Port Trust in the context of the Tamil Nadu statute and in paragraph 6 of the said judgment observed that the exigibility of the said Port Trusts under the respective State enactments is not examined thereunder. Therefore, this Court has only referred to the provisions of TN Act and not examined the scope of the Act vis-à-vis the assessee-Port Trust in Madras Port Trust case.

20. It is further pertinent to notice that the TN Act was amended by Act 22 of 2002 whereby explanation (3) was added to definition clause 2(g) of the TN Act. By the said amendment the Madras Port Trust has now been declared as a dealer under the TN Act. Explanation (3) states that if the port trust disposes of any goods including unclaimed or confiscated or unserviceable or scrap surplus, old or obsolete goods or discarded material or waste products whether by auction or otherwise directly or through an agent for cash or for deferred payment or for any other valuable consideration, notwithstanding anything contained in the TNGST Act, it shall be deemed to be a dealer for the purpose of the Act. Therefore, by amendment act the legislature has specifically brought in Port Trust also within the definition of "dealer" under Section 2(g) of the Act and thus, the substratum of the judgment in Madras Port Trust case has been lost.

21. Shri Giri has relied upon the decision of this Court in CST v. Sai Publication Fund, (2002) 4 SCC 57 and submitted that where the main activity is not a business then any incidental or ancillary transaction would only amount to business if an independent intention to carry on business in the incidental or ancillary transaction is established. In the said case, the provisions of Bombay Sales Tax Act, 1959 were examined to ascertain whether the ancillary activity of publication and sale of books by Saibaba Trust amounted to "business" under the said Act, when the dominant activity of the said Trust was non-profit dissemination of message of Saibaba. Therein the Court has examined the definition of dealer under Section 2(11) of the said Act and observed that every person is not a "dealer" but only those persons "who carry on the business" by buying or selling goods are regarded as "dealers". Thus, under the said Act, from the very definition of dealer, it follows that a person would not be a dealer in respect of the goods sold or purchased by him unless he carries on the business of buying and selling such goods. In the instant case, the definition of dealer under Section 2(viii) is wide and specifically includes persons who have effected sale or transfer of goods irrespective of the said sale or transfer being in course

of business or not. Therefore, the dictum of this Court in the said decision would also not be applicable in the instant case.

22. Therefore, in light of the foregoing discussions, we are of the considered opinion that the activities of the assessee in respect of buying, selling, supplying or distributing goods, executing works contract, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration, whether in course of business or not, would fall within the purview of Section 2(viii) of the Act. Hence, the assessee-Port Trust would fall within the meaning of "dealer" under Section 2(viii) of the Act and is consequently assessable to tax under the Act. We are of the considered opinion that the High Court has not committed any error, whatsoever, and therefore, the civil appeal being devoid of any merit requires to be dismissed.

23. In the result, the appeal is dismissed and the judgment and order passed by the High Court is confirmed. No costs.

Ordered accordingly.

SUPREME COURT OF INDIA

CIVIL APPEAL NO. 8192 OF 2003

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VIKRAM CEMENT & ANR.

Vs.

STATE OF MADHYA PRADESH & ORS.

A.K. SIKRI AND ROHINTON FALI NARIMAN JJ

17th March, 2015

HF ▶ Assessee-appellant

CONSTITUTION OF INDIA – VALIDITY OF NOTIFICATION – VIRES – UNJUST ENRICHMENT – REFUND – ENTRY TAX DULY PAID AT RATES PRESCRIBED TILL YEAR 1999 – NOTIFICATION ISSUED IN YEAR 1999 LOWERING RATE OF TAX (1%) FOR PERIOD OF 6 MONTHS FOR THE YEAR 1997 – EXPLANATION APPENDED REGARDING NON-REFUNDABILITY OF TAX ALREADY PAID BY DEALERS AT HIGHER RATE FOR THE CONCERNED PERIOD – APPELLANT HAVING PAID TAX ALREADY AT HIGHER RATE DENIED REFUND THEREBY – CHALLENGE AGAINST THE EXPLANATION ON BASIS OF VIOLATION OF ARTICLE 14 – HELD BY SUPREME COURT, THE IMPUGNED EXPLANATION CREATED TWO CATEGORIES OF TAXPAYERS PAYING TAX AT DIFFERENT RATES EVEN THOUGH IDENTICALLY PLACED – NO REASONABLE RELATION COULD BE FIGURED OUT OF SUCH CLASSIFICATION TO THE OBJECT OF LEGISLATION – EXPLANATION HELD DISCRIMINATORY IN NATURE AND VIOLATIVE OF ARTICLE 14 – NO REASON BEING STATED BY GOVT. FOR NON-REFUND, IT IS PRESUMED THAT RATE OF TAX AT THE LOWER RATE WAS APPLICABLE DURING THE RELEVANT PERIOD – ASKING HIGHER RATE IS THUS, VIOLATIVE OF ARTICLE 265 – QUESTION OF UNJUST ENRICHMENT TO BE GONE INTO WHILE DECIDING ENTITLEMENT FOR REFUND – IMPUGNED EXPLANATION QUASHED AND HELD UNCONSTITUTIONAL – ARTICLE 14 AND ARTICLE 265 OF THE INDIAN CONSTITUTION.

The Entry Tax was being duly paid by the appellant on entry of coal, gypsum and bauxite required for manufacturing of cement. In the year 1999, the rate of tax was 2.5%, 2% and 10% respectively on these materials. A Notification dated 4/5/1999 was issued reducing the rate of tax to 1% for the period 1/5/1997 to 30/9/1997. The rate of tax prior to this period and after this period remained as earlier. An Explanation was appended to the Notification stating that the amount already paid by the dealer at higher rate shall not be refunded. Since the appellant had already paid higher rate, which was now reduced to 1% vide Notification, it claimed refund of excess tax paid but was denied refund due to the Explanation. The Validity of the Explanation was challenged before the High Court but the writ was dismissed in view of the judgment passed in the case of Century Textiles and Industries Ltd. vs State of Madhya Pradesh and others. An appeal is filed before Supreme Court challenging on grounds of violation of Article 14. Allowing the appeal, it is held as under:

(i) *The explanation appended to the Notification results in invidious discrimination towards those who have paid the tax at a higher rate, like the appellant, with those category of persons who paid the tax @ 1% and were defaulters. This has resulted in carving out two categories of taxpayers paying tax at different rates even though identically situated, which is violative of Article 14. There seems no objective except that the Govt. did not intend to refund the tax already collected from those who have paid it at higher rate as no explanation is given by the authorities in this regard. It was held that the classification must not be arbitrary but must be rational based on some qualities and characteristics which have a reasonable relation to the object of the legislation. Thus, the impugned explanation was held to be discriminatory in nature.*

(ii) *Also, no reasons have come in the counter affidavit filed by the State as to why there was a necessity of adding such an explanation for not refunding the excess amount. It is, therefore, presumed that rate of 1% was applicable for the relevant period and asking any person to pay at a higher rate would be violative of Article 265 of the Constitution.*

(iii) *In order to determine as to whether a particular dealer is entitled to refund or not, the govt. can go into the issue of unjust enrichment while considering his application for refund. It cannot be presumed that the burden was positively passed on to the buyers by these dealers and, therefore, they are not entitled to refund.*

The impugned explanation in the Notification is unconstitutional and thereby quashed.

Present: For the Petitioner: Mr. Niraj Sharma

For the Respondent: Mr. C.D. Singh

****

A.K. SIKRI, J.

1. The bare minimum facts which are required to be mentioned to decide this appeal are recapitulated, in brief, hereinbelow:

2. The appellant Nos. 1 and 2 are the units of Grasim Industries Limited, which carries on manufacture and sale of cement. It requires raw material in the form of coal, gypsum and bauxite. On the aforesaid raw materials, the appellants had been paying entry tax for entry of these goods in the territory of the State of Madhya Pradesh under M.P. Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (hereinafter called the 'Entry Tax Act'). In the year 1997, the entry tax on the aforesaid items of raw materials payable under the Act was at the following rates:

COAL - 2.5%

GYPSUM - 2%

BAUXITE - 10%

In the year 1999, respondent No.1 - State issued Notification No. A-3-80-98-ST-V (49) dated 4.5.1999. By this Notification it reduced the rate of entry tax, namely, coal, gypsum and bauxite by making the entry tax payable at the rate of 1% only. This Notification remained in force for a limited period, that is from 1.5.1997 to 30.09.1997. The rate of entry tax prior to 1.5.1997 and after 30.09.1997 remained the same, namely, 2.5%, 2% and 10% for coal, gypsum and bauxite respectively.

3. We are concerned here with the aforesaid period when entry tax payable was @ 1% only. However, while reducing the entry tax to 1%, in the same very Notification an Explanation was also appended stating that the amount which is already paid by the dealer at the higher rate shall not be refunded. This Explanation is worded in the following terms:

> *"Explanation - The amount shall not be refunded in any case on the basis that the dealer had paid the tax at a higher rate."*

As the Notification was issued only in May 1999 and it realted to the past period, i.e. 1.5.1997 to 30.09.1997 and the entry tax is payable at the point of entry of the goods into the State, as and when the appellants were bringing the aforesaid raw material into the State of Madhya Pradesh, they had been paying the entry tax. During the period 1.5.1997 to 30.09.1997, they had paid the entry tax at the rate which was prevalent at that time, though reduced to 1% vide the Notification dated 4.5.1999. In this manner, according to the appellants, though they had paid the entry tax at the higher rate, which was now reduced to 1% vide the aforesaid Notification, they became entitled to get the refund of the excess amount paid, but were still deprived of that refund because of the aforesaid Explanation.

4. Naturally, being aggrieved by the said Explanation, the appellants challenged the validity of the Explanation by filing writ petition in the High Court of Madhya Pradesh. The challenge was led primarily on two counts: (i) in the first instance, it was pleaded that this Explanation was arbitrary and discriminatory being violative of Article 14 of the Constitution inasmuch as the classification which has carved out because of the said explanation had the effect of treating the appellants and others who had paid tax at a higher rate, differently from those who had not paid the tax at all and were defaulted. It was argued that such a classification was not based on any intelligible differentia and had no nexus with any objective sought to be achieved. A number of judgments in support of this contention were cited in the High Court. (ii) The second argument raised was that it amounted to exaction of tax at a higher rate, namely, at the rate of 2.5%, 2% and 10% for coal, gypsum and bauxite respectively, though the rate fixed ultimately for the period in question by the Notification dated 4.5.1999 was 1%. Therefore, such an 'Explanation' in the Notification was in the teeth of Article 265 of the Constitution and per se illegal.

5. The High Court, though took note of the aforesaid arguments, did not deal with these arguments in the manner in which these submissions were made and dismissed the writ petition vide impugned judgment dated 11.9.2002 only on the ground that identical issue had been considered by its own Division Bench earlier in the case of ***Century Textiles and Industries Ltd. v. State of Madhya Pradesh & Ors.***[1] To be fair to the High Court, we would also mention that the High Court has referred to another judgment of this Court in ***Indian Oil Corporation v. Municipal Corporation, Jullundhar***[2] and having relied upon the observations in the said case to the effect that where the octroi duty had already been collected, there was no question of any equity in favour of the Indian Oil Corporation to claim the refund thereof.

6. Learned counsel appearing for the appellants has placed before us the same arguments which were advanced before the High Court with the plea that the High Court did not even consider those arguments appropriately. He submitted that it was a clear case of discrimination qua the appellants who had faithfully paid the tax and, therefore, the provisions of Article 14 of the Constitution will squarely attract in the facts of the present case. The learned counsel for the State, on the other hand, referred to the reasoning given by the High Court in the impugned judgment in support of his submissions while countering the arguments by the learned counsel for the appellants.

7. After giving our thoughful consideration to the issue involved, we are of the view that there is force in the submission of the learned counsel for the appellants. The Explanation attached to Notification dated 4.5.1999, or for that mater the Notification dated 5.7.1999, which states that the amount shall not be refunded in any case on the basis that dealer had filed the tax at a higher rate, results in invidious discrimination towards those who have paid the tax at a higher rate, like the appellants, when compared with that category of the persons who were defaulters and have now been allowed to pay the tax at the rate of 1% for the relevant period. The consequence is that it carves out two categories of tax payers who are made to pay the tax at different rates, even though they are identically situated. There is no basis for creating these two classes and there is no rationale behind it which would have any causal connection with the objective sought to be achieved. It would be pertinent to mention that on repeated query made by this Court to the learned counsel for the respondents, he could not explain or show from any material on record as to what led the authorities to provide such an Explanation. Therefore, it becomes apparent that there is no objective behind such an Explanation appended to the Notification dated 4.5.1999 which is sought to be achieved, except that the Government, after collecting the tax from those who had paid at a higher rate, did not intend to refund the same. This can hardly be countenanced, more so when it results in discrimination between the two groups, though identically situated.

8. The law on the scope and meaning of Article 14 of the Constitution has now been well articulated. We may gainfully refer to the case of ***D.S. Nakara & Ors. v. Union of India***[3], wherein this Court observed as under:

> *"10. The scope, content and meaning of Article 14 of the Constitution has been the subject-matter of intensive examination by this Court in a catena of decisions. It would, therefore, be merely adding to the length of this judgment to recapitulate all those decisions and it is better to avoid that exercise save and except referring to the latest decision on the subject in Maneka Gandhi v. Union of India[4], from which the following observation may be extracted:*
>
> > *"...what is the content and reach of the great equalising principle enunciated in this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all embracing scope and meaning for, to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits....Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."*
>
> *11. The decisions clearly lay down that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, viz. (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group; and (ii) that that differentia must have a rational relation to the objects sought to be achieved by the statute in question [See* ***Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar & Ors.****[5]]. The classification may be founded on differential basis according to objects sought to be achieved but what is implicit in it is that there ought to be a nexus, i.e. casual*

connection between the basis of classification and object of the statute under consideration. It is equally well settled by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure. (emphasis supplied)"

9. In ***Re.: Special Courts Bill, 1978***[6], this Court undertook a survey of plethora of decisions touching upon the 'Equality' doctrine enshrined in Article 14 of the Constitution and culled out certain principles. In principle No.3, the Court highlighted that though classification was permissible and it was not for the Courts to insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case, but, at the same time, classification would be treated as justified only if it is not palpably arbitrary. It was also emphasized that the underlined purpose in Article 14 of the Constitution was to treat all persons similarly circumstanced alike, both in privileges conferred and liabilities imposed. Following was the emphatic message given by the Court:

"(4)...It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same. (emphasis supplied)"

Another principle which was restated was that the classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all persons grouped together and not in others who are left out, but those qualities and characteristics must have reasonable relation to the object of the legislation.

10. Article 14 eschews arbitrariness in any form. This principle was eloquently explained in ***EP. Royappa v. State of Tamil Nadu***[7] holding that the basic principle which informs both Articles 14 and 15 is equality and inhibition against discrimination. We would like to quote the following passage from that judgment as well, which is as under:

"From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 14. Article 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

On the application of the aforesaid principles to the facts of the present case, the irresistible conclusion is that the Explanation is highly discriminatory in nature.

11. The matter can be looked into from another angle as well, which will yield the same results.

12. We have to keep in mind that vide Notification dated 4.5.1999, it is the rate of entry tax on the aforesaid raw materials which is reduced to 1%. The effect of that would be that any person bringing raw materials, viz. coal, gypsum and bauxite, within the State of Madhya Pradesh was liable to pay the entry tax only at the rate of 1%. Once this aspect is kept in mind, the legal effect thereof has to be that all the persons including the appellants, who had already paid the tax, were supposed to pay the tax at the rate of 1% only. Therefore, if they had paid the tax at a higher rate, they were entitled to the refund of excess amount of tax paid. No reasons are coming forth in the counter affidavit filed by the State either in the

High Court or in this Court or in any other form as to why there was a necessity of adding such an Explanation for not refunding the excess amount paid by the dealer in excess of 1% which was the entry tax legally payable for this period. Once we consider the matter from this angle, it also becomes clear that as the entry tax payable was at the rate of 1% only, asking any person to pay at a higher rate would be clearly violative of Article 265 of the Constitution.

13. Article 265 of the Constitution has to be read along with Article 14 in the given context. This co-relation between the two provisions is beautifully brought out in ***Kunnathat Thathunni Moopil Nair v. State of Kerala & Anr.***[8] as under:

> *"10. The most important question that rarises for consideration in these cases, in view of the stand taken by the State of Kerala, is whether Art. 265 of the Constitution is a complete answer to the atack against the constitutionality of the Act. It is, therefore, necessary to consider the scope and effect of that Article. Article 265 imposes a limitation on the taxing power of the State in so far as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection thereof and, secondly, the tax must be subject to the conditions laid sown in Art. 13 of the Constitution. One of such conditions envisaged by Art. 13(2) is that the Legislature shall not make any law which takes away or abridges the equality clause in Art.14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Art.14 of the Constitution, it must be struck down as unconstitutional. For the purpose of these cases, we shall assume that the State Legislature had the necessary competence to enact the law, though the petitioners have seriously challenged such a competence. The guarantee of equal protection of the laws must extend even to taxing statutes. It has not been contended otherwise. It does not mean that every person should be taxed equally. But it does not mean that if property of the same character has to be taxed, the taxation must be by the same standard, so that the burden of taxation, may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes a similar burden on everyone with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. Hence, if the Legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Art. 14 will not be in the way of such a classification resulting in unequal burdens on different classes of properties. But if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property. It must, therefore, be held that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Art. 14, though the Courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in way that the Court might think*

more just and equitable. The Act has, therefore, to be examined with reference to the attack based on Art. 14 of the Constitution."

14. At this stage, we would like to refer to another judgment of this Court which is quite proximate to the situation at hand, namely**, *Corporation Bank v. Saraswati Abharansala & Anr.***[9] That was case where rate of Sales Tax was reduced from 1% to 0.5% vide SRO No. 1075/99 dated 27.12.1999, which was given retrospective effect from 1.4.1999. The respondent in that case, who had paid the sales tax @ 1% for the period 6.4.1999 to 10.12.1999, claimed refund of the excess tax paid, i.e. over and above 0.5%. This request was rejected by the Assistant Commissioner, Sales Tax. The assessee filed the writ petition challenging the order of the Assistant Commissioner, which was dismissed by the Single Judge of the High Court. However, the assessee's intra-court appeal was allowed by the Division Bench directing the authorities to refund the excess amount collected. The said decision of the Division Bench was upheld by this Court in the aforesaid judgment holding that non-refund would not only offend equality clause contained in Article 14 of the Constitution, it would also be in the teeth of Article 265 of the Constitution which mandates that no tax shall be levied or collected, except by authority of law. Following passages from the said judgment are worth a quote:

"20. Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by authority of law.

21. In terms of the said provision, therefore, all acts relating to the imposition of tax providing, inter alia, for the point at which the tax is to be collected, the rate of tax as also its recovery must be carried out strictly in accordance with law.

22. If the substantive provision of a statute provides for refund, the State ordinarily by a subordinate legislation could not have laid down that the tax paid even by mistake would not be refunded. If a tax has been paid in excess of the tax specified, save and except the cases involving the principle of 'unjust enrichment', excess tax realized must be refunded. The State, furthermore, is bound to act reasonably having regard to the equality clause contained in Article 14 of the Constitution of India.

23. It is not even a case where the doctrine of unjust enrichment has any application as it is not the case of the respondent/Setate that the buyer has passed on the excess amount of tax collected by it to the purchasers.

24. In view of the admitted fact that tax had been collected and paid for the period 6th April, 1999 and 10th December, 1999 @ 1% of the price which having been reduced from 1st April, 1999 to 0.5%, the State, in our opinion, is bound to refund the excess amount deposited with it."

15. It is possible, as was sought to be argued by the learned counsel for the State, that while adding this Explanation the Government had kept in mind the principle of unjust enrichment. Presumably because of this reason, the High Court also referred to the judgment in the case of ***Indian Oil Corporation* (supra)**. However, on such a presumption alone, there cannot be any justification for adding the Explanation of the nature mentioned above. In order to determine as to whether a particular dealer is in fact entitled to refund or not, the Government can go into the issue of unjust enrichment while considering his application for refund. That would depend on the facts of each case. It cannot be presumed that the burden was positively passed on to the buyers by these dealers and, therefore, they are not entitled to refund.

16. For all the aforesaid reasons, we are of the opinion that the impugned Explanations in the Notifications dated 4.5.1999 and 5.7.1999 are unconstitutional. We, accordingly, allow the appeal and quash the said Explanations.

No costs.

SUPREME COURT OF INDIA

CIVIL APPEAL NO. 2957 OF 2007

VOLTAS LTD.

Vs.

STATE OF GUJARAT

H.L. DATTU, C.J.I., ARUN MISHRA AND AMITAVA ROY, JJ.

8th April, 2015

HF ▶ Assessee

ENTRIES IN SCHEDULE – WORKS CONTRACT – COMPOSITION OF TAX – FABRICATION AND INSTALLATION OF WATER CHILLING PLANT – ENTRY 2 PROVIDED FOR RATE OF COMPOSITION FOR " INSTALLATION OF AIR CONDITIONERS AND A.C. COOLERS" AND ENTRY 5 FOR "FABRICATION AND INSTALLATION OF PLANT & MACHINERY" – THE CONTRACT AS A WHOLE WAS NOT ONLY INSTALLATION AS IT WAS TAILOR MADE TO MEET REQUIREMENTS OF CUSTOMERS – DESIGNED TO MEET CERTAIN PARAMETERS – CONTRACT IS FOR FABRICATION AND INSTALLATION OF CHILLING PLANT – TAXABLE UNDER ENTRY 5 @ 5%.

WORDS & PHRASES - FABRICATION – MEANING OF – A PROCESS WHICH WOULD INVOLVE A LAYOUT FOR THE ULTIMATE DEVICE TO BE INSTALLED PRECEDED BY A DESIGN OF THE PARAMETERS PRESCRIBED CONFIGURATION OF THE RESULTANT COMPONENTS AND INTEGRATION THEREOF TO STRUCTURE THE ULTIMATE MECHANISM OR PRODUCT – INSTALLATION THEREOF WOULD BE A SUBSEQUENT STEP TO FINALLY POSITION THE PLANT TO COMPLETE THE WORKS CONTRACT

INTERPRETATION OF STATUTES – COURT TO LOOK WHAT IS CLEARLY SAID AND THERE IS NO ROOM FOR ANY INTENDMENT – THERE IS NO EQUITY ABOUT A TAX – NO PRESUMPTION AS TO TAX – NO PART OF A LEGISLATION IS REDUNDANT – NO WORD USED IN NOTIFICATION TO BE BRUSHED ASIDE – FULL EFFECT TO BE GIVEN TO EVERY WORD.

CLASSIFICATION OF GOODS – BURDEN OF PROOF IS ON THE TAXING AUTHORITY TO SHOW THAT A PARTICULAR CLASS OF GOODS OR ITEM IN QUESTION IS TAXABLE IN THE MANNER CLAIMED BY THEM – MERE ASSERTION IS OF NO AVAIL

Assessee received an order from M/s Anupam for fabrication and installation of water chilling plant at its factory at Vapi. The order was with certain specifications which were required to be adhered to with the assertion that sufficient precautions be taken to ensure that chilled water at 5^oC to 6^oC is available for the manufacturing process. The contract also required the assessee to provide the customer with the lay-out detail, foundation drawing and other necessary information required for the erection of the plant.

Gujarat Sales Tax provided for composition of tax under Section 55A which required issuance of Notification fixing different rates of composition for different works contract. Entry 2 of the said Notification dated 18.10.1993 provided for a rate of composition as 15% for "INSTALLATION OF AIR-CONDITIONERS AND AC COOLERS" but Entry 5 had provided for composition rate as 5% for "FABRICATION AND INSTALLATION OF PLANT AND MACHINERY".

The assessee moved an application u/s 62 to seek clarification with regard to applicability of appropriate rate of tax under composition. The contention of the assessee was rejected and it was held by Revenue authority that works contract was covered by Entry No. 2 levying tax @ 15%. Assessee approached the Tribunal against said order. In the meanwhile assessment of the assessee was also finalized applying the composition rate of 15% for the works contract involved. After failing in first appeal, the said matter was also taken up before the Tribunal. Both the appeals filed before the Tribunal were dismissed against which writ and Reference were filed before High Court. High court had answered the question against the assessee sustaining the determination made by revenue authorities holding that the appellant's works contract is for installation of air-conditioning plant and it did fall under Entry 2 of Notification and hence taxable @ 15%. On appeal before the Supreme Court.

Held: The work order in clear terms did enjoin that the design parameters pertaining to tonnage of refrigeration, final temperature of the water to be made available for the process of manufacturing pigments and the quantity of the chilled water essential therefore were indispensable and were in addition to the other specifications as offered by the appellant. The rigour of the insistence for the adherence to the design parameters is patent also from the request of the customer requiring the appellant to provide it with the layout detail, foundation drawing and other necessary information essential for the erection of the water chilling plant. ***The exercise as a whole as contemplated by the work order thus was neither intended nor can be reduced to mere installation of the finally emerging apparatus.*** *The work order noticeably did not refer to any readymade or instantly available devices, meeting the requirements of the customer so much so to be only installed at its factory. Instead, the work order had been apparently tailor-made to the requirements from which no departure was intended or comprehended. It is in this perspective that the word "fabrication" appearing in Entry No. 5 of the Notification assumes a decision significance. The word "fabrication" had not been applied in the works contract for installation of air-conditioners and A.C. Coolers contained in Entry No. 2 of the Notification. Having regard to the inseparable interdependence between the description of a works contract and the corresponding composition rate of tax, none of the inherent components of the works to be executed can either be ignored or disregarded for identifying the correct composition rate of the levy under the Act. Any other approach could tantamount to doing violence not only to the legislative purpose conveyed by Section 55A but also the language of its yield i.e. the Notification seeking to promote the statutory end. Viewed in that context, mere omission of the expressions "air-conditioners" and "A.C. Coolers" in Entry No. 5 would not be of any definitive consequence. The words plant and machinery applied to include air-conditioners and A.C. Coolers, if the works contract involved require fabrication as well as installation thereof.*

Meaning of Fabrication

"Fabrication" is a process which would involve a layout for the ultimate device to be installed, preceded by a design of the parameters prescribed, configuration of the resultant components and integration thereof to structure the ultimate mechanism or product. Installation thereof would be a subsequent step to finally position the plant to complete the works contract.

Interpretation of Statues

While interpreting a taxing statute one has to look merely at what is clearly said and there is no room for any intendment. There is no equity about a tax and there is no presumption as to a tax.

It is trite as well that in case of reasonable doubt, the construction most beneficial to the subject is to be adopted. The meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notion that may be entertained by a court which may appear to be it just and expedient.

No construction to a legislation ought to be provided so as to render a part of it otiose or redundant. It is a cardinal principle of interpretation not to brush aside a word used in a statute or in a Notification issued under statute and full effect must be given to every word of an instrument.

Burden of Proof

Qua the issue of classification of goods, the burden of proof is on the taxing authority to demonstrate that a particular class of goods or item in question is taxable in the manner claimed by them and that mere assertion in that regard is of no avail.

Conclusion

Accordingly, the inescapable conclusion is that the appellant's works contract for fabrication and installation of water chilling plant at the factory of M/s Anupam would fall under Entry 5 of the Schedule to the Notification dated 18.10.1993 issued u/s 55A of the Act and would be taxable @ 5%. Civil Appeal is allowed.

Cases relied upon:

Cape Brandy Syndicate v. Inland Revenue Commnrs. (1921) 1 KB 64 at p.71

Sussex Peerage case (1844) 11 C1 & Fin 85 : 8 ER 1034(HL)

Tuticorin vs. T.S.Devinatha Nadar & Ors. (1968)68 ITR 252

Commissioner of Income Tax-III vs. Calcutta Knitwears, Ludhiana (2014) 6 SCC 444

Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Pvt. Ltd. 2015 (1) SCC 1

U.O.I. & Ors. vs. Garware Nylones Ltd.etc. (1996) 10 SCC 413

HPL Chemicals Ltd. vs. Commissioner of Central Excise, Chandigarh (2006) 5 SCC 208

Maharashtra University of Health Sciences & Ors. vs. Satchikitsa Prasarak Mandal & Ors. (2010)3 SCC 786

The South Central Railway Employees Co- operative Credit Society Employees Union, Secundrabad vs. The Registrar of Co-operative Societies & Ors. reported in (1998) 2 SCC 580

Case distinguished:

Sanden Vikas (India) Ltd. V. Collector of Central Excise, New Delhi (2003) 4 SCC 699

Present: For Appellant(s): Mr. Arvind P. Datar, Sr. Adv.
Mr. Pratap Venugopal, Adv.
Ms. Surekha Raman, Adv.
Ms. Supriya Jain, Adv.
For M/s. K. J. John & Co.

For Respondent(s): Ms. Madhvi Diwan, Adv.
Ms. Jesal, Adv.
Ms. Puja Singh, Adv.

For Ms. Hemantika Wahi,Adv.

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AMITAVA ROY, J.

1. The oft encountered debate on the extent of tax liability based on the classification of the determinants of a levy in law seeks judicial scrutiny in the attendant factual conspectus. The appellant being aggrieved by the determination made by the High Court of Gujarat on the issue common to a reference under Section 69 of the Sales Tax Act, 1969 (for short hereinafter referred as to as the "Act") being Sales Tax Reference No.1/2004 and its appeal, i.e. Special Civil Application No. 12508/2002, against it, seeks redress against the judgment and order dated 4.09.2006 to that effect.

2. We have heard the learned counsel for the parties.

3. The indispensable skeletal facts introduce the appellant, M/s. Voltas Ltd. as a company incorporated under the Companies Act, 1956 engaged amongst others in the business of execution of jobs design, supply and installation of air-conditioning plants construed to be indivisible works contracts. It is a registered dealer under the Act. By a communication dated 22.10.1993 of M/s. Anupam Colours and Chemicals Industries, Bombay, an order was placed with it for water chilling plant at its factory at Vapi. The basic design parameters were enumerated in the work order as hereunder:

"1.Tonnage of Refrigeration .. 11 TR

2. Final temperature or chilled water to be made available for our process... 5 to 6C

3.Quantity of chilled water process in about 10 hours. .. 12,000 liters (5 to 6 C) required for our liters"

Other specifications pertaining to the water chilling plant were advised to be in conformity with the assessee's offer, as referred to therein. The work order insisted on the requirement of chilled water to be used directly for its process of manufacturing pigments with the assertion that sufficient precautions be taken to ensure that chilled water at 5 to 6 degree centigrade is available for such process. The letter emphasized as well that the assessee would provide the customer with the lay-out details, foundation drawing and other necessary information required for the erection of the plant. The essential segments of the works contracts involved, as would be eventually relevant for the adjudicative exercise underway, were thus specified with distinct details in the work order.

4. The Act which is a legislation to consolidate and amend the law relating to the levy of tax on the sale or purchase of goods in the State of Gujarat has set out in Part-A of Schedule II-A thereof, the rates of the impost on the sale of goods involved in the execution of the works contracts, the relevant excerpt whereof is quoted as under:

Sr.No	Description of works contract	Entry No. in Schedule-IIA of the Act	Regular rate of tax
1.	Installation of air-conditioners and A.C coolers and for repairs thereof.	67	18%
2.	Furniture and fixtures partitions including contracts for interior decoration and repairs thereof	104	8%
3.	Fabrication and installation of lifts or elevators or escalators and for repairs	120	8%

	thereof		
4.	Fabrication and installation of plant and machinery and repairs thereof	39	8%
5.	Construction of bodies on chassis of Motor Vehicles including three wheelers and for repairs thereof	128(5)	4%
6.	Ship building including construction of barges, Ferries Tugs Trawlers or Dredgers and for repairs thereof	186	4%

5. Section 55-A of the Act dwells on the scheme of composition of tax whereunder a dealer as referred to therein and in the circumstances and subject to such conditions as may be prescribed, is left with the option to pay in lieu of the amount of tax leviable from him under Section 7 or 8 in respect of any period, a lump sum by way of composition at the rate/rates, as may be fixed by the State Government by notification in the Official Gazette, having regard to the incidence of tax on the nature of the goods involved in the execution of total value of the works contract. Apt it would be to quote Section 55A as well for ready reference:

"SECTION 55A. COMPOSITION OF TAX.

(1) The Commissioner may, in such circumstances and subject to such conditions as may be prescribed, permit every dealer referred to in sub-clause (f) of clause (10) of section 2 to pay at his option in lieu of the amount of tax (including additional tax) leviable from him under section 7,(or 8) in respect of any period, a lump sum by way of composition at the rate or rates as may be fixed by the State Government by Notification in the Official Gazette having regard to the incidence of tax on the nature of the goods involved in the execution of total value of the works contract.

(2) The provisions of sections [13,51 and 55] shall not apply to a dealer who opts for composition of tax under sub-section (1).]"

Pursuant to this provision, and as empowered thereby, the Government of Gujarat vide the notification dated 18.10.1993 (for short hereinafter referred to as the Notification) did fix the rate of composition payable by such dealer (s) in lieu of the amount of tax otherwise leviable under the Act and as contemplated in the said statutory provision. As the stand-off centers around the rate of composition so fixed, essential it would be to set out the table of relevant entries to be immediately adverted to:

Sr.No.	Description of works contract	Rate of Composition
1.	Works contract for civil works like construction of buildings, bridges or roads, and for repairs thereof	2%
2.	Installation of air-conditioners and A.C. Coolers	15%
3.	Furniture and fixtures, Partitions including contracts for interior decoration	5%
4.	Fabrication and installation of lifts or elevators or	10%

	escalators	
5.	Fabrication and installation of plant and machinery	5%
6.	Construction of bodies on chassis of motor vehicles including three wheelers	3%
7.	Ship building, including construction of barges, ferries tugs, trawlers or dredgers	2%
8.	Works contracts other than those mentioned above	12%

6. The recorded facts demonstrate that the appellant being under the impression qua the works contract ordered vide letter dated 22.10.1983 of M/s. Anupam Colour and Chemicals that it would attract the rate of composition prescribed against Entry No.5 hereinabove i.e. fabrication and installation of plant and machinery and not 15% against Entry No.2 i.e. installation of air-conditioners and AC coolers or 12% against Entry No.8 i.e. works contracts other than those mentioned, filed an application before the Deputy Commissioner of Sales Tax (Legal), Gujarat under Section 62 of the Act and insisted that the works contract involved came within the purview of Entry No.5 attracting the composition rate of tax at 5% only. The said revenue authority by its order dated 16.10.1996 however rejected the plea of the appellant and instead held that the works contract was covered by Entry No.2 as the assessee had to air-condition the plant to be erected by it. The margin of difference in the composition rates compared to the rates of tax for the identical works contract as catalogued in the Schedule to the Act did also weigh with the revenue authority in arriving at this conclusion.

7. The appellant-assessee being dissatisfied did appeal against this finding before the Gujarat Sales Tax Tribunal, Ahmedabad (for short hereinafter referred to as the "Tribunal") which was registered as Appeal No. 16/1996. In course of the regular assessment for the Assessment Year 1993-94, the concerned Sales Tax Officer, pursuant to the decision rendered by the Deputy Commissioner of Sales Tax on 16.10.1996, assessed the appellant by applying the composite rate of 15% for the works contract involved.

8. The appellant thus preferred an appeal against this assessment order before the Assistant Commissioner of Sales Tax, Ahmedabad and having failed before this forum did take the issue before the Tribunal in Second Appeal No.97/2001. These two appeals were also dismissed by the Tribunal vide its judgment and order dated 2.12.2002 whereafter the appellant invoked the writ jurisdiction of Gujarat High Court registered as Special Civil Application No. 12508/2002 which to reiterate, have been, by the impugned decision, disposed of along with Sales Tax Reference No.1/2004 laid by the Tribunal before it under Section 69 of the Act referring the following question of law:

> *"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the appellant's works contract for fabrication and installation of air-conditioning plants falls under Entry 2 and, therefore, taxable at the rate of 15% and not under Entry 5 under which it is taxable at the rate of 5% of the Schedule to the notification dated 18.10.93 issued under Section 55A of the Gujarat Sales Act, 1969?"*

9. The High Court has answered the question referred in the affirmative thus sustaining the determination made by the revenue authorities/fora and the learned Tribunal declaring that

the appellant's works contract for fabrication and for installation of air-conditioning plant did fall under Entry 2 of the Notification and was taxable at the composition rate of 15%.

10. As the decision of the High Court assailed herein would disclose, in its view, the air-conditioning systems are classified according to their construction and operating characteristics and that it would be incorrect to differentiate between a central air-conditioning system and a room air- conditioner on the basis that the installation of air-conditioning plant requires preparation of plant whereas no such exercise is to be undertaken in case of installation of window air-conditioner etc. This is more so as the basic components applied in the manufacture of a air-conditioning plant, room air-conditioner or split air-conditioner are almost similar with difference in size and are not drastically different. The appellant's plea that in central air-conditioning system, fabrication has to be undertaken requiring preparation of plant etc. and that thus the central air-conditioning system has to be treated differently from a room air- conditioner or window air-conditioner etc. was not accepted because, according to the High Court, even in a room air-conditioner or window air- conditioner or split air-conditioner or AC cooler, elevation and lay out of the area requiring conditioning, has to be taken into consideration. The appellant's contention that Entry 5 dealt with all kinds of fabrication and installation of all kinds of plant and machinery and that there was no reason to exclude the installation of air-conditioning plant therefrom was negatived. The High Court was of the view that the composition scheme ought to be regarded as an exemption reprieve and thus needed to be construed strictly. Reliance was placed on the decision of this Court in ***Sanden Vikas (India) Ltd. V. Collector of Central Excise, New Delhi (2003) 4 SCC 699*** which held with reference to a particular entry in an exemption notification under the Central Excise Tariff Act, 1985 that the air- conditioner kit of a car did fall within the meaning of air-conditioners. It rejected the proposition that in common parlance air-conditioner, room air-conditioner, window air-conditioner, A.C. cooler, air-conditioning plant etc. were differently known and thus installation of air-conditioning plant would fall within Entry No.5.

11. Mr. Datar, the learned senior counsel for the appellant has assertively urged that having regard to the inalienable and essential constituents of the works contract as per the work order, fabrication as well as the installation of the water chilling plant were distinctly different items of works and thus the appellant was taxable at the composition rate of 5% against Entry No.5 of the Notification. Referring to the work order dated 22.10.1993 in particular, the learned senior counsel has maintained that the water chilling plant of the customer was to be configured in conformity with the design parameters referred to therein and not on readymade specifications on the election or discretion of the appellant-assessee. According to Mr. Datar the design parameters prescribed by the customer, to cater to its requirement amongst others of the temperature of the chilled water and the volume thereof to be used for its process of manufacturing pigment did assuredly involve design and fabrication of the essential composition of the system which by no means could be equated with the installation thereof simplicitor as the end device. That the customer was persistently particular on the adherence to its prescribed design parameters as is apparent from the work order, demonstrates that the works contract, in any view of the matter, cannot be drawn within the contours of Entry 2 of the Notification, he urged.

12. As against this, Ms. Madhvi Diwan, the learned counsel for the Revenue has argued that as the supply of the water chilling plant as per the works contract involved for all practicable purposes does not envisage any process of fabrication, the appellant is liable to be taxed at the composition rate of 15%. According to her, the basic and functional components of the water chilling plant being identical to that of an air- conditioning plant, the appellant's plea of application of 5% composite rate prescribed against Entry No.5 of the Notification is wholly

misplaced and thus no interference with the impugned judgment and order is called for. Reliance was placed on the decision of this Court in Sanden Vikas (India) supra.

13. The rival assertions have received our due consideration. The competing entries requiring scrutiny to ascertain the correct composition rate of tax payable vis--vis the works contract involved are engrafted admittedly in the Notification issued by the Government of Gujarat in exercise of powers conferred by Section 55A of the Act. Logically thus, the interpretation necessitated by the rival orientations ought to be in furtherance of the underlying objective of the said provision. A plain perusal thereof would attest that thereby, in the circumstances to be prescribed, a dealer can be left at his option to pay in lieu of the amount of tax payable, a lump sum by way of composition, at the rate or rates as may be fixed by the State Government having regard to the incidence of tax on the nature of the goods involved in the execution of total value of the works contract. Unmistakably, therefore, the State Government while fixing the composition rate of tax has to be mindful of the nature of the works contract executed and by no means can be oblivious thereof. Further, a composition rate of tax is in lieu of the amount of levy otherwise payable by the dealer under the Act. The scheme of composition as envisaged by Section 55A therefore in our comprehension does not admit of any synonymity with that of exemption as contemplated in law. This pre-supposition of the High Court as one of the contributing factors in concluding that the works contract in question did fall within the framework of Entry No.2 of the Notification is apparently erroneous.

14. As adverted to hereinabove, the work order in clear terms did enjoin that the design parameters pertaining to tonnage of refrigeration, final temperature of the water to be made available for the process of manufacturing pigments and the quantity of the chilled water essential therefor were indispensable and were in addition to the other specifications as offered by the appellant. The rigour of the insistence for the adherence to the design parameters is patent also from the request of the customer requiring the appellant to provide it with the lay out detail, foundation drawing and other necessary information essential for the erection of the water chilling plant. The exercise as a whole as contemplated by the work order thus was neither intended nor can be reduced to mere installation of the finally emerging apparatus. The work order noticeably did not refer to any readymade or instantly available devices, meeting the requirements of the customer so much so to be only installed at its factory. Instead, the work order had been apparently tailor-made to the requirements from which no departure was intended or comprehended. It is in this perspective that the word "fabrication" appearing in Entry No.5 of the Notification assumes a decisive significance.

15. The legislative intendment entrenched in Section 55A of the Act to maintain a direct correlation between the composition rates of tax as the Notification would reveal and the description of the corresponding works contract is patent. Understandably, the word "fabrication" had not been applied in the works contract for installation of air-conditioners and A.C. coolers contained in Entry No.2 of the Notification. The author of the said Notification, however, did consciously include the expression "fabrication" while describing the works contract enumerated in Entry 5 thereof. Having regard to the inseparable interdependence between the description of a works contract and the corresponding composition rate of tax, none of the inherent components of the works to be executed can either be ignored or disregarded for identifying the correct composition rate of the levy under the Act. Any other approach could tantamount to doing violence not only to the legislative purpose conveyed by Section 55A but also the language of its yield i.e. the Notification seeking to promote the statutory end. Viewed in that context, mere omission of the expressions "air-conditioners" and "A.C. coolers" in Entry No.5 would not be of any definitive consequence. The words plant and

machinery applied in Entry 5 are otherwise compendious enough to include air-conditioners and A.C. coolers, if the works contract involved require fabrication as well as installation thereof.

16. The word "fabrication" as defined in the Aiyan's Advanced Law Lexicon (Vol.II), 3rd Edition 2005 is "to manufacture".

17. The Oxford Dictionary defines the word "fabrication" to mean to construct or manufacture an industrial product.

18. The word "manufacture" as per the Aiyan's Advanced Law Lexicon (Vol.II) in its plainest form and shorn of other details is the process of transforming or fashioning of raw materials into a change of form for use. The process of fabrication therefore conceptually would involve a lay out for the ultimate device to be installed, preceded by a design of the parameters prescribed, configuration of the resultant components, and integration thereof to structure the ultimate mechanism or product. Installation thereof would be a subsequent step to finally position the plant to complete the works contract. As fabrication in terms of the work order in the instant case is a distinctly independent yet integral segment of the works contract contributing to the final physical form of the water chilling plant with the characteristics intended, it cannot be construed to be, synonymous to the installation thereof.

19. The High Court, as the impugned judgment would exhibit, had confined itself wholly to the components of various air-conditioning devices available and the range of the use thereof and in our estimate had missed the significant aspect of "fabrication" integrally involved in the works contract to supply the water chilling plant with the design parameters stipulated by the customer. The High Court did adopt a general approach vis-a-vis the air-conditioning devices commercially available in different forms dehors the singular factual aspects of the work order constituting the works contract. The High Court, thus, in our view, by overlooking the component of fabrication in the works contract opined that the same was within the purview of Entry No.2 and not Entry No.5. The description of the works contract, to reiterate, being of determinative bearing for ascertaining the composition rate of tax, we are of the unhesitant opinion, in the face of the design parameters insisted upon in the work order and consequential process of fabrication involved to cater thereto, that the works contract involved squarely falls within the ambit of Entry No.5 of the Notification. The margin of difference in rates of tax as prescribed by the Act compared to those mentioned in the Notification ipso facto does not detract from this conclusion. This consideration per se cannot override the decisive characteristics of the works contract otherwise unequivocally spelt out by the work order.

20. The primary canon of interpretation of a taxing statute hallowed by time is underlined by the classic statement of ROWLATT,J. in ***Cape Brandy Syndicate v. Inland Revenue Commnrs. (1921) 1 KB 64 at p.71*** as extracted hereunder:

> *"In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

It is trite as well that in a case of reasonable doubt, the construction most beneficial to the subject is to be adopted. The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expression used therein rather than from any notion that may be entertained by a Court which may appear to be it just and expedient. Even prior in point of time, TINDAL, CJ in ***Sussex Peerage case (1844) 11 C1 & Fin 85 : 8 ER 1034(HL)*** had propounded thus:

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the law-giver."

These views have with time resonated in various judicial pronouncements with unambiguous approval of this Court as well amongst others in Income Tax Officer, ***Tuticorin vs. T.S.Devinatha Nadar & Ors. (1968)68 ITR 252*** and very recently in ***Commissioner of Income Tax-III vs. Calcutta Knitwears, Ludhiana (2014) 6 SCC 444*** and ***Commissioner of Income Tax (Central)-I, New Delhi vs. Vatika Township Pvt. Ltd. 2015 (1) SCC 1***. A plethora of decisions in this regard, available though, we do not wish to burden the instant narration therewith.

21. Qua the issue of classification of goods to determine the chargeability thereof and the rates of levy applicable, it is no longer res- integra that the burden of proof is on the taxing authority to demonstrate that a particular class of goods or item in question is taxable in the manner claimed by them and that mere assertion in that regard is of no avail as has been enunciated by this Court in ***U.O.I. & Ors. vs. Garware Nylones Ltd.etc. (1996) 10 SCC 413*** and relied upon with approval in ***HPL Chemicals Ltd. vs. Commissioner of Central Excise, Chandigarh (2006) 5 SCC 208.***

22. Equally, fundamental is the principle of statutory interpretation that no construction to a legislation ought to be provided so as to render a part of it otiose or redundant as held inter alia by this Court in ***Maharashtra University of Health Sciences & Ors. vs. Satchikitsa Prasarak Mandal & Ors. (2010)3 SCC 786***.

23. That it is the cardinal principle of interpretation not to brush aside a word used in a statute or in a Notification issued under a statute and that full effect must be given to the every word of an instrument had been underscored by this Court in ***The South Central Railway Employees Co- operative Credit Society Employees Union, Secundrabad vs. The Registrar of Co-operative Societies & Ors. reported in (1998) 2 SCC 580***. The Notification in the instant case being apparently statutory in nature is akin to subordinate legislation to actualize and advance the legislative intent engrafted in Section 55A. It not only owes its existence to the Act but would also be amenable to the cardinal principles of interpretation adverted to herein above.

24. In the overall legal and factual perspectives as obtained herein, any endeavour to drag the works contract involved within the framework of Entry No.2 would be repugnant to the basic principles of interpretation of statutes and subordinate legislations like the statutory Notification under Section 55A of the Act. To exclude the work of fabrication from the works contract as per the work order would render it (works contract) truncated to a form not intended by the customer. This would strike as well at the root of the mandate of correlation of a works contract and the corresponding composition rate of tax as envisaged by Section 55A of the Act and the Notification issued thereunder.

25. The decision of this Court in Sanden Vikas (India) Ltd.(supra) is of no avail to the revenue vis--vis the issue falling for scrutiny herein.

26. In the face of the determinations made herein above, the inescapable conclusion is that the appellant's works contract for fabrication and installation of water chilling plant at the factory of Anupam Colours and Chemicals at Vapi would fall under Entry 5 of the Schedule to the Notification dated 18.10.1993 issued under Section 55A of the Act and would be taxable at the rate of 5% as prescribed thereby. The impugned decision dated 4.9.2006 of the High Court of Gujarat at Ahmedabad in Sales Tax Reference No.1/2004 and Special Civil Appeal

No.12508/2002 and other determinations as are contrary to the views expressed herein are hereby set aside.

27. The Civil Appeal is allowed.

SUPREME COURT OF INDIA

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CIVIL APPEAL NO. 4542 OF 2007

PRADIP NANJEE GALA

Vs.

SALES TAX OFFICER & ORS.

H.L. DATTU, CHIEF JUSTICE, ARUN MISHRA AND S.A. BOBDE, JJ.

29th April, 2015

HF ▶ Revenue

RECOVERY OF TAX – LIABILITY OF THE PARTNER – SETTLEMENT OF DUES – TAX DUE AGAINST PARTNERSHIP FIRM – APPELLANT BEING A PARTNER SOUGHT SETTLEMENT OF DUES AS PAYABLE BY HIM ON THE BASIS OF PARTNERSHIP DEED – COMMISSIONER ISSUED A LETTER QUANTIFYING THE AMOUNT DUE ON THE BASIS OF PARTNERSHIP DEED – APPELLANT SOUGHT ABSOLVEMENT FROM THE LIABILITY OF THE PARTNERSHIP FIRM – SECTION 45 PROVIDES FOR REMISSION OF LIABILITY SUBJECT TO THE CONDITIONS PRESCRIBED - NO POWER WITH THE MINISTER OR THE COMMISSIONER TO GRANT REMISSION – CONDITIONS OF SEC.45 AND RULES ALSO NOT FULFILLED – PARTNER JOINTLY AND SEVERALLY LIABLE TO MAKE PAYMENT OF DUES OF THE PARTNERSHIP FIRM. APPEAL DISMISSED WITH COSTS OF RS.5 LAKHS.

A partnership firm was assessed to tax for Samvat 2004 and Samvat 2005 raising additional demand of tax under the Bombay Sales Tax Act and Central Sales Tax Act 1956. During pendency of appeal a partner of the firm sent a letter to the State Minister for Finance seeking settlement of Sales Tax dues payable by him as a partnership of the assessee firm. The said offer had been accepted and in the light of the same the Commissioner of Sales Tax had issued a letter quantifying the amount due on the basis of Partnership Deed. The Tribunal, however, dismissed the appeal refusing to adjudicate upon the settlement of the dues between the State and the assessee and to the question whether a partner is relieved of his obligation under the Act. The Petitioner being a partner approached the High Court by way of a Writ Petition requesting that he be absolved of all the dues against the assessee firm. The writ petition was dismissed holding that Section 18 of the Act provides for joint and several liability of a partnership and, therefore, a partner cannot be absolved of his liability . Further, the power of Commissioner u/s 45 does not contemplate any settlement of the nature claimed in the Writ Petition and, therefore, no shelter can be taken under that for discharge of duty under the Act. On appeal before the Supreme Court held :

Section 18 of the Act specifically provides for the joint and several liability of the partners of the firm towards payment of tax under the Act. Further, Section 45 provides for remission under certain circumstances as prescribed under the rules and none of the Rules can be invoked in the present case. The remission of tax amount exceeding Rs.2,000 can only be

made after obtaining sanction of the State Govt and neither the State Minister of Finance, or the Commissioner has any power to allow remission of tax in the present set of circumstances. Further, there cannot be any settlement with any individual partner regarding the liability in respect of the dues of an assessing firm. Further, no benefit can be taken from the language of the Act which mandates the exercising of powers only in the circumstances prescribed by the Rules. The provisions of law in a taxing statute are to be interpreted strictly and there is no scope for reading equity into tax laws. Accordingly, the settlement, if any, reached between the appellant and the State Govt for part payment of tax liability by the partner would not fall within the four corners of the Act & Rules. The appeal is dismissed with costs of Rs.5 lakhs.

Cases relied upon:

Cape Brandy Syndicate v.IRC, [(1921) 1 K.B. 64, 71]

CIT v. V. MR. P. Firm Muar, (1965) 1 SCR 815

CIT v. Shahzada Nand & Sons, (1966) 3 SCR 379;

Murarilal Mahabir Prasad v. B.R. Vad, (1975) 2 SCC 736;

CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360;

State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312;

Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613;

CIT v. Calcutta Knitwears, (2014) 6 SCC 444;

CTO v. Binani Cements Ltd.,(2014) 8 SCC 319.

Present: For Appellant(s): Mr. S. Ganesh, Sr. Adv.
Mr. S. Ravi Shankar,Adv.
Mr. S. Yamunah Nachiar, Adv.
For Respondent(s): Mr. Rahul Chitnis, Adv.
Mr. Aniruddha P. Mayee,Adv.

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H.L. DATTU, CJI

1. This appeal is directed against the judgment and order passed by the High Court of Judicature at Bombay in Writ Petition No. 2226 of 1989, dated 03.02.2006, whereby and whereunder, the High Court has held that the appellant is liable for payment of tax under Bombay Sales Tax Act, 1959 (for short, "the Act") and dismissed the writ petition.

2. The question raised before us is whether the respondent-Revenue could resile from a settlement entered into with the assessee on the basis of which the appellant has already paid and settled his dues under the Act.

3. Since the protracted proceedings in the instant case have spawned over three decades, we would only notice the most relevant facts necessary for disposal of the appeal.

4. Facts in brief are as follows: The appellant had joined as a partner in the assessee-Firm. His status as the partner of the said Firm, not being of any consequence to the question that arises for our consideration, does not require to be noticed by us. The relevant assessment years are Samvat 2034 (12.11.1977 to 31.10.1978) and Samvat 2035 (01.11.1978 to 24.06.1979). The Assessing Authority had carried out the assessments and confirmed

the demand for Rs.13,33,091/- under the Act and Rs.85,878/- under the Central Sales Tax Act, 1956 (for short, "the CST Act") for Samvat 2034; and Rs.28,18,202/- under the Act and Rs.44,577/- under the CST Act for Samvat 2035. The appellant had preferred appeals against the aforesaid assessments before the first appellate authority, which were dismissed by order dated 30.09.1981.

5. Being aggrieved by the aforesaid orders, the appellant had approached the Maharashtra Sales Tax Tribunal (for short, "the Tribunal"). During the pendency of the said appeals, the appellant had addressed a letter to the State Minister for Finance dated 23.11.1983, seeking settlement of sales tax dues payable by him as a partner of the assessee-Firm. It is the case of the appellant that the then State Minister for Finance accepted the offer of settlement and accordingly, in the light of the said settlement, the Commissioner of Sales Tax had issued a letter on 16.01.1984 quantifying the amount due and payable by the assessee-Firm for the relevant assessment years on the basis of the partnership deed. Before the Tribunal, the respondents have denied the existence of such settlement and further submitted that there has been no decision quantifying the individual liability of the appellant and absolving him from the liability to pay for the dues of the assessee-Firm for said assessment years. Since, the question before the Tribunal was restricted to determination and payment of liability by the appellant qua the assessee-Firm, the Tribunal had refused to adjudicate upon both: (a) whether there exists any settlement between the parties regarding the tax liability and (b) whether the appellant was relieved of his obligation under the Act.

6. Aggrieved by the aforesaid, the appellant approached the Writ Court. The assessee had contended that he had approached the State Minister for Finance seeking settlement of his individual dues, which was accepted as well as implemented by the order of the Commissioner dated 16.01.1984 and, therefore, the appellant is absolved of all the liabilities confirmed against the assessee-Firm for the relevant assessment years. The Revenue has adopted a stand that under the Act, apart from the power of remission of tax payable by the dealer under Section 45 of Act, there exists no other provision which would empower the authorities to settle the liability of an individual partner. Further, that Section 18 of the Act specifically provides that in respect of the dues of the firm, the liability of a partner is joint and several and, therefore, neither the State Minister for Finance nor the Commissioner could have legally entered into any settlement regarding the liability of individual partner in respect of the dues of the assessee-Firm.

7. The High Court, after due consideration of the submissions made by both the parties and meticulous examination of the case records as well as the relevant provisions of law, has observed that the case of the appellant does not require them to examine the validity of the liability confirmed against the assessee-Firm and thus, examined the question as to whether the settlement entered into between the Commissioner and the appellant herein is permissible under the Act. The High Court has concluded that under Section 18 of the Act the partners of the Firm are jointly and severally liable to pay the tax dues of the assessee-Firm and no provision under the Act contemplates a settlement between a partner of the assessee-Firm and the Commissioner to determine individual liability. The High Court has further noticed that Section 45 of the Act which speaks of power of remission of the Commissioner also does not contemplate any settlement of the nature claimed herein and therefore, could not be invoked to shelter the appellant from discharging his liability under the Act. Hence, the Writ Court has thought it fit to fix the entire liability of payment of sales tax on the assessee and upheld the order passed by the Revenue by the judgment and order dated 03.02.2006.

8. It is the aforesaid judgment and order passed by the Writ Court, which is questioned by the assessee before us in this appeal.

9. Shri S. Ganesh, learned counsel for the appellant-assessee would submit that the appellant could not be held liable to settle tax liability of the assessee-Firm under the Act, because he has already paid his dues as a partner of the assessee-Firm under the settlement entered into between him and the State Minister for Finance. He would further refer to the order of the Commissioner dated 16.01.1984 in support of the determination of his individual dues by the respondent-Revenue and therefore submit that since the appellant has discharged his share of the liability, he ought to be absolved of all the liabilities confirmed against the assessee-Firm for the relevant assessment years under the Act.

10. Per contra, the Revenue would support the impugned judgment and order passed by the High Court.

11. Before we proceed to examine the merits of submissions advanced by learned counsel appearing for the parties to the lis, relevant provisions of the Act and Rules require to be noticed by us.

12. Section 18 of the Act provides for the liability of a firm to pay tax and contemplates joint and several liability of the partners of the firm towards the payment of such tax liability under the Act. Section 45 of the Act provides for remission of tax payable by a dealer under the Act. It reads:

> *"The Commissioner may, in such circumstances and subject to such conditions as may be prescribed, remit the whole or any part of the tax payable, in respect of any period, by any dealer:*
>
> *PROVIDED that if the amount to be remitted exceeds two thousand rupees, the remission of the excess shall not be made without the previous sanction of the State Government."* (emphasis supplied)

13. It would further be relevant to notice the appropriate circumstances and conditions which are prescribed by the appropriate authority adherence to which is required under Section 45 of the Act for the Commissioner to exercise his power of remission. Rules 43A, 44 and 44A speak of remission as provided for under the Act. Rule 43A provides for the remission of purchase tax payable in respect of purchases of goods specified in Schedule E of the Rules. Rule 44 speaks of certain cases where an authorised dealer or commission agent who has become liable to pay purchase tax under section 14 of the Act could claim remission. Section 44A speaks of remission of purchase tax payable by authorised dealer in certain cases.

14. The plain reading of Section 45 of the Act would indicate that the legislature has vested the power of remission of tax only with the Commissioner and subjected the exercise of said power in accordance with such circumstances and conditions as prescribed by the State Government under the Bombay Sales Tax Rules, 1959 (for short, "the Rules"). The proviso to the provision specifies that the remission of tax amount if exceeds Rs.2000/- ought to be made by the Commissioner after obtaining sanction of the State Government. The Section neither speaks of any power to enter into a settlement for such purposes by the State Minister of Finance nor prescribes exercise of powers by the Commissioner in light of any such settlement.

15. Section 18 of the Act specifically provides that the liability of a partner in respect of the dues payable by the firm is joint and several. But for Section 45 of the Act which permits remission of the tax payable by the dealer, that is, the assessee-Firm, there is no provision under the Act empowering the State Government or the Commissioner to enter

into a settlement with an individual partner regarding his liability in respect of the dues payable by the assessee-Firm. Further, the Rules relevant to the exercise of power of remission by the Commissioner under the Act viz., Rules 43A, 44 and 44A also do not provide any condition with respect to remission of sales tax under the Act by entering into any settlement, more so a settlement for the payment of individual liability of partners under the partnership deed. Therefore, in our considered opinion, in the absence of any specific provision contained in the Act or the Rules, there could be no settlement with an individual partner so as to discharge him from his obligation to pay the sales tax dues payable by the assessee-Firm.

16. Further, in our view, the submission advanced by Shri Ganesh that the conditions prescribed under the statute at hand ought to be read considering the facts and circumstances of the instant case to provide beneficial meaning to the statute, also does not hold any waters. The statute herein clearly and expressly provides for the limitation on exercise of powers of remission by the Commissioner and mandates them to be exercised only "in such circumstances and subject to such conditions as may be prescribed." Section 2(21) of the Act provides that "prescribed" under the Act would mean as prescribed under the Rules and herein, the Rules being silent on any settlement of the nature allegedly entered into between the appellant and the State Government, the external circumstances including a settlement cannot be considered by the Commissioner while exercising power of remission of tax under the Act.

17. It is trite that the letter of law has to be accorded utmost respect and strictly adhered to especially while interpreting a taxing statute. There ought not exist any scope for impregnating the interpretation by reading equity into taxing statutes. The classic statement of Rowlatt, J., in ***Cape Brandy Syndicate v.IRC, [(1921) 1 K.B. 64, 71]*** still holds the field. It reads as under:

> *"In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

18. Further, the three Judge Bench of this Court in ***CIT v. V. MR. P. Firm Muar, (1965) 1 SCR 815*** has authoritatively observed that:

> *"13. ...Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not..."*

[See: ***CIT v. Shahzada Nand & Sons, (1966) 3 SCR 379; Murarilal Mahabir Prasad v. B.R. Vad, (1975) 2 SCC 736; CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360; State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312; Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613; CIT v. Calcutta Knitwears, (2014) 6 SCC 444; CTO v. Binani Cements Ltd.,(2014) 8 SCC 319.***]

19. The convoluted mesh of facts and the extremely protracted proceedings which span over three decades, at the instance of appellant, indicate that the basis of case made out by the appellant does not exist in either the statute law or, in fact, any law applicable to the present proceedings. The settlement, if any, reached between the appellant and the State Government for part payment of tax liability by the partner of an assessee-Firm would not fall under the four corners of the Act or the Rules as has been claimed by the appellant since the beginning of the proceedings under the Act.

20. Therefore, in light of the aforesaid, we are of the considered opinion that the High Court has rightly examined the issues before it and the judgment and order passed by it does not suffer from any error, whatsoever, and thus, the civil appeal being devoid of any merit requires to be dismissed. The judgment and order passed by the High Court is confirmed.

21. In the result, the appeal is dismissed with costs of Rs.5,00,000/-.

PUNJAB & HARYANA HIGH COURT

CWP NO. 9684 OF 1990

PRAKASH PIPES INDUSTRIES LTD.
Vs.
STATE OF HARYANA AND ANOTHER

RAJIVE BHALLA AND B.S. WALIA, JJ

05th February, 2015

HF ▶ Petitioner - Assessee

REVISION – NOTICE ISSUED BY COORDINATE RANK OFFICER – ASSESSMENT CONCLUDED BY DEPUTY EXCISE & TAXATION COMMISSIONER – SHOW CAUSE NOTICE FOR RE-ASSESSMENT SERVED BY OFFICER OF COORDINATE RANK INSTEAD OF SENIOR RANK – WRIT FILED PRAYING FOR QUASHING OF SUCH NOTICE – CONCEDED BY STATE – NOTICE WITHDRAWN AND LIBERTY GRANTED TO STATE TO PROCEED AFRESH U/S 40 AS PER LAW – WRIT ALLOWED – SECTION 40 (1) AND SECTION 40(2) OF 1973 OF HGST ACT.

After the conclusion of assessment by the Deputy Excise & Taxation Commissioner, a notice for revision was issued by an officer of coordinate rank. The assessee filed a writ praying that the notice be quashed as such notice ought to be served by an officer of senior rank and not of coordinate rank. The state conceded with a prayer to withdraw the notice. The writ is allowed with liberty to the State to serve a fresh notice u/s 40(2) of the 1973 Act in accordance with law.

Present: Mr. R.K. Chhibbar, Senior Advocate with

Mr. Gaurav Mankotia, Advocate for the petitioner.

Ms. Mamta Singhal, AAG, Haryana

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RAJIVE BHALLA, J.

1. The petitioner prays for issuance of a writ of certiorari quashing show cause notice, issued under Section 40(2) of the Haryana General Sales Tax Act, 1972 (hereinafter referred to as "the Act"), proposing to revise an already concluded assessment.

2. Counsel for the petitioner submits that the assessment order was passed by the Deputy Excise and Taxation Commissioner (hereinafter referred to as "the DETC"), Hisar. The show cause notice for re-assessment under Section 40(2) of the Act was, therefore, required to be issued by an officer senior to the DETC, Hisar, but has been issued by an officer of co-ordinate rank, namely, the DETC (Inspection-cum-Revisional Authority), thereby rendering the impugned notice null and void.

3. Counsel for the State of Haryana submits that she has been instructed by Mr. Ajay Sihag, Excise and Taxation Officer, Hisar, to make a statement that the show cause notice impugned in the present petition may be treated as withdrawn but with liberty to the State to serve a fresh notice under Section 40 (2) of the 1973 Act, after following procedure prescribed by law.

4. We have heard counsel for the parties and in view of statement made by counsel for the State of Haryana, on instructions from Mr. Ajay Sihag, allow the writ petition and set aside the show cause notice with liberty to the State of Haryana to proceed afresh, under Section 40 (2) of the Act, in accordance with law but without prejudice to the rights of the parties.

PUNJAB & HARYANA HIGH COURT

CWP No. 12106 of 2007

BHARAT SANCHAR NIGAM LIMITED
Vs.
STATE OF HARYANA AND OTHERS

RAJIVE BHALLA AND B.S. WALIA, JJ.

4th February, 2015

HF ▶ Petitioner - assessee

TELECOM SERVICES - WHETHER EXIGIBLE TO SALES TAX – DEMAND RAISED CONSIDERING TELECOM FACILITIES EXIGIBLE TO TAX – ASSESSMENT ORDER FOR RECOVERY – WRIT FILED FOR QUASHING OF SUCH ORDER – HELD, FOLLOWING BSNL JUDGEMENT, TELECOM SERVICES ARE IN NATURE OF A SERVICE THAT DO NOT INHER ELEMENT OF SALE – IMPUGNED ORDER AND DEMAND NOTICE SET ASIDE – MATTER REMITTED TO ASSESSING AUTHORITY TO DECIDE AFRESH -WRIT ALLOWED.

Demand on account of tax levied on telecom facilities was raised by assessing authority and an order for its recovery was passed by the Ld. Joint Excise and Taxation Commissioner. Allowing the writ, it is held that in view of judgement passed in the case of Bharat Sanchar Nigam Limited, the telecom services provided by the petitioner are in a nature of service and do not inher an element of sale. Therefore, impugned orders are set aside and matter is remitted back to the assessing authority for adjudicating afresh within three months of receipt of a certified copy of the order so passed.

Case followed:

Bharat Sanchar Nigam Limited and another V Union Of India and others 2006(3)SCC 1

Present: Mr. Gurpreet Singh, Addl. Central Government
Standing Counsel for the petitioner.
Ms. Mamta Singhal Talwar, AAG, Haryana.

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RAJIVE BHALLA

1. The petitioner prays for issuance of a writ of certiorari for quashing assessment

order, demand notice dated 15.3.2007 (Annexure P-4) issued by the Assessing Authority, Gurgaon and order dated 27.6.2007 (Annexure P-9) passed by the Joint Excise and Taxation Commissioner (Appeals) with a further prayer that a direction may be issued to the respondents not to realise Rs.2,50,06,196/-from the account of the petitioner.

2. Counsel for the petitioner submits that controversy in the present petition has been settled by the Supreme Court in ***Bharat Sanchar Nigam Ltd. and another v. Union of India and others, 2006(3) SCC 1***, by holding that telecom facilities are a service that do not inher any element of sale and are, therefore, not exigible to sales tax, under the Haryana General Sales Tax Act, 1973. Counsel for the petitioner also submits that in Civil Writ Petition No.18913 of 2003 (***M/s Bharat Sanchar Nigam Limited v. State of Haryana and others***), a Division Bench of this Court had set aside a similar assessment order and remitted the matter to the Assessing Officer to take a fresh decision in the matter. The Assessing Officer has, after considering the matter afresh, held that sales tax is not leviable. The writ petition may be allowed, the impugned order and the demand notice may be set aside and the State of Haryana may be directed to refund the amount paid by the petitioner as sales tax.

3. Counsel for the State of Haryana is not in a position to raise any argument, against the judgment in Civil Writ Petition No.18913 of 2003 (***M/s Bharat Sanchar Nigam Limited v. State of Haryana and others***) or controvert the facts.

4. We have heard counsel for the parties, perused the impugned order and the demand notice. The Supreme Court having held in BSNL's case (supra) that telecom services provided by the petitioner are in a nature of a service that do not inher any element of sale, the impugned orders and the demand notice are without authority of law.

5. Consequently, we allow the writ petition, set aside the demand notice (Annexure P-4) and order dated 27.6.2007 (Annexure P-9) and in terms of order dated 04.09.2006, passed in Civil Writ Petition No.18913 of 2003, remit the matter to the Assessing Officer, for adjudication afresh, within three months of receipt of a certified copy of this order.

6. The petitioner is directed to appear before the Assessing Officer, for further proceedings on 16.3.2015.

PUNJAB & HARYANA HIGH COURT

VATAP NO 41 OF 2014

STATE OF HARYANA
Vs.
WINDORZ INDIA PVT. LTD

AJAY KUMAR MITTAL AND FATEH DEEP SINGH, JJ.

22th September, 2014

HF ▶ Dealer / respondent

PENALTY – ATTEMPT TO EVADE TAX – CHECK POST/ ROAD SIDE CHECKING – NATURE OF TRANSACTION – GOODS IN TRANSIT INTERCEPTED – DOCUMENTS SHOWING BRANCH TRANSFER PRODUCED – PENALTY IMPOSED BASED ON ENQUIRY HOLDING IT AS INTERSTATE SALE- APPEAL ALLOWED BY TRIBUNAL HOLDING THAT CHECKING OFFICER NOT TO ASSESS NATURE OF TRANSACTION- ALSO, NEITHER DOCUMENTS PRODUCED DOUBTED NOR MENS REA TO EVADE TAX ESTABLISHED – APPEAL BY REVENUE DISMISSED AS FINDINGS RECORDED BY TRIBUNAL NOT SHOWN TO BE ERRONEOUS- APPEAL DISMISSED ON MERITS AS WELL AS BEING TIME BARRED- *SEC 31(8) OF HVAT ACT*.

LIMITATION – APPEAL – APPLICATION FOR CONDONATION OF DELAY OF 485 DAYS FOR DELAYED FILING OF APPEAL – SUFFICIENT CAUSE NOT SHOWN – APPEAL DISMISSED AS BEING TIME BARRED- SEC 5 OF LIMITATION ACT, 1963.

The goods were in transit from Faridabad to Delhi and were checked near Badarpur border. Documents were produced showing branch transfer as alleged. It was suspected to be meant for interstate sale as per enquiry conducted. Penalty was imposed. The Tribunal allowed the appeal in favour of the appellant in view of the fact that the assessing officer had not doubted the documents, nor mens rea to evade the tax was established. The checking officer exercising summary jurisdiction could not have assessed the nature of transaction. On appeal filed by Revenue, it is held that the findings recorded by the Tribunal are not shown to be perverse or erroneous and therefore, no interference is called for.

Also, the application for condoning the delayed filing after 485 days is without sufficient cause. The appeal is, therefore, dismissed on merits as well as it being time barred.

Present: Ms. Tanisha Peshawaria, DAG, Haryana, for the appellant.

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AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the revenue under Section 36 of the Haryana Value Added Tax Act, 2003 (in short "the Act") against the order dated 9.7.2012 (Annexure A-4) passed by the Haryana Tax Tribunal, Chandigarh (hereinafter referred to as "the Tribunal") in STR No. 39 of 2006-07 in STA No. 936 of 2004-05, claiming the following substantial questions of law:-

(i) Whether the provisions of Section 31(8) of the VAT Act empowers the officer detaining the goods (checking officer) to hold enquiry into the nature of the transaction occasioning the movement of goods in order to ascertain as to whether the transaction is inter-state sale or a branch transfer?

(ii) Whether in the facts and circumstances of the case the Ld. Tribunal was justified while observing into the impugned order that Checking Officer was not empowered to go in the nature of transaction whereas Section 31(8) of VAT Act clearly provide the Checking Officer is fully empowered to decide the nature of transaction?

(iii) Whether in the facts and circumstances of the case the Ld. Tribunal was justified in observing that Checking Officer had not doubted the correctness of the documents accompanying the goods is contrary to the facts of the case and there is an error of facts apparent on the records instituting a valid reason for calling for review of impugned order whereas it is clear from the order that he has doubted the documents i.e. enquiry was held and proceedings under Section 31 of HVAT Act were held?

(iv) Whether in the facts and circumstances of the case the Ld. HTT was justified in not reviewing its earlier order when the errors in the order are apparent on the record and were brought to the notice of HTT?

(v) Whether in the facts and circumstances of the case the Ld. HTT was justified in declining the review application vide its order dated 09_07_2012?

2. The facts necessary for adjudication of the present appeal as narrated therein are that during the course of roadside checking on 17.9.2004, ... tempos bearing registration Nos. HR-38-7537 and HR-38BG-0197 loaded with glass panels of various sizes while going from Faridabad to Delhi were checked near Badarpur border. As per documents, the goods were being transported to Delhi as stock transfer from Faridabad. After enquiry, it was found that the said goods were being taken to the site of Tata Teleservices, New Delhi and the stock transfer was an interstate sale. The assessing authority vide order dated 4.10.2004 (Annexure A-1) held that it was an attempt to evade tax, imposed penalty amounting to Rs. 1,09,426/- besides tax of Rs 43,770/- . Feeling aggrieved, the dealer filed an appeal before the Joint Excise and Taxation Commissioner (Appeal) who vide order dated 30.11.2004 (Annexure A-2) dismissed the same. Against the order dated 30.11.2004 (Annexure A-2), the dealer filed an appeal before the Tribunal. The Tribunal vide order dated 10/15.5.2006 (Annexure A-3) allowed the appeal. Thereafter, the appellant filed a review petition before the Tribunal who vide order dated 9.7.2012 (Annexure A-4) dismissed the same. Hence, the present appeal.

3. We have heard learned State counsel.

4. The Tribunal had recorded that the Assessing Officer was exercising summary jurisdiction and the nature of transaction could be determined only at the time of regular

assessment and not by the checking officer while the goods were in transit. Further, the Assessing Officer had not doubted the documents accompanying the goods nor had established any mens rea to evade tax. The findings recorded by the Tribunal reads thus:-

> *"We have considered the matter carefully and have also seen the facts on record and the judgments relied upon by Sh. Sarwal. It is a matter of record that while deciding the case the officer imposing penalty has held the transaction as an inter state sales. Penalty proceedings, because these are summary in nature hence it can only be determined by the Assessing Authority at the time of regular assessment and not by the checking officer in transit. The officer has not doubted the documents accompanying the goods nor has he established any mensrea to evade tax. In such a situation when no tax evasion is there the penalty imposed in the present case cannot be maintained and is accordingly quashed. Instant appeal is allowed."*

6. Learned State counsel could not show that the findings recorded by the Tribunal were erroneous or per verse in any manner.

7. Further, the present appeal is barred by a period of 485 days. An application bearing CM No. 2757-Cll of 2014 under Section 5 of the Limitation Act, 1963 (in short "the 1963 Act") has been moved for condonation of 485 days' delay in filing the appeal.

8. The explanation given in the application for condonation of delay of 485 days does not satisfy the test of sufficient cause within the meaning of Section 5 of the Limitation Act, 1963. Thus, no ground for condonation of colossal delay of 485 days has been made out.

9. In view of the above, the appeal is dismissed on merits as well as being time barred.

PUNJAB & HARYANA HIGH COURT

VATAP No. 69 of 2014

HERO HONDA MOTORS LIMITED
Vs.
STATE OF HARYANA AND OTHERS

RAJIVE BHALLA AND AMOL RATTAN SINGH, JJ

26nd February, 2015

HF ▶ Revenue

INTEREST – JURISDICTION – SEPARATE ORDER PASSED AFTER CONCLUSION OF ASSESSMENT – SHOW CAUSE NOTICE AGAINST PROPOSED LEVY OF INTEREST AND PENALTY SERVED DURING PENDENCY OF ASSESSMENT PROCEEDINGS – ASSESSMENT PROCEEDINGS CONCLUDED PASSING ORDER WITHOUT LEVY OF INTEREST – SEPARATE ORDER PASSED IMPOSING INTEREST ON DELAYED PAYMENT OF TAX LATER – QUESTION OF JURISDICTION RAISED BY APPELLANT CONTENDING THAT INTEREST OUGHT TO BE LEVIED AT THE TIME OF ASSESSMENT OR DEPARTMENT TO HAVE RECTIFIED ORDER U/S 33 OF ACT TO IMPOSE INTEREST – HELD SINCE NOTICE FOR LEVY OF INTEREST HAD BEEN SERVED DURING PENDENCY OF ASSESSMENT PROCEEDINGS, THERE WAS NO REQUIREMENT OF RECTIFICATION OF ASSESSMENT ORDER – NON IMPOSITION OF INTEREST ALONGWITH ASSESSMENT ORDER IS MERE IRREGULARITY ON PART OF ASSESSING AUTHORITY – APPEAL DISMISSED.

The appellant had filed an appeal against the levy of interest by a separate order when the assessment proceedings had already been concluded without levy of interest. As a preliminary issue it was argued that such interest could be levied at the time of assessment or by rectifying the error u/s 33 of the Act. It is contended by revenue that during pendency of assessment proceedings the assessing authority had issued a separate notice requiring the appellant to show cause against the levy of penalty and interest. The proceedings concluded with demand of interest but since question of interest was a subject matter of a separate notice, assessment order and order imposing interest were passed separately. It is held that this was merely an irregularity on part of assessing authority which did not render the impugned order null and void for want of jurisdiction. Since the notice had already been served during pendency of assessment proceedings, there was no need of rectifying assessment order. Therefore, appeal is dismissed. However, any opinion on merits shall be disregarded by Tribunal while deciding the appeal on merits.

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

Ms. Mamta Singla Talwar, AAG, Haryana for the respondents

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RAJIVE BHALLA, J.

1. The appellant challenges orders Annexures A-13, A-13/A and A-13/B passed by the Haryana Tax Tribunal, at Chandigarh holding that the assessing authority was justified in passing the order imposing interest.

2. Counsel for the appellant submits that assessment proceedings for assessment year 1998-99 concluded without levy of interest but while considering the question of penalty, a separate order was passed imposing interest. The assessing authority was required to impose interest at the time of assessment and in case interest was not imposed, was required to rectify the error by resort to Section 33 of the Haryana Sales Tax, Act, 1973 (hereinafter referred to as "the Act'). The assessing authority has no jurisdiction to pass a separate order imposing interest after assessment had concluded. Counsel for the appellant relies upon a judgment of the Hon'ble Supreme Court in Commissioner of Trade Tax, U.P. Versus Kanhai Ram Thekedar, [2005] 141 STC 1 (SC). Counsel for the appellant prays that the Tribunal has affirmed the order passed by the assessing authority without considering that such an order cannot be passed.

3. Counsel for the State of Haryana submits that during assessment proceedings, a separate notice was served, requiring the appellant to show cause why penalty and interest should not be imposed. The assessment order was passed but the show cause notice, regarding penalty and interest remained pending. The assessing authority was well within its jurisdiction to decide the notice and while dropping penalty proceedings, has imposed interest on delayed deposit of tax.

4. We have heard counsel for the parties, perused the impugned orders, but are not inclined to grant any relief to the appellant.

5. The appellant was, admittedly, being assessed to different components of value added tax. Admittedly, during pendency of assessment proceedings, the assessing authority issued a notice calling upon the appellant to show cause why penalty and interest be not imposed for delayed deposit of tax. The assessment proceedings concluded with the assessing authority demanding interest on various components of tax but as the question of interest on delayed payment of tax was subject matter of a separate show cause notice, chose not to pass any order along with the assessment order. The assessing authority passed a separate order dropping penalty proceedings, but imposing interest on delayed deposit of tax. The appellant filed an appeal which was dismissed by the appellate authority and is now agitating the matter before the Tribunal.

6. Before the Tribunal, the appellant raised a preliminary issue that there is no provision in the statute, that empowers the assessing authority, to initiate proceedings for levy/recovery of interest, after passing of the assessment order. The appellant also urged that if the assessing officer was of the opinion that interest has not been imposed, he could have rectified the assessment order, under Section 33 of the Act. The Tribunal has, by a majority of its members, rejected the aforesaid contention.

7. A considered appraisal of the facts reveals that during assessment proceedings, a separate notice was served, requiring the appellant to show cause against the proposed levy of interest and penalty. The assessing authority should have, ideally decided the question of penalty and interest along with the assessment order but its failure to do so is, at the most, an irregularity, that does not render the impugned order null and void for want of jurisdiction.

The judgment in Kanhai Ram Thekedar's case (supra), does not advance the petitioner's case as revenue authorities sought to recover interest without passing an order imposing interest. In the present case, a show cause notice was issued and an order was passed levying interest.

8. An argument that once assessment stood concluded, the assessing authority could not have passed a separate order demanding interest and should have instead filed an application for rectification of the assessment order and then also within two years, disregards the fact that notice requiring the appellant to show cause against proposed levy of interest, was issued and was pending during assessment proceedings and thus, there was no need to have resort to rectification proceedings under Section 33 of the Act. Consequently, finding no merit, we dismiss the appeal and affirm the majority opinion of the Tribunal.

9. Any observation/opinion as to the merits of the controversy shall be disregarded by the Tribunal while deciding the appeal on merits.

PUNJAB & HARYANA HIGH COURT

VATAP No. 86 of 2013

VATAP No. 87 of 2013

STATE OF HARYANA

Vs.

RAVINDRA TUBES LTD. AND OTHERS

RAJIVE BHALLA AND AMOL RATTAN SINGH, JJ

13th February, 2015

HF ▶ Assessee

REVIEW- MAINTAINABILITY OF APPLICATION- SEC 41(1) OF HVAT ACT- ASSESSMENT ORDER PASSED BY ASSESSING AUTHORITY (DETC) – REVISION MADE BY COMMISSIONER - MATTER REMITTED FOR REASSESSMENT – APPEAL BY ASSESSEE BEFORE TRIBUNAL – ORDER PASSED BY ASSESSING AUTHORITY RESTORED SETTING ASIDE ORDER OF REVISIONAL AUTHORITY – REVIEW FILED BY DETC BEFORE TRIBUNAL NOT MAINTAINABLE AS ITS OWN ORDER BEING RESTORED DID NOT RENDER HIM AGGRIEVED – APPEAL BY STATE BEFORE HIGH COURT – HELD, REVENUE OUGHT TO HAVE EMPOWERED AN OFFICER OTHER THAN THE ASSESSING AUTHORITY TO FILE AN APPLICATION FOR REVIEW IN VIEW OF SEC41(1) OF THE ACT – APPEAL DISMISSED WITH LIBERTY TO STATE TO EITHER FILE AN APPEAL AGAINST ORDER OF TRIBUNAL, OR FILE A FRESH APPLICATION FOR REVIEW BY ANY PERSON CONSIDERED AGGRIEVED – *SECTION 41(1) OF HVAT ACT*

An assessment order was passed by the Assessing Authority (DETC). Revision was taken up by the Excise and Taxation Commissioner who remitted the matter to the assessing authority for reassessment. The assessee appealed against the order of the Commissioner before Tribunal who set aside the order of revisional authority and restored order of DETC. A review application was filed before Tribunal by the DETC which was dismissed on the ground that since the DETC's order had been restored, he was not aggrieved for filing the review application. The State filed an appeal against the order. It is held by the High Court that in view of section 41(1) of the Act, where an order passed by an assessing authority is restored by the Tribunal, the assessing authority cannot file an application for review against an order restoring its order whether as assessing authority or the person aggrieved. The State should have empowered an officer other than the Assessing Authority for filing it. However, State is at liberty to file an appeal against the order of the Tribunal, or to file a fresh application for review by any person considering himself aggrieved.

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

Mr. Sandeep Goyal, Advocate for the respondents.

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RAJIVE BHALLA, J.

1. By way of this order, we shall decide VAT Appeal Nos.86 and 87 of 201 3, as the impugned orders in both appeals are similar.

2. The State of Haryana is before us challenging order dated 17.11.2011, passed by the Haryana Tax Tribunal, dismissing an application for review.

3. Counsel for the State of Haryana submits that even though orders passed by the Excise and Taxation Commissioner-cum-Revisional Authority, Hisar, were set aside and assessment orders passed by the Deputy Excise and Taxation Commissioner-cum-Assessment Authority, were restored by the Tribunal, the Act does not prohibit the Deputy Excise and Taxation Commissioner-cum-Assessment Authority, who represents the State, from filing a petition for review of the order passed by the Tribunal. The majority opir1ion recorded by the Tribunal that as the order passed by the Deputy Excise and Taxation Commissioner had been restored he had no right to file an application for review, is incorrect as the Tribunal has not considered the words and expressions used in Section 41(1) of the Act. Counsel for the State of Haryana further submits that the minority opinion, affirming the right of the Deputy Excise and Taxation Commissioner, to file an application for review, is the correct opinion in law and may, therefore, be affirmed.

4. Counsel for the respondents submits that the Deputy Excise and Taxation Commissioner, Hisar, concluded assessment on 30.08.1995. The revisional authority set aside the assessment order and remitted the matter to the assessing authority for re-assessment. The respondents challenged the order passed by the revisional authority before the Tribunal. The Tribunal, set aside the order passed by the revisional authority and restored the order passed by the assessing authority, i.e. Deputy Excise and Taxation Commissioner, Hisar. The Deputy Excise and Taxation Commissioner filed an application for review. The Tribunal has rightly held that in this situation, as the Deputy Excise and Taxation Commissioner is not a person aggrieved, he could not maintain an application for review.

5. We have heard counsel for the parties and perused the paper book..

6. The short question that arises for consideration is whether the Deputy Excise and Taxation Commissioner could maintain an application for review, under Section 41(1) of the Act, against the order passed by the Tribunal, restoring his order. Admittedly, the order passed by the Deputy Excise and Taxation Commissioner, was restored by the Tribunal. The Deputy Excise and Taxation Commissioner, filed an application for review of this order. The Tribunal has dismissed the application by holding that as order passed by the Deputy Excise and Taxation Commissioner has been restored, he is not a person aggrieved and, therefore, cannot maintain an application for review.

7. Section 41(1) of the Act empowers the "Assessing Authority" or "any person aggrieved" to file an application for review. A situation may arise, as has arisen in the present case, where an order passed by an assessing authority (the Deputy Excise and Taxation Commissioner), is restored by the Tribunal. In such a situation, the assessing authority cannot possibly file an application for review against an order restoring its order whether as the

assessing authority or the person aggrieved. The revenue should have empowered an officer other than the assessing authority to file an application for review.

8. We, therefore, find no reason to differ from the majority opinion recorded by the Tribunal and while dismissing the appeal, grant liberty to the State of Haryana to either file an appeal against the order passed by the Tribunal, remanding the matter to the assessing authority or to file a fresh application for review by any person considering himself to be aggrieved.

PUNJAB & HARYANA HIGH COURT

CWP No. 8921 of 2014

RAJDHANI SALES
Vs.
STATE OF PUNJAB AND OTHERS

RAJIVE BHALLA AND B.S. WALIA, JJ.

5th February, 2015

HF ▶ None

INPUT TAX CREDIT – FAILURE TO PRODUCE ACCOUNT BOOKS – AGREED BY PETITIONER TO DEPOSIT TAX LEVIED BY DEPARTMENT ON ITS PURCHASES FROM A PARTICULAR FIRM PROVIDED DEPARTMENT AGREES TO RE- EXAMINE ITS INPUT TAX CREDIT DISALLOWED DUE TO FAILURE TO PRODUCE ACCOUNT BOOKS ETC- DEPARTMENT ACCEPTED THE PROPOSITION PROVIDED AMOUNT DUE DEPOSITED – MATTER REMITTED BY HIGH COURT TO ASSESSING OFFICER PROVIDED PETITIONER DEPOSITS RELEVANT DOCUMENTS AND DEPOSITS THE TAX FAILING WHICH ORIGINAL ORDERS TO PREVAIL.

The petitioner stated that if the state is ready to re examine the ITC disallowed for failure to produce invoices and account books , the petitioner is ready to deposit Rs 4, 83,090/- levied as tax for purchases from M/s Jai Laxmi Agro Industries. The state on the other hand submitted that if the petitioner deposits the so mentioned amount, the assessing officer shall re- examine the claim for ITC, provided all relevant documents are produced within one month. On writ being filed, it is held that the matter is restored to the Assessing Officer, to examine the claim for ITC but only if the petitioner produced relevant documents within one month. The order so passed is subject to the petitioner's depositing Rs 4,83,090/-.Failure to do so would have the original assessment order prevailing.

Present: Mr. Avneesh Jhingan, Advocate, for the petitioner.

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

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RAJIVE BHALLA, J.

1. The petitioner challenges the vires of Section 62(5) of the Punjab VAT Act, 2005 (hereinafter to be referred as 'the Act'). Counsel for the petitioner states that he has instructions to state that in case the State is ready to re-examine input tax credit disallowed

for failure to produce purchase invoices and account books, the petitioner is ready to deposit Rs.4,83,090/-, the tax levied for purchase from M/s Jai Laxmi Agro Industries.

2. Counsel for the State of Punjab submits that she has instructions to state that in case the petitioner deposits Rs.4,83,090/-, the Assessing Officer shall re-examine the petitioner's claim, for entitlement to the input tax credit, provided the petitioner produces all relevant purchase invoices/documents, within one month.

3. We have heard counsel for the parties and in view of the statement made by counsel for the parties, dispose of the writ petition by setting aside the impugned orders and restoring the matter to the Assessing Officer, to examine the petitioner's claim for input tax credit, afresh and in accordance with law, but only if the petitioner produces all relevant purchase invoices/documents etc., within one month.

4. In case, the petitioner does not produce the relevant purchase invoices/documents, within one month, the original assessment order shall come into effect, forthwith. The order so passed is, however, subject to the petitioner's depositing Rs.4,83,090/- within three weeks from today.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP No. 16808 OF 1994

SHAKTI INDUSTRIES
Vs.
REVISIONAL AUTHORITY-CUM-DEPUTY EXCISE AND TAXATION COMMISSIONER

RAJIVE BHALLA AND AMIT RAWAL, JJ.

30th January, 2015

HF ▶ Petitioner/ assessee

ENTIES IN SCHEDULE – HOOKA (BRASS/IRON) – WHETHER CLASSIFIED AS UTENSILS- PAYMENT OF TAX ON SALE OF HOOKA AT THREE PAISA IN A RUPEE CONSIDERING IT A UTENSIL – ASSESSMENT CONCLUDED ACCEPTING THIS CONTENTION INITIALLY – SALE OF HOOKA TREATED AS GENERAL GOODS TAXABLE @ 8 % BY ASSESSING OFFICER IN FOLLOWING ASSESSMENT YEAR – APPEAL ACCEPTED BY FIRST APPELLATE AUTHORITY – REVISIONAL AUTHORITY HELD IT AS NOT FALLING UNDER CATEGORY OF UTENSILS ON BASIS OF ORDER PASSED BY TRIBUNAL IN SIMILAR CASE FOR OTHER YEARS – WRIT FILED – HELD, ABSENCE OF LEGISLATIVE INTENT TO CONFINE THE TERM 'UTENSIL' TO ANY PARTICULAR UTENSIL, OR TO THE MODE AND MANNER OF ITS USE OR TO PLACE OF ITS USE, RENDERS HOOKA TO FALL WITHIN THE MEANING OF THE WORD 'UTENSIL' LIABLE TO TAX AT THREE PAISA IN A RUPEE- OBSERVATION OF REVISIONAL AUTHORITY HELD TO BE NARROW AND ERRONEOUS- ORIGINAL ASSESSMENT ORDERS RESTORED.

As per the notification issued prescribing a rate of 3 paise in a rupee on sale of ferrous and non ferrous metal utensils including brass utensil ,the petitioner manufacturing brass/iron hookas deposited tax at three paisa in a rupee treating it as utensil. The returns were initially accepted . For the following assessment years the assessing officer held that hooka fell under the category of general goods and liable to tax @ 8 %. The first appeal was accepted. For three different years, the Revisional Authority held hookas not to be treated as utensils and ordered recovery of tax by following the judgement passed in case of M/s Standard Steel and Metal Ind V State of Haryana. Aggrieved by the order , a writ was filed. The Hon'ble High Court held that, absence of legislative intent to confine the term 'utensil' to any particular utensil, or to the mode and manner of its use or to place of its use, renders hooka to fall within the meaning of the word 'utensil' liable to tax at three paisa in a rupee. The observation of the Revisional authority was held to be narrow and erroneous and original assessment orders were restored.

Case referred:

M/s Standard Steel & Metal Industries, Sonepat vs. The State of Haryana STA No. 211 of 93-94

Present: Mr. Rajiv Agnihotri, Advocate, for the petitioner.

Ms. Mamta Singal Talwar, AAG, Haryana

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RAJIVE BHALLA, J.

1. The petitioner prays for issuance of a writ of certiorari quashing orders dated 15.04.1994 (Annexures P-8, P-8/A, P-8/B and P-8/C), passed by the Deputy Excise & Taxation Commissioner-cum-Revisional Authority, Rohtak, holding that as Hookas are not "utensils", sales tax would be charged, under the entry relating to general trade.

2. The petitioner is engaged in the business of manufacture and sale of brass/ iron Hookas and their parts. The State of Haryana, issued a notification, dated 18.03.1988, prescribing a rate of 3 paise in a rupee on sale of ferrous and non ferrous metal utensils including brass utensils. The petitioner deposited sales tax at three paise in a rupee by treating Hookas as utensils and accordingly filed a return for assessment year 1989-90, which was accepted by the Assessing Officer. However, for the next assessment year, the Assessing Officer, vide order dated 30.12.1992 held that Hookas are not utensils and by treating them as general goods charged them to sales tax @ 8%. The petitioner filed an appeal before the Joint Excise and Taxation Commissioner (Appeals), Rohtak, which was allowed on 31.03.1993, by holding that as Hookas are utensils, the petitioner is obliged to pay tax at the rate of 3 paise in a rupee. The revisional authority, however, served notices for re-assessment, for assessment years 1988-89, 1990-91, 1991-92 and 1992-93, calling upon the petitioner to show cause why these assessment orders be not revised as Hookas and their parts are not utensils.

3. The petitioner filed a writ petition, praying that the show cause notices be quashed but the writ petition was dismissed as pre-mature. The petitioner, thereafter, filed an application dated 15.06.1994, asking the revisional authority to furnish information of the material that forms the basis of its opinion that Hookas and their parts are not utensils. The revisional authority did not respond to the application but vide order dated 08.12.1993, passed orders Annexures P-8, P-8/A, P-8/B and P-8/C, holding that Hookas are not utensils and ordered recovery of the shortfall in payment of tax. The revisional authority based its opinion upon an order dated 08.12.1993, passed by the Sales Tax Tribunal, Haryana, in STA No.211 of 93-94 (M/s Standard Steel & Metal Industries, Sonepat v. The State of Haryana), holding that a Hooka is not a utensil.

4. Counsel for the petitioner submits that admittedly the State of Haryana has notified that ferrous and non-ferrous metal "utensils", including pressure cookers would invite sales tax at three paise in a rupee. The expression "utensils" is not defined in the Act or under the rules and does not restrict the meaning of the word "utensil" to utensils used in a kitchen. The meaning assigned by the revisional authority, based upon an opinion recorded by the Tribunal in the case of M/s Standard Steel & Metal Industries, Sonepat (supra), is incorrect. A utensil is a tool, receptacle/instrument, vessel or a container and may or may not be used in a kitchen and may depending upon its user, be used for various purposes, at home, in the kitchen, for ceremonial purposes, dairy farming in hotels, restaurants etc. The base of the Hooka, is a receptacle/container used for storing water. A hooka is used in rural households and is also an integral part of social interactions, thereby clearly proving that hooka is a utensil and would, therefore, fall in the entry pertaining to ferrous and non ferrous utensils. The revisional authority has not dealt with submissions oral or written advanced on behalf of the petitioner. The petitioner had been collecting and paying tax for the last many years @ 3% and as there was a bonafide dispute as to classification, namely, the levy of interest and penalty is not warranted.

5. Counsel for the revenue, on the other hand, submits that while exercising power under Section 40(2) of the Haryana General Sales Tax Act, the revisional authority has rightly relied upon an order passed by the Tribunal in M/s Standard Steel & Metal Industries, Sonepat (supra), to hold that sale of a Hooka falls in general trade and must be taxed @ 8% to a rupee. The mere fact that the word "utensil" is not defined under the Act, does not detract from the fact that a Hooka cannot be held to be utensil as it is used for smoking and cannot be used in a kitchen, hotel, restaurant etc. As regards the assumption of jurisdiction by the revisional authority, it is contended that as the order passed by the Tribunal holding that a Hooka is not a utensil, was binding upon the Assessing Officer, the revisional authority was empowered,in the exercise of power under Section 40 of the Act, to revise the assessment orders. It is further contended that the levy of interest and penalty is a natural consequence of the failure of the petitioner to pay tax at the correct rate.

6. We have heard counsel for the parties, perused averments in the petition as well as reply filed by the State of Haryana and the impugned orders.

7. The question that calls for an answer is whether the Hooka, (brass/iron base) manufactured and sold by the petitioner is a "utensil", for purposes of payment of sale tax under the Haryana General Sales Tax Act, 1973.

8. Admittedly, vide notification dated 18.03.1988, the State of Haryana notified a rate of three paise in a rupee as sales tax for "ferrous and non-ferrous metal utensils including pressure cookers".

9. Admittedly, the petitioner was assessed to sales tax by treating the Hooka, manufactured by the petitioner, as a utensil, but for the following assessment years the Assessing Officer changed his opinion and held that a Hooka is not a utensil and, therefore, chargeable to VAT at 8 paise in a rupee. The petitioner filed an appeal, which was allowed by holding that a hooka is a utensil. The revisional authority, thereafter, revised assessments by placing reliance upon an order dated 08.12.1993, passed by the Sales Tax Tribunal Haryana in M/s Standard Steel & Metal Industries, Sonepat (supra), holding that a hooka is not a utensil. A relevant extract from the order, passed by the Sales Tax Tribunal, in M/s Standard Steel & Metal Industries, Sonepat (supra), reads as follows:-

> "*I have considered the submissions of the parties and have also seen the facts on record. The sole point for consideration before the Tribunal in the present case is whether the Hooka is a utensil or a general goods. This issue is quite clear. The utensils are those pots(goods) which are generally used in kitchens, restaurants and hotels etc. The hookas cannot be said to be utensils in common parlance and is certainly a general good which has rightly been treated as such and has been taxed at the general rate of tax. Since the tax was due with the returns, the levy of interest and penalty both is fully in accordance with the provisions of law for late payment and is hereby confirmed. I, therefore, find no force in the arguments and the appeal is dismissed."*

10. A perusal of the above order reveals that the Tribunal has without reference to any definitions of the word "utensil" or any meaningful discussion, abruptly, held that as utensils are pots/goods, that are generally used in kitchens, restaurants and hotels, a hooka cannot be classified as a utensil.

11. Before we answer the question posed, namely, whether a hooka is a utensil, for the purposes of a Haryana General Sales Tax Act, it would be appropriate to record that words and expressions used in a taxing statute are to be construed strictly and where a generic word appears in a statute, the word so used has to be interpreted and understood in it common

generic sense, by reference to the local area to which it applies, and after considering legislative intent, if discernible from the statutory provision.

12. The relevant entry uses the words "ferrous and nonferrous metal utensils including pressure cookers". Neither the Act nor the Rules define the word "utensil". The word, therefore, has to be understood and interpreted in its common generic sense as understood in the State of Haryana. Before recording our final opinion as to the meaning of the word "utensil", it would be appropriate to reproduce the meaning of the word "utensil, as set out in various dictionaries both legal and general, as follows:-

> ***Shorter Oxford Dictionary***
>
> ***Utensil:- "****Any article useful or necessary in a house hold; a domestic implement, vessel, or article of furniture; and instrument or vessel in common use in a kitchen, dairy , etc; any vessel or other article serving a useful end or purpose; a tool or implement used by artisans, farmers, etc."*
>
> ***Stroud's Judicial Dictionary of Words & Phrases, Volume 3, Sixth Edition;***
>
> ***UTENSIL:-*** *"anything necessary for our use and occupation; household stuffe" (Cowel).*
>
> *CHAMBERS 21st CENTURY DICTIONARY, REVISED EDITION-*
>
> *"utensil 'ju tensil'- noun an implement or tool, especially one for every day or domestic use. Cooking utensils. 14C: from French utensil, from Latin utensils 'fit for use' or 'useful', from uti to use."*
>
> *THE NEW INTERNATIONAL WEBSTER'S COMPREHENSIVE DICTIONARY OF ENGLISH LANGUAGE, ENCYCLOPEDIC EDITION-*
>
> *"u-ten-sil (yoo-ten sel) n. A vessel, tool, implement, etc.; serving a useful purpose, especially for domestic or farming use. See synonyms under TOOL. [-OF utensile- L utensils fit for use u-tens, ppr. Of uti use]".*

13. A utensil as commonly understood and defined, is an implement, a tool, a receptacle, a vessel, a container etc. that may be used for various purposes, depending upon the nature of the utensil and the use to which it is put. The same utensil may be used in a kitchen, in a hotel, in a restaurant, for worship, for ceremonial purposes, in a dairy farm, for farming and various other purposes that may require the use of a utensil, as a tool, a receptacle, an instrument, a vessel or a container. A utensil is not necessarily confined to articles used in a kitchen, a hotel or a restaurant but is often misunderstood as referring to an item used in a kitchen. While interpreting words, used in a statute, a court shall make an attempt to discern legislative intent and if discernible, proceed to interpret the word accordingly. A perusal of the relevant entry reveals that it does not confine the word utensil to utensils used in a kitchen. If the State had intended to confine the meaning of the word "utensil" to articles used in kitchens, it could have easily added the words "used in a kitchen", after the word "utensil". The State was conscious that if it assigned such a restrictive meaning to the word 'utensil' it would lead to multiple complications and, therefore, used the generic term "utensil" without linking it to any particular utensil, except pressure cookers, or to the mode and manner of its user or to the place of its user. The word utensil, therefore, must necessarily be understood as a tool, a receptacle, a vessel, an instrument, or a container, than may be used as a tool, a receptacle, an instrument, a vessel or a container.

14. A Hooka, particularly in rural areas of the State of Haryana, is admittedly used to smoke tobacco at home. A hooka is also an integral part of social interactions in rural areas and is, therefore, used at home and in social and public interactions. A Hooka has a brass base fitted with two pipes. The first pipe is attached to an earthen pot where coal and tobacco are placed and the second pipe is used to puff tobacco smoke. The brass base is a receptacle used for storing water and for fixing the pipes of a Hooka. A Hooka, as referred to above, is used in rural societies, at home or outside and as it is a receptacle/container used for storing water, through which smoke is passed before it is inhaled it would necessarily partake the nature of a utensil. We are, therefore, inclined to hold that in the absence of any legislative intent to confine the meaning of the word "utensil, to any particular place, mode or manner of user, the hooka manufactured by the petitioner must necessarily fall within the meaning of the word "utensil".

15. The opinion recorded by the Sales Tax Tribunal, which forms the basis of the order passed by the revisional authority, reveals a general sweeping assumption that utensils are used only in kitchens, hotels and restaurants, without referring to any definition, recording any meaningful discussion and without referring to fact that a Hooka is used at home and in social interactions, in the State of Haryana. The revisional authority, did not record any independent opinion but relied upon the opinion recorded by the Sales Tax Tribunal in M/s Standard Steel & Metal Industries, Sonepat (supra).

16. We are, therefore, of the firm opinion that the order passed by the revisional authority holding that a Hooka would fall under the entry relating to general trade is based upon a narrow and erroneous interpretation of the word "utensil".

17. In view of what has been recorded hereinabove, we answer the question in favour of the petitioner by holding that the Hooka and its parts manufactured/sold by the petitioner partake the nature of a "utensil", liable to sales tax at the rate of 3 paise in a rupee.

18. Consequently, we allow the writ petition, set aside orders dated 15.04.1994 and restore the original assessment orders.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP No. 3903 of 2015

AMIT SINGLA
Vs.
UNION OF INDIA AND ANOTHER

S.J. VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

11th March, 2015

HF ▶ Revenue

WRIT- ALTERNATIVE REMEDY – SHOW CAUSE NOTICE – SERVICE TAX – SHOW CAUSE NOTICE SERVED IN RESPECT OF TAX PAYABLE FOR A SPECIFIED PERIOD - ANOTHER SHOW CAUSE NOTICE SERVED IN RESPECT OF DIFFERENT SERVICES BUT PERIOD ALREADY INCLUDED IN FIRST SHOW CAUSE NOTICE – CONTENTION BY PETITIONER THAT FRESH SHOW CAUSE NOTICE CAN'T BE SERVED IN RESPECT OF DIFFERENT SERVICES FOR PERIOD WHICH IS THE SUBJECT MATTER OF FIRST SHOW CAUSE NOTICE – CHALLENGE TO SHOW CAUSE NOTICE NOT ENTERTAINED AT THIS STAGE – ISSUE TO BE ADJUDICATED BY AVAILING ALTERNATE REMEDY – WRIT DISMISSED.

A show cause notice for assessment years 2005-06 to 2009-10 was issued for recovery of service tax payable in respect of suppressed material. On appeal, the recovery by commissioner was stayed by Tribunal. However, a fresh show cause notice for assessment years 2008-09 to 2011-12 was served in respect of different services. The petitioner contended that since the two years ie 2008-09 and 2009-10 were the subject matter of both notices, fresh show cause notice could not be served. Dismissing the writ, it is held that such issue is to be adjudicated by availing alternate remedy. Challenge to show cause notice is not to be entertained at this stage by court.

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

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S.J. VAZIFDAR A.C.J.

1. The petitioner has challenged a show-cause notice dated 04.10.2013 issued pursuant to and under the provisions of Section 73(1) of the Finance Act, 1994 (for short 'the Act').

2. The petitioner contends that prior to the impugned show cause notice the respondents had served a show-cause notice dated 19.10.2010. One of the contentions in this first show cause notice was that the petitioner had suppressed material in respect of its business of 'Goods

Transport Agency'. The respondents contended that the service tax was payable in respect of this part of the petitioner's business. By an order dated 27.06.2012 the Commissioner confirmed and ordered the recovery of an amount of service tax of about ` 70 lacs under section 73(1) of the Act in respect thereof. The order has been challenged by the petitioner before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi. A stay

against the order dated 27.06.2012, we are informed, has been granted and the appeal is pending.

3. The impugned show cause notice dated 04.10.2013 has been issued again under section 73 of the Act in respect of the assessment years 2008-09 to 2011-12. The earlier show-cause notice was in respect of the assessment years 2005-06 to 2009-10. The petitioner contends that two years, namely, the years 2008-09 and 2009-10 are the subject matter of both the show cause notices. However, the second show cause notice is in respect of fresh material and relating to 'Cargo Handling Services" and 'Business Auxiliary Service'. It is contended that this fresh show cause notice even though in respect of different services could not be issued in respect of the period which is already the subject matter of the first show cause notice.

4. We do not consider it either necessary or appropriate to entertain a challenge to the show cause notice on this ground at this stage. Even the issue whether the further show cause notice can be issued in respect of the same assessment year but for different taxable services ought in the first instance be adjudicated upon by availing the alternate remedy provided under the Act. Issues of fact will also be required to be gone into in the event of the question being determined against the petitioner.

5. The writ petition is, therefore, dismissed. Needless to clarify that the petition has been dismissed only on the ground that the petitioner ought to avail of the alternate remedy. We have not expressed any views on-merits.

PUNJAB & HARYANA HIGH COURT

CWP NO. 747 OF 2013

VIVEK SHIKSHA SAMITI
Vs.
CHIEF COMMISSIONER OF INCOME TAX, PANCHKULA

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

25th March, 2015

HF ▶ Petitioner

EXEMPTION – INCOME TAX ACT – EDUCATIONAL INSTITUTION APPLICATION REJECTED ON MERITS AND NON- COMPLIANCE – APPLICATION FILED FOR EXEMPTION U/S 10(23C)(vi) OF THE ACT – REJECTED ON TWO GROUNDS - PROFITS OBSERVED TO BE HIGHER THAN 15% IN THE PAST FIVE YEARS AND NON -FURNISHING OF REQUISITE DOCUMENTS – PETITIONER ALLEGED HAVING DULY FURNISHED DOCUMENTS – WRIT DISPOSED OF WITH AN OPPORTUNITY TO PETITIONER TO PRODUCE DOCUMENTS - MATTER TO BE DECIDED BY COMMISSIONER OF INCOME TAX IN VIEW OF JUDGEMENT PASSED IN QUEEN'S EDUCATIONAL SOCIETY – *SEC 10 (23C) (vi) OF INCOME TAX ACT*

The petitioner had applied for exemption under the Income Tax Act. The application was rejected as it was observed that the profit margin was 25.05% which is higher than the limit of 15% as provided. Also, documents such as vouchers were not produced. However, a writ was filed alleging that the petitioner had furnished the documents. It is observed by the court that there had been some communication gap. One more opportunity is granted to the petitioner to produce the documents. The matter is to be decided by the Commissioner income Tax (Exemption) in view of Supreme Court judgement passed in case of Queen's Educational Society. The writ is disposed of.

Case Referred

Queen's educational society Vs. Commissioner of Income Tax CA No.5167 of 2008

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

Ms.Urvashi Dhugga, Advocate, for the respondent.

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S.J.Vazifdar, Acting Chief Justice

1. Rule. Rule returnable and heard finally.

2. The petitioner has challenged the order dated 24.09.2012 (Annexure P5), passed by the Chief Commissioner of Income Tax, Panchkula, rejecting its application for exemption, filed under Section 10(23C)(vi) of the Income Tax Act, 1961.

3. The impugned order observes that after debiting the depreciation etc., the profit margin is 25.05%, which is higher than the limit of 15%, under the said provision. However, as rightly argued on behalf of the respondent, the order does not state that this is for more than 5 years. Disallowance can only be if this position continues for a period of more than 5 years. The order is also passed *inter alia* on the ground that the petitioner did not produce certain documents such as vouchers.

4. Mr.Goyal, learned counsel for the petitioner states that vide the notice dated 25/29.03.2012 (Annexure P3), the respondent called upon the petitioner to furnish certain documents. The same were furnished, as is evident from the petitioner's letter (Annexure P4). The petitioner's grievance is that the impugned order should not have been passed due to the non-compliance of the said notice dated 25/29.03.2012. Further, the respondent did not, upon receipt of the reply, allege that the particulars have not been furnished.

5. It is not necessary to go into this aspect in any further detail. There appears to have been some communication gap in this regard. The ends of justice would be served by granting the petitioner, an opportunity of producing the documents required by the respondent.

6. In these circumstances, the impugned order dated 24.09.2012 (Annexure P5) is set aside and the matter is remanded for a fresh decision, after giving the petitioner an opportunity of producing any document(s) that the respondent may require. We are informed that the matter will, now, be decided by the Commissioner of Income Tax (Exemption), Chandigarh. The matter shall be decided, in accordance with law, including on the basis of the judgment passed by the Supreme Court in **CA No. 5167 of 2008** titled *M/s Queen's Educational Society Vs. Commissioner of Income Tax*, decided on 16.03.2015.

Writ petition is, accordingly, disposed of.

PUNJAB & HARYANA HIGH COURT

I.T.A. No.350 of 2014

MOHAN LAL BANSAL
Vs.
INCOME TAX OFFICER, WARD-II(1), FARIDABAD

S.J. VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

31st March, 2015

HF ▶ Appellant

REMAND – INCOME TAX ACT – MATTER REMANDED TO ASSESSING OFFICER BY ITAT – CONTENTION RAISED BEFORE HIGH COURT THAT IMPUGNED ORDER CONTAINS OBSERVATIONS BY TRIBUNAL AGAINST APPELLANT – ON APPEAL AGAINST REMAND ORDER, HELD THAT APPREHENSION NOT WELL FOUNDED – OBSERVATIONS ARE PRIMA FACIE – HAD THEY BEEN CONCLUSIVE TRIBUNAL WOULD HAVE DECIDED ITSELF – MATTER TO BE LEFT OPEN FOR THE APPELLANT TO RAISE CONTENTIONS IN FURTHER PROCEEDINGS - REMAND PROCEEDINGS TO BE DECIDED ON MERITS UNINFLUENCED BY OBSERVATION OF TRIBUNAL – WRIT DISPOSED OF.

In this case the matter was remanded by Income Tax Tribunal pertaining to assessment year 2007-08 for the assessing officer to decide genuineness of purchases. Certain observations were made against appellant in the impugned order.An appeal was filed against the remand order. It is held that observations made by Tribunal were only prima facie and not conclusive; otherwise the Tribunal would have decided the matter itself. Parties should be allowed to keep it open to raise contentions in further proceedings. It is held that the remand proceedings ought to be decided on merits uninfluenced by observations made by the Tribunal in the impugned order.

Present: Mr. Sandeep Goyal, Advocate for the appellant

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE

This is an appeal against the order of the Income Tax Appellate Tribunal remanding the matter pertaining to assessment year 2007-08 to the Assessing Officer.

2. We are not inclined to interfere with the Tribunal's exercise of jurisdiction in remanding the matter for fresh consideration. It will be necessary for the Assessing Officer to determine whether the transactions of purchase by the appellant from the two entities are genuine or not.

3. Mr. Goyal submitted that the impugned order contains observations against the appellant. The apprehension is not well-founded. Firstly, the observations are only *prima facie*. If they were conclusive in nature, the Tribunal would have itself decided the matter. All the contentions of the parties are obviously open before the Assessing Officer and in further proceedings. The proceedings, upon remand, would be decided on their merits uninfluenced by the *prima facie* observations of the Tribunal in the impugned order. Even issues such as whether the other two entities had discharged their onus regarding the genuineness of the transactions are kept open. It would also be open, for instance, for the appellant to contend that even assuming that they did not or do not establish the genuineness of their transactions, it may not effect the appellant's case, if the appellant is otherwise able to establish the genuineness of his transactions.

4. The appeal is, therefore, disposed of but subject to the above clarifications. It is reiterated that the remand proceedings whether before the Assessing Officer or in any proceedings to challenge the decision of the Assessing Officer would be decided on their own merits uninfluenced by the observations of the Tribunal.

PUNJAB & HARYANA HIGH COURT

VATAP NO. 211 OF 2014

GHASI RAM PANNA LAL
Vs.
STATE OF HARYANA & ANOTHER

S.J. VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

24th March, 2015

HF ▶ Appellant

CONDONATION OF DELAY – APPEAL – SICKNESS OF MARRIED DAUGHTER – ASSESSMENT YEAR 2007-08 – APPEAL AGAINST ASSESSMENT ORDER AND PENALTY ORDER FILED AFTER 761 DAYS AND 250 DAYS RESPECTIVELY SEEKING CONDONATION ON GROUNDS OF ILLNESS OF MARRIED DAUGHTER OCCUPYING THE WHOLE FAMILY IN HER TREATMENT – APPEAL REJECTED OBSERVING THAT FOR THE ASSESSMENT YEAR IN QUESTION, BUSINESS HAD RISEN AND THAT MARRIED DAUGHTER WAS RESPONSIBILITY OF IN-LAWS- APPEAL BEFORE TRIBUNAL DISMISSED – DELAY CONDONED BY COURT ACCEPTING ILLNESS OF MARRIED DAUGHTER IS A SUFFICIENT CAUSE IRRESPECTIVE OF THE FACT THAT BUSINESS OF APPELLANT HAD FLOURISHED – FIRST APPELLATE AUTHORITY DIRECTED TO HEAR APPEAL ON MERITS – *SEC 5 OF LIMITATION ACT, 1963*

Assessment was framed for the year2007-08 vide order dated 29/3/2011. Penalty was imposed on 13/8/2012. An appeal was filed before the First Appellate Authority along with an application for condonation of delay against the order dated 29/3/2011 after a delay of 761 days and against penalty order after a delay of 250 days. In both cases the ground for condonation was taken as medical illness of married daughter. It was pleaded that the daughter of the appellant had been married in 2011 in Balliya district in U.P. and had been diagnosed with blood clot cancer disease few months after marriage and had to be brought back to Gurgaon for medical treatment. The family had remained occupied for a period of 2 years for getting her treated. The Joint Excise and Taxation Commissioner did not find this as a sufficient cause and observed that since the business had flourished in the assessment year, shelter of daughter's illness was a lame excuse. Moreover, it was held that married daughter was a responsibility of her in- laws. An appeal was filed before Tribunal which was also rejected. On appeal before High Court, it is held that the the ground taken up by appellant was a sufficient cause which was proved with sufficient medical record. Mere flourishing of appellant's business was held not to be a ground for not condoning the delay. Accepting the appeal, delay is condoned and the Ld.Joint Excise & Taxation Commissioner is directed to hear the appeal on merits.

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

Ms.Mamta Singla Talwar, AAG, Haryana.

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G.S.SANDHAWALIA J.

1. This judgment shall dispose of VATAP Nos.211 & 230 of 2014, involving common questions of law and facts. However, to dictate orders, facts have been taken from VATAP No. 211 of 2014 titled *M/s Ghasi Ram Panna Lal vs. State of Haryana & another.*

2. Challenge in the present appeal is to the order dated 06.05.2014 (Annexure A7), passed by the Haryana Tax Tribunal, Chandigarh (for short, the 'Tribunal'), whereby it has failed to exercise its jurisdiction and declined to interfere in the Appellate Order dated 21.10.2013 (Annexure A5) vide which the Joint Excise & Taxation Commissioner (Appeals) Faridabad (for short, the 'JETC') had dismissed the appeal of the appellant, against the order of assessment dated 29.03.2011 (Anneuxre A2) being time barred by 761 days, as per the case of the respondents. Similarly, the second appeal filed against the order of penalty, was also dismissed, being time barred by 250 days, as per the case of the respondents. Appeal No.230 of 2014 pertains to the case of penalty, imposed under Section 38 of the Haryana General Sales Tax Act, 1973, vide order dated 13.08.2012 and the appeal against the same was also dismissed on the same ground.

3. The facts of the case would go on to show that the assessment was made on 29.03.2011 in the case of the appellant, who is a proprietary concern and a dealer, trading in iron & steel, cement & white cement and ACC sheets. Since no appeal was filed against the assessment order, the respondent-authorities imposed a penalty of Rs. 36,26,530/- on 13.08.2012. An appeal was filed before the JETC along with an application for condonation of delay against the order dated 29.03.2011 and the plea taken was that the date of communication of the order was 25.06.2011. The ground for condonation of delay was that the daughter of the appellant, who had been married in February, 2011, in Baliya District in Uttar Pradesh, had been diagnosed with blood clot cancer disease few months after the marriage and had to be brought back to Gurgaon for medical treatment. She had remained hospitalised in Gurgaon for a long period and was also treated as outdoor patient after series of clinical tests. The family had remained occupied for a period of 2 years for getting her treated and thus, a sufficient case was sought to be made out on that ground. The medical file was to be produced during the hearing.

4. The JETC dismissed the appeal on the ground that there was no sufficient ground or logical explanation shown why the appeal had not been filed within the specified period of limitation. The gross turn-over of the appellant firm having increased to Rs. 3.07 crores during the assessment year 2007-08 showed that the appellant was very active in his business and could not take shelter of the so-called illness of his married daughter. Further justification was sought to be given in the order by holding that the daughter was not divorced and the in-laws had the responsibility and therefore, it was only a lame excuse and the JETC declined to condone the delay, vide order dated 21.10.2013 (Annexure A5).

5. The appellant took the case to the Tribunal, which has further dismissed the appeal vide the impugned order dated 06.05.2014 (Annexure A7) by recording a finding that the appellant had not bothered about the filing of the appeal and he had no intention of doing the same and noticed that the limitation period was of 60 days from the date of communication and though under Section 5 of the Limitation Act, 1963, the Courts had power, in the totality of the events, did not interfere.

6. The appellant has, thus, raised the following question of law:

"Whether on the facts and in the circumstances of the case the Ld. Tribunal was justified in not condoning the delay wherein there exists a sufficient cause for the same?"

7. In addition to the above question of law, the issue of perversity also arises in the present case as there is no denying the fact that the appellant has placed sufficient material on record before this Court in the form of medical treatment file of his daughter, Ms. Ritika Singla, aged around 26 years. The treatment started in the month of June, 2011 and the MRI report was prepared at Bangalore. Other materials have also been placed on record to show that she had been treated in various hospitals at New Delhi, including Sir Ganga Ram Hospital, Dr.Doda's Diagnostics & Healthcare and Medanta Hospital at Gurgaon. A perusal of the said record would go on to show that the patient was suffering from complication of blood flow in the femoral veins which had got compressed. The said fact was never specifically denied or controverted in any manner by the respondent-authorities and it is not that the authorities came to a different conclusion that the certificates issued were incorrect and were only created for making out a sufficient cause. The illness was also of the period after the order was passed in March, 2011 and allegedly communicated in June, 2011.

8. Merely because the appellant was a dealer in cement, steel and ACC sheets and that his business kept on flourishing during this period would not be a ground to hold that the delay was not to be condoned. The reasoning to deny the benefit of condonation of the delay caused cannot be held to be justified in the facts and circumstances of the case. The Apex Court in ***Collector, Land Acquisition, Anantnag Vs. Mst. Katiji (1987) 2 SCC 107*** and ***G.Ramegowda, Major Vs. Special Land Acquisition Officer, Bangalore (1988) 2 SCC 142***, has held that each and every days' delay is not to be explained and that the word 'sufficient cause' is an elastic term and if the explanation offered is not concocted, the case should be decided on merits as substantial justice is the paramount consideration.

9. Reference can also be made to the principles laid down by the Apex Court in the case of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & others 2013 (12) SCC 649***, which read as under:

"15. From the aforesaid authorities the principles that can broadly be culled out are:

i) There should be a liberal, pragmatic, justice-oriented, nonpedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.

iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

vi) *It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.*

vii) *The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.*

viii) *There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

ix) *The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

x) *If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.*

xi) *It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.*

xii) *The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.*

xiii) *The State or a public body or an entity representing a collective cause should be given some acceptable latitude.*

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

a) *An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.*

b) *An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.*

c) *Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.*

d) *The increasing tendency to perceive delay as a non- serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."*

10. In the present case, the application was very specific and the delay was sought to be condoned on the ground of illness of his married daughter who had been treated at various hospitals all over the country and had been suffering from blood clot cancer disease.

11. In such circumstances, we are of the opinion that the question of law framed above is liable to be answered in favour of the appellant that the Tribunal was not justified in not allowing the application for condonation of delay and the reasoning given to dismiss the appeal, suffered from perversity. Resultantly, the order dated 06.05.2014 (Annexure A7), passed by the Tribunal, is set aside and the application for condonation of delay, filed before the JECT is accepted on account of sufficient cause having been shown. Resultantly, the JECT shall hear both the appeals on merits. Both the appeals are allowed in the above stated terms.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP NO. 6405 OF 2015

NOVATEUR ELECTRICAL AND DIGITAL SYSTEMS PRIVATE LIMITED
Vs.
STATE OF HARYANA AND OTHERS

S.J. VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J.

6th April, 2015

HF ▶ Petitioner

BANK GUARANTEE – NOTICE FOR ATTACHMENT WHILE APPEAL PENDING BEFORE FIRST APPELLATE AUTHORITY – DEMAND RAISED PURSUANT TO ASSESSMENT – APPEAL FILED AGAINST ASSESSMENT ORDER – NOTICE FOR ATTACHMENT ISSUED DURING PENDENCY OF APPEAL – CHALLENGE TO THE IMPUGNED ORDERS STATING PETITIONER READY TO FURNISH BANK GUARANTEE BY A CERTAIN DATE – HELD, IMPUGNED ORDERS NOT TO BE IMPLEMENTED IN THE EVENT OF FURNISHING OF GUARANTEE TILL THE DISPOSAL OF APPEAL AND FOR A PERIOD OF 4 WEEKS THEREAFTER.

A demand of about Rs 8.46 crores was raised vide assessment order dated 16/1/05 and 29/1/15. An appeal was filed before the Joint Excise and Taxation Commissioner. However, notices and summons were issued by the Assistant collector 1st grade – cum – Excise & Taxation Officer demanding payment and threatening to issue a warrant of arrest and attachment in the event of the petitioner failing to do so. The petitioner stated that it would furnish an unconditional bank guarantee on or before 14.4.2015. The statements were accepted. The High Court ordered that the impugned orders shall not be implemented till 14/4/15 in the event of furnishing of bank guarantee and till the disposal of appeal and 4 weeks thereafter.

Present: Mr. Kashmiri Lal Goyal, Senior Advocate with Mr. Amrinder Singh and Mr. A.P. Singh, Advocates for the petitioner

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE

Notice of motion.

2. Ms. Mamta Singla Talawar, AAG, Haryana, accepts notice on behalf of the

respondents.

3. The petitioner has filed an appeal before the Ist Appellate Authority, namely, Joint Excise & Taxation Commissioner (Appeals) against an assessment order dated 16.01.2015 and 29.01.2015 raising an aggregate demand of about Rs.8.46 crores.

4.The petitioner, in this petition, has challenged the notices and summons issued by the Assistant collector Ist Grade-cum-Excise & Taxation officer, Sonepat, demanding payment and threatening to issue a warrant of arrest and attachment in the event of the petitioner failing to do so -(Annexure P/1 (collectively).

5. As we noted earlier, the appeal is pending before the first appellate authority. We dispose of this petition in view of the statement made on behalf of the petitioner that they will on or before 14.04.2015 furnish an unconditional guarantee of a nationalised bank in the sum of Rs.8.50 crores to the satisfaction of the first appellate authority. The guarantee shall remain valid for a period of six weeks after the decision of the first appellate authority.

6. The statements are accepted. In view of the undertaking to furnish the guarantee, the impugned orders shall also not be implemented till 14.04.2015. In the event of the petitioner furnishing a guarantee, as aforesaid, the impugned notices shall not be implemented pending the hearing and final disposal of the appeal and for a period of four weeks thereafter.

7. Copy *dasti* under the signatures of the Bench Secretary.

PUNJAB & HARYANA HIGH COURT

CWP NO. 6214 OF 2015

DHURI POLYMERS
Vs.
STATE OF PUNJAB AND OTHERS

S.J. VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J.

1st April, 2015

HF ▶ Petitioner

PENALTY – ATTEMPT TO EVADE TAX – CHECK POST/ ROADSIDE CHECKING – SHOW CAUSE NOTICE – MATTER ALREADY HEARD BY EXCISE AND TAXATION OFFICER – WRIT FILED AGAINST SHOW CAUSE NOTICE ALLEGING THAT OFFICER HAS TOLD TO PASS ORDERS AGAINST THE PETITIONER- DEALER TO MEET HIS TARGETS – NO GROUNDS FOUND TO ENTERTAIN PROCEEDINGS AT THIS STAGE BY HIGH COURT – RESPONDENTS DIRECTED TO DECIDE IN ACCORDANCE WITH LAW AND TO MENTION REASONS WHILE PASSING ORDERS.

The goods of the dealer were detained and a show cause notice was served . The appellant appeared before the officer. The matter was heard but the orders were not passed as yet. The dealer filed a writ alleging that he has been told by the Ld. Officer that the action would be taken against the petitioner to meet his targets. Disposing of the writ, it is held that there is no reason to entertain the proceedings at this stage. The officer is directed to pass orders as per law and also mention the reasons for the order so passed.

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

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE

1. The petitioner has already replied to the show cause notice which has been impugned in this petition. The petitioner has appeared before the Excise and Taxation Officer and been heard by him. The order, however, has not been passed. The petitioner's vehicle and the goods contained therein continue to be detained. We see no reason to entertain the proceedings at this stage at least. The petitioner alleges that it has been told by the Excise and Taxation Officer and the AETO that the action is going to be taken against the petitioner in order to meet the targets.

2. We are confident that the officer will decide the matter in accordance with law and not for the reasons alleged by the petitioner. Needless to state that the reasons shall be furnished by the respondents for the order to be passed pursuant to the impugned show cause notice.

3. The writ petition is accordingly disposed of.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

VATAP NO. 219 OF 2014

OM TRADING COMPANY
Vs.
STATE OF HARYANA

S.J. VAZIFDAR, ACTING CHIEF JUSTICE AND GURMIT RAM, J.

30th March, 2015

HF ▶ Appellant

CONDONATION OF DELAY – APPEAL – COMMUNICATION GAP BETWEEN COUNSEL AND APPELLANT – DISMISSAL OF APPEAL BY TRIBUNAL DUE TO DELAY IN FILING – COPY OF ORDER PASSED BY FIRST APPELLATE AUTHORITY ALLEGED NOT BEEN RECEIVED BY APPELLANT – DENIAL BY COUNSEL REGARDING RECEIPT OF COPY OF ORDER – HELD BY HIGH COURT, APPELLANT NOT TO BE VISITED WITH SUCH DRASTIC CONSEQUENCES AS DISMISSAL OF APPEAL ON ACCOUNT OF COMMUNICATION GAP BETWEEN APPELLANT AND ADVOCATES – MATTER RESTORED BEFORE TRIBUNAL TO BE HEARD ON MERITS.

The appeal before Tribunal was dismissed due to delay of 77 days in filing it. It was observed by the Hon'ble High Court that it involved substantial question of law. The reason for delay was that the copy of order was not received by it and his counsel denied having received it either. The High Court has allowed the appeal as the appellant should not be visited with such a drastic consequence of dismissal of appeal on account of communication gap between him and his counsel. The matter is restored before the Tribunal to be decided on merits.

Present: Mr. Avneesh Jhingan, Advocate, for the appellant.

Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana.

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE

1. This is an appeal against the order and judgement of the Tribunal dated 23.01.2012 dismissing the appellant's appeal on the ground that there was a delay of 77 days in filing the same. The appeal raises substantial questions of law contained in paragraph 13. It is agreed that the procedure is that the order passed by the First Appellate Authority is forwarded to the counsel/advocate. The learned advocate denied having received the copy of the order. Even assuming that the advocate had received the copy of the order, it would make no difference. The appellant did not receive the copy of the order.

2. We do not see any reason for the appellant to be visited with such a drastic consequence of the dismissal of the appeal on account even of any communication gap between the appellants and their advocates.

3.The impugned order is set aside. The appeal before the Tribunal shall stand restored and be decided on merits.

4.Disposed of.

PUNJAB & HARYANA HIGH COURT

CWP NO. 11781 OF 1994

INDO-PIRIN GLOVES LIMITED
Vs.
STATE OF HARYANA & OTHERS

RAJIVE BHALLA AND B.S. WALIA, JJ

15th January, 2015

HF ▶ Revenue

APPEAL – TRIBUNAL – WHETHER MAINTAINABLE AGAINST DISMISSAL OF REVIEW PETITION – ASSESSMENT ORDER PASSED – DISMISSAL OF APPEAL BY FIRST APPELLATE AUTHORITY – APPEAL BEFORE TRIBUNAL ALSO DISMISSED – WRIT PETITION FILED BEFORE HIGH COURT – REVIEW PETITION ALSO FILED BEFORE FIRST APPELLATE AUTHORITY – WRIT DISMISSED WITH OBSERVATIONS THAT THE MERITS OF REVIEW PETITION FILED BEFORE FIRST APPELLATE AUTHORITY SHOULD NOT BE EFFECTED - REVIEW PETITION BEFORE FIRST APPELLATE AUTHORITY DISMISSED – APPEAL BEFORE TRIBUNAL DISMISSED BEING NOT MAINTAINABLE – ON WRIT HELD - SINCE THE ORIGINAL ORDER HAD ATTAINED FINALITY UPTO HIGH COURT THE FILING OF APPEAL AGAINST DISMISSAL OF REVIEW PETITION WAS MEANINGLESS – IN THIS REGARD THE TRIBUNAL HAD HELD THAT THE APPEAL WAS NOT MAINTAINABLE

Pursuant to the assessment order passed assessing the petitioner to tax, an appeal was filed before JETC which was dismissed. The review petition filed was also dismissed. Appeal against the original order was dismissed by the Tribunal as barred by limitation. A writ was filed against this order. In the meanwhile, the petitioner filed an appeal against the order passed by JETC dismissing the review petition. The writ was dismissed holding that it should not affect the pending review petition. The appeal before Tribunal challenging the order of JETC against dismissal of review petition was dismissed holding that appeal against order of review is not maintainable. Aggrieved by the order, a writ was filed alleging that the appeal is maintainable u/s 39(2) of the Act. It is held by the High Court that mere fact that the order of High Court records that any observation in the order shall not affect the decision of appeal on merits in the pending review cannot be construed as affirmation of the maintainability of appeal against dismissal of review. Since the challenge to the original order passed by JETC and the Tribunal had attained finality with dismissal of writ, the filing of appeal against dismissal of review petition was meaningless. It was in this context that the Tribunal had held that appeal is not maintainable.

Present: Mr. Jagmohan Bansal, Advocate for the petitioner.
Ms. Mamta Singhal Talwar, AAG, Haryana.

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RAJIVE BHALLA, J

1.The petitioner prays for issuance of a writ for quashing orders Annexure P-8 passed by the Sales Tax Tribunal, Haryana (hereinafter referred to as "the Tribunal"), Annexure P-4 passed by the Assessing Authority and Annexure P-6 passed by the Joint Excise and Taxation Commissioner (Appeal), Faridabad (hereinafter referred to as the "JETC").

2.Counsel for the petitioner submits that as no sale has been proved or even took place within the State of Haryana, the assumption of jurisdiction by the Assessing Officer to assess the transport of machines from Gurgaon to Delhi to sale tax, is not warranted. Counsel for the petitioner further submits that the machinery was imported into India, pursuant to a joint venture between the State Trading Corporation of India Limited (A Government of India undertaking), ITC Pirin Sofia, Bulgaria and M/s Liberty Footwear, Karnal with share holding of 40%, 40% and 20% respectively. The machinery was stored in the godown in Gurgaon as the project had to be executed at Gurgaon but on account of certain difficulties in the project, the project was abandoned and eventually the joint venture company went into liquidation. To avoid payment of rent, the machine was being transported to the premises of the State Trading Corporation in Delhi, when it was stopped at Haryana-Delhi Border and eventually the Assessing Officer, by inferring a sale passed order (Annexure P-4), assessing the petitioner to sales tax. The petitioner thereafter filed an appeal before the JETC, which was dismissed on 06.11.1990. A review petition filed against the order passed by the JETC was dismissed on 23.03.1992. Appeal filed by the petitioner against the original order passed by the JETC was dismissed by the Sales Tax Tribunal as barred by limitation. The petitioner filed a writ petition against this order. In the meantime, the petitioner filed an appeal against the order passed by the JETC, dismissing the application for review. The writ petition was dismissed by holding that this order shall not affect the pending review petition. The appeal filed by the petitioner challenging order passed passed by the JETC dismissing the application for review was dismissed, by the Tribunal by holding that an appeal against an order of review is not maintainable. Counsel for the petitioner further submits that as Section 39 (2) of the Haryana Sales Tax, Act, 1973, uses the word "an order", the Tribunal has erred in dismissing the appeal. The Tribunal has itself in other cases, by orders Annexures P-9 and P-10 held that an appeal is maintainable against an order dismissing an application for review. Counsel for the petitioner prays that the impugned order may be set aside and the matter may be remitted to the Tribunal for adjudication afresh.

3.Counsel for the revenue submits that the writ petition is mis-conceived. The petitioner filed an appeal before the Tribunal against, order dated 06.11.1990, passed by the JETC on 06.11.1990. The Tribunal dismissed the appeal as barred by limitation. The petitioner filed a writ petition challenging this order. The writ petition was dismissed. The Tribunal, therefore, rightly dismissed the appeal against the order dismissing the application for review.

4. We have heard counsel for the parties and perused the impugned order.

5. The petitioner is before us challenging order passed by the Tribunal, dismissing his appeal against the order passed by the JETC refusing to review its order. A perusal of the impugned order reveals that the Tribunal dismissed the appeal by holding that an appeal against an order of review is not maintainable. A bare reading of Section 39 (2) of the Haryana General Sales Tax Act, 1973, reveals that Section 39 (2) of the Act commences with the words "An order" thereby leaving no ambiguity that an appeal is maintainable against any and every order, including an order dismissing an application for review, unless prohibited by any statutory provision. The question before us is, however, entirely different namely whether an appeal against an order dismissing an application for review is maintainable after challenge to the original order has failed.

6. The petitioner was assessed to sale tax. An appeal filed by the petitioner before the JETC was dismissed on 06.11.1990. The petitioner filed an application for review of this order. The application for review was dismissed on 23.03.1992. The appeal, filed by the petitioner against order dated 06.11.1990 was dismissed as barred by limitation. The petitioner filed CWP No.1214 of 1993 which was dismissed by holding as follows:-

> *"The appellate Authority dismissed the appeal, as barred by time, holding that there was no sufficient cause for condoning the delay. Whether there existed sufficient grounds for condoning the delay or not, is a question of fact and can not be gone into in writ jurisdiction. The contention of learned counsel for the petitioner is that ground for condonation of delay in filing the appeal was taken that the petitioner was wrongly advised by the counsel to file a review application against the order of the First Appellate Authority, it has not been shown to us that affidavit of the counsel, who had given such wrong advice, was filed before the appellate Authority. We find no ground to entertain this writ petition and dismiss the same. It may be further observed, as stated by counsel for the petitioner that an appeal has already been filed against the order rejecting the review application, that any observation made in this order will not affect the decision of such an appeal on merits."*

7. A perusal of the aforesaid order dismissing the writ petition reveals that order passed by the Tribunal, dismissing the appeal, filed to challenge order passed by the JETC, was affirmed by holding that the petitioner is unable to show sufficient cause for condonation of delay, thereby shutting out any further challenge to the assessment order. The mere fact that the order records that any observation in the order shall not affect the decision of the appeal on merits in the pending review cannot be construed as an affirmation of the maintainability of the appeal against the order dismissing the review petition. The petitioner's contention that the order passed in the writ petition should be read as directing the Tribunal to decide the appeal against the order of review on merits, disregards the fact that challenge to the original order passed by the JETC and the Tribunal having attained finality with dismissal of the writ petition, the filing of any appeal against dismissal of the review petition by the JETC was meaningless. It was in this context that the appeal filed by the petitioner was not maintainable before the Tribunal. Consequently, we have no option but to dismiss the writ petition.

8. Dismissed accordingly.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP NO. 6714 OF 2014

SANATAN DHARAM SHIKSHA SAMITI
Vs.
CHIEF COMMISSIONER OF INCOME TAX

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

25th March, 2015

HF ▶ Assesse

EXEMPTION – INCOME TAX ACT – EDUCATIONAL INSTITUTION – EXEMPTION APPLIED U/S 10(23C)(vi) – APPLICATION REJECTED – WRIT FILED – MATTER REMANDED TO CCIT TO DECIDE AS PER LAW LAID DOWN IN KSHATRIYA SABHA MAHARANA PRATAP BHAWAN – CCIT AGAIN REJECTED THE APPLICATION ON SAME GROUBNS – NO FRESH CONSIDERATION TAKEN UP – NO DISCREET ENQUIRY MADE – ON WRIT - REASONS CITED FOUND IDENTICAL TO PREVIOUS ORDER ALREADY SET ASIDE BY HIGH COURT – MATTER REMANDED TO CIT (EXEMPTION) TO DECIDE AS PER LATEST JUDGEMENT OF CIT VS QUEEN'S EDUCATIONAL SOCIETY.

The application filed by the petitioner for exemption u/s 10(23C)(vi) of the Act was rejected. A writ was filed and the same was disposed of with the case of Kshatriya Sabha Maharana Pratap Bhawan and the matter was remanded to the CCIT to decide in the light of the judgment mentioned above. The order passed by the CCIT was repeated with the same reasons as cited earlier. Also, it was clearly mentioned that no discreet enquiry has been made in this regard. On filing of writ, it is held that since no fresh consideration has been taken up the impugned order is set aside. The CIT (exemption) would decide the matter including question of limitation as per the law laid down in Queen's Educational Society.

Case referred

M/s Queen's Educational Society Vs. Commissioner of Income Tax, CA No.5167 of 2008

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

Ms.Urvashi Dhugga, Advocate, for the respondent.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

1. Rule. Rule returnable and heard finally.

2. The petitioner has challenged the order dated 11.11.2013 (Annexure P21), passed by the Chief Commissioner of Income Tax, Panchkula (for short, the 'CCIT'), rejecting its

application for exemption/approval, filed under Section 10(23C)(vi) of the Income Tax Act, 1961 (for short, the 'Act') for the assessment years 2005-06 to 2008-09.

3. The petitioner has sought the said exemption by filing application dated 31.03.2008 (Annexure P4), which was rejected vide the impugned order. The original order was challenged in CWP No.858 of 2009 titled *Kashatriya Sabha Maharana Partap Bhawan, Kurukshetra Vs. Union of India & another,* decided on 29.01.2010 and the Division Bench of this Court *inter alia* held that earning profits is not a deciding factor to conclude that an educational institution exists for profit. The Division Bench further held that where more than 15% of the income of the educational institution is accumulated on or after 01.04.2002, the period of accumulation of amount exceeding 15% is not permissible beyond 5 years, provided the excess income has been applied or accumulated for exemption, wholly or exclusively, for the purpose of education. It was further held that on an application, the authority could grant approval, subject to such terms and conditions as it may deem fit, provided that they are not in conflict of the Act and that the parameters of earning profits beyond 15% and its investment is wholly for the purpose, as may be expressly stipulated, as per the statutory requirement.

4. Considering the order that we intend passing, it is not necessary to refer to the judgment in any detail. Suffice it to note that the Division Bench ultimately allowed the writ petitions, set aside the impugned orders and directed the CCIT to decide the same, afresh, after considering every case independently, but in the light of the judgment.

5. The petitioner's case, however, was decided on remand. On the other hand, in the meantime, the assessment orders were completed on the basis that no exemption had been obtained under Section 10(23C)(vi) of the Act. The petitioner has challenged these orders. The CCIT has held against the petitioner. The appeals against the order of the CCIT are pending in this Court. We are informed that in those appeals, a Division Bench of this Court has passed an interim order, directing the CCIT to decide the applications, in accordance with the judgment passed by the Division Bench in CWP No.858 of 2009 on 29.01.2010.

6. Thereafter, the impugned order was passed by the CCIT. After setting out the facts, the CCIT furnished the reasons for rejecting the application. All the paragraphs except paragraph No.7 are almost identical to the order dated 23.03.2009 (Annexure P14), which had been set aside by the Division Bench vide judgment dated 29.01.2010. It does not appear to be a fresh consideration of the matter in its entirety. The impugned order concludes with paragraph No.7. It is important to note that in paragraph No.7, it has been specifically stated that in a short span of time, no discrete enquiry could be made. It is also pertinent to note that for the subsequent years, the exemption has been granted. The impugned order, therefore, has in fact, not complied with the order dated 29.01.2010, in its correct perspective. It was for the CCIT to go into the matter afresh and then pass an order.

7. One of the contentions raised by Ms. Dhugga, learned counsel appearing for the respondent, is that the issue of limitation, as regards the applications for assessment years 2005-06 to 2007-08 were correctly decided vide the original order dated 23.03.2009 and therefore, that issue stands concluded.

8. The submission is not well founded. Whether the issue was correctly decided or not, is not relevant at this stage. The fact is that the order dated 23.03.2009 was set aside by the Division Bench vide order dated 29.01.2010, in its entirety. It is necessary, therefore, for the CCIT to decide the matter afresh including on the question of limitation.

9. In the circumstances, the impugned order dated 11.11.2013 (Annexure P21) is set aside. We are informed that the matter is, now, to be decided by the Commissioner of Income Tax (Exemption), Chandigarh. Accordingly, the Commissioner of Income Tax (Exemption), Chandigarh shall decide the matter, afresh, in accordance with the judgment dated 29.01.2010.

We reiterate that all the issues including the issue of limitation shall be decided after keeping in mind the principles laid down by the Apex Court in **CA No.5167 of 2008** titled *M/s Queen's Educational Society Vs. Commissioner of Income Tax,* decided on 16.03.2015.

10. The writ petitions are, accordingly, disposed of.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP NO. 2606 OF 2015

BEETEL TELETECH LIMITED
Vs.
STATE OF HARYANA AND OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

12th March, 2015

HF ▶ Assessee

STAY OF RECOVERY – BANK GUARANTEE- INVOCATION – LEVY OF INTEREST UNDER CST AND HVAT ACT – CONSOLIDATED APPEAL FILED – BANK GUARANTEE FURNISHED DURING PENDENCY OF APPEAL – INVOCATION SOUGHT BEFORE ORDER PASSED – COMMON ORDER PASSED SUBSEQUENTLY REMANDING THE MATTER BACK TO ASSESSING OFFICER REGARDING INTEREST UNDER HVAT ACT – APPEAL RELATING TO CST DISMISSED BEING NOT MAINATANABLE IN VIEW OF CONSOLIDATED APPEAL BEING FILED – WRIT FILED – LIBERTY TO PETITIONER TO FILE FRESH APPEAL UNDER CST – INVOCATION OF BANK GUARANTEE STAYED TILL DECISION OF ASSESSING OFFICER REGARDING HVAT AND APPEAL UNDER CST WHICHEVER IS LATER

The petitioner was assessed and interest under the local act and CST was levied. A consolidated appeal was filed during the pendency of which Bank Guarantee was furnished. The JETC had heard the arguments and reserved the judgment. In the meantime bank guarantee was sought to be invoked. Subsequently, a common order was passed remanding the matter regarding issue of interest under local act to the assessing officer and dismissing the issue regarding CST on the ground that a consolidated appeal was not maintainable. On writ filed it was held by the High Court it is not necessary at this stage to decide whether a consolidated appeal is maintainable. The petitioner is at liberty to file a fresh appeal relating to CST and delay if any should be condoned in such circumstances. The respondents are restrained from invoking the Bank Guarantee until after the expiry of a period of four weeks from the date of assessment order with respect to HVAT and decision in the appeal against CST whichever is later.

Present: Mr. Aman Partap and Mr.Amrinder Singh, Advocates for the petitioners.

Ms. Mamta Singla Talwar, AAG Haryana.

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE

CM No.3157 of 2015

CM is allowed.

Document (Annexure P-6) is taken on record.

CWP No.2606 of 2015

Rule. Rule returnable forthwith and heard finally.

2. The petitioner has challenged the communication dated 9.2.2015 (Annexure P-1) of respondent No.2-Excise and Taxation Officer-cum-Assessing Authority encashing the bank guarantee issued by respondent No.4 – Kotak Mahindra Bank at the request of the petitioner and in favour of respondent No.2. This guarantee in the sum of `1.75 Crores was furnished in the appeals filed by the petitioner before respondent No.3 – Joint Excise and Taxation Commissioner (Appeals) (for short `JETC') and was sought to be encashed after arguments had been heard but judgment had not been pronounced. The same was stayed by interim order dated 12.2.2015 by the court. Subsequently, during the course of writ petition, respondent No.3 – JETC, passed the order in the appeal on 30.1.2015 (Annexure P-6). The Assessing Officer had assessed the petitioner to Haryana VAT and to Central sales tax by a common assessment order. As it was a common assessment order, the petitioner filed a single consolidated appeal challenging the same as regards levy HVAT and CST. The JETC by the order dated 30.1.2015 in the appeal remanded the matter as far as the interest component on HVAT was concerned. The Assessing Authority is still to pass the fresh order pursuant to the remand order. It would not be proper therefore, at this stage to invoke the bank guarantee in respect of the interest demanded on the dues towards the HVAT. As far as the principal amount is concerned, the petitioner in any case has not been successful in challenging the same and the petitioner has already paid the same. By the said order dated 30.1.2015, the JETC dismissed the appeal insofar as it related to the CST assessed by the Assessing Officer on the ground that a single consolidated appeal was not maintainable. The appeal, therefore, insofar as related to the assessment of CST was dismissed not on merits but on a technicality.

3. We do not consider it necessary to decide whether this view was correct or not. In other words it is not necessary atleast at this stage to decide as to whether a consolidated appeal is maintainable. It would be open to the petitioner to file a separate appeal against the order of the Assessing officer in relation to the assessment of the CST. The issue to say the least debatable. If there is a power to condone the delay, we see no reason why the delay should not be condoned in such circumstances. The ends of justice would demand the same.

4. In the event of an appeal being filed the guarantee that has already been issued would naturally continue pending such appeal.

5. In these circumstances, the writ petition is disposed of by the following order:

> The respondents are restrained from the receiving any amount under the said bank guarantee until after the expiry of a period of four weeks from the date of the assessment order by the Assessing Officer with respect to the interest on HVAT and the decision in the appeal before JETC against the assessment of CST whichever is later.
>
> This order is subject to the appeal before the JETC being filed on or before 15.4.2015.

PUNJAB & HARYANA HIGH COURT

CWP NO. 28512 OF 2013

IDEA CELLULAR LTD.
Vs.
UNION OF INDIA AND OTHERS

RAJIVE BHALLA AND AMOL RATTAN SINGH, JJ

23rd March, 2015

HF ▶ Petitioner Company

REFUND – SALES TAX - TAX COLLECTED WITHOUT AUTHORITY OF LAW WHETHER REFUNDABLE WHEN ASSESSMENT ORDERS HAVE ATTAINED FINALITY – SEC 20 OF HVAT ACT – VAT COLLECTED ON SIM CARD ACTIVATION SERVICE – SUPREME COURT DECIDED AGAINST SUCH LEVY – REFUND DENIED ON GROUNDS THAT ASSESSMENT ORDERS ALREADY ATTAINED FINALITY AND WERE NEVER APPEALED AGAINST – WRIT FILED AGAINST RETENTION OF TAX – CONTENTION BY STATE THAT IT HAS NO POWER TO REFUND U/S 20 OR REMIT IT AS SERVICE TAX DUE FROM PETITIONER TO UNION OF INDIA – ON WRIT HELD THAT COURTS TO RISE ABOVE INHERENT IMPEDIMENTS AND ENSURE UNLAWFUL COLLECTION BE REFUNDED – ARTICLE 226 ENSURES UNDOING OF TAX COLLECTION EVEN AFTER ASSESSMENT ORDERS HAVE ATTAINED FINALITY – MERE FACT THAT ORDERS HAVE BEEN PASSED FOR LEVYING AND COLLECTION WOULD NOT CONFER LEGITIMACY IN RETAINING THE TAX – STATE DIRECTED TO FORWARD THE AMOUNT TO UNION OF INDIA TO DISCHARGE LIABILITY TO PAY SERVICE TAX AS PRAYED BY PETITIONER – ASSESSMENT ORDERS SET ASIDE.

On the premise that activation of sim card is a sale, the state collected VAT from the petitioner pursuant to assessment order passed. After the Supreme Court held in the case of Bhartiya Sanchar Nigam Limited that this is a service and not sale, the petitioner claimed refund which was denied. A writ was filed questioning if the state could retain the amount collected as Vat after it being considered unlawful as per Supreme Court judgement, otherwise the petitioner would be doubly taxed as it had to pay service tax for the same period. The petitioner has prayed that the tax already collected be forwarded to service tax department of the union of India after declaring the assessment order in question as non- est. The state has agreed that though it has no authority to levy VAT on such service, it has no statutory power to refund the same and as the assessment orders have attained finality, a writ cannot be issued to set aside these orders or direct the state for refund or remittance to union of India.

1) It is held that as per Article265 of the Constitution of India, a tax shall not be levied except by authority of law. The collection of VAT on sale of sim cards is thus non – est being without authority of law.

2) Though sec 20 of the Act does not provide for refund, the court must rise above inherent impediments and ensure the state does not levy tax without authority or refund it if so collected.

3) Article 226 would come to rescue of an aggrieved party to undo a tax collection made without authority of law even after assessment orders have attained finality, otherwise it would be an unconstitutional levy.

4) The levy and collection of tax pursuant to assessment orders not being relatable to a statutory power emanating from a statute is therefore violative of Article 264 of constitution of India and a nullity. Mere fact that orders have been passed levying and collecting tax would not confer legitimacy on the act of the state to retain it.

5) The state is thus directed to forward this amount to union of India to discharge the petitioner's liability to pay service tax. The assessment orders in question are declared nullity. The amount of VAT transferred by the state to service tax department shall not be deemed to be full and final till adjudication by the authority concerned.

Cases referred:

U.P. Pollution Control Board and others V Kanoria Industrial Ltd. And another, (2001) 2 SCC, 549

Fizz Dinks P ltd. V State of Haryana and others , (2001) 123 STC 183(P&H)

Saraswati Sugar Mills V Haryana state board, (1992) 1 SCC 418

Solonah Tea Co. Ltd. V Supdt. Of Taxes, Nowgong (1988) 1 SCC, 401

Shree Baidyanath Ayurved Bhawan (P)Ltd. V State of Bihar, (1996) 6 SCC,86

Present: Mr. K.L.Goyal, Sr. Advocate, with Mr. Sandeep Goyal, Advocate, for the petitioner.
Mr. Sunish Bindlish, Advocate,for respondent nos.1, 4,5 and 6.
Ms. Mamta Singal Talwar, AAG, Haryana for respondent nos. 2, 3, and 7.

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RAJIVE BHALLA, J.

1. The petitioner is before us praying for issuance of a writ of mandamus directing respondent No.2 and respondent No.3 to refund sales tax/VAT deposited by the petitioner, on the activation of SIM cards, for issuance of a writ of certiorari quashing assessment orders dated 22.02.2006, 26.03.2008 and 22.02.2006 (Annexures P-3A, P-3B and P-3C), passed by the Assessing Authority under the Haryana Value Added Tax Act, 2003 and for quashing order dated 15.10.2013 (Annexure P-9), dismissing the representation for refund of the amount of VAT illegally retained by the State of Haryana.

2. Counsel for the petitioner submits that the petitioner provides cellular services and for the said purpose, activates SIM cards. The State of Haryana collected VAT from the petitioner, pursuant to assessment orders dated 22.02.2006, 26.03.2008 and 22.02.2006 (Annexures P-3A, P-3B and P-3C) on the premise that activation of SIM cards is a sale. The Supreme Court having held in *Bharat Sanchar Nigam Limited and another vs Union of India and others, (2006) 145 SCT 91* and in the case of the petitioner in *Idea Mobile Communication Ltd. v. C.C.E. & C., Cochin, 2011(43) VST 1 (SC)* that activation of SIM card is a service and not a sale, the petitioner approached the State of Haryana for refund of the amount of VAT but as no action was taken in the matter, filed CWP No. 25638 of 2012, which was disposed of directing the respondents to decide the petitioner's representation for refund. The representation was illegally dismissed, on 15.10.2013 (Annexure P-9) on entirely irrelevant

considerations, namely, that the petitioner did not challenge its liability before the Assessing Authority, the petitioner did not file any appeal against the assessment orders and as the petitioner has charged value added tax from its customers, the amount cannot be refunded.

3. Counsel for the petitioner further submits that the Supreme Court having held that activation of SIM card is not a sale, the question before the authorities was not whether the petitioner did or did not challenge its liability to pay VAT or did or did not file an appeal but whether the State of Haryana could continue to retain the amount collected as VAT after the Supreme Court had held that the petitioner is not liable to pay VAT. Admittedly, the VAT paid by the petitioner and retained by the State of Haryana is not relatable to any statutory provision and, therefore, must be refunded to the petitioner.

4. In case, the State of Haryana does not refund this amount, the petitioner would be doubly taxed as the Service Tax Department of the Union of India, has raised a demand for deposit of service tax for the period for which the petitioner has deposited VAT. Counsel for the petitioner further submits that a declaration of law by the Supreme Court applies from the date of inception of a statute and therefore, does not confer any right upon the State of Haryana to charge, or retain VAT, without authority of law. Counsel for the petitioner further submits that there is no question of unjust enrichment as all that the petitioner asserts and prays for is that as assessment orders and tax collected are without authority of law, the assessment orders may be declared nonest and the tax collected by the State of Haryana may be forwarded to the Service Tax Department of the Union of India.

5. Counsel for the petitioner relies upon a judgment of the Hon'ble Supreme Court in ***U.P.Pollution Control Board and others v. Kanoria Industrial Ltd. And another, (2001) 2 SCC 549*** and a Division Bench judgment of this Court in ***Fizz Drinks P. Ltd. v. State of Haryana and others, (2001) 123 STC 183*** , to support of these arguments.

6. Counsel for the State of Haryana submits that the assessment orders have become final. The petitioner, therefore, cannot pray for issuance of a writ to quash the assessment orders and or direct refund of the amount voluntarily deposited by the petitioner. The petitioner deposited VAT in accordance with the assessment orders and in the absence of any plea raised at the time of assessment about its exigibility to tax, cannot seek quashing of assessment orders or refund. Counsel for the State of Haryana relies upon a judgment of the Supreme Court in ***Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal and others, (2007) 8 SCC 418***. Counsel for the State of Haryana also submits that Section 20 of the VAT Act, which confers the power of refund does not apply to the present case and as the Haryana VAT Act does not contain any provision that allows the respondents to refund the amounts deposited by the petitioner, the writ petition may be dismissed.

7. Counsel for the State of Haryana further submits that the judgment in *Bharat Sanchar Nigam Limited* (supra) clearly indicates a prospective overruling of the Supreme Court's opinion in the ***State of Uttar Pradesh v. Union of India (supra)*** and, therefore, cannot enure to the benefit of the petitioner. It is also contended that in case the State of Haryana is directed to refund the amount to the petitioner, it would be a case of unjust enrichment, a course prohibited by law. Counsel for the State of Haryana relies upon a judgment in ***M/s Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536*** in support of this argument.

8. Counsel for the Union of India submits that in ***Bharat Sanchar Nigam Limited*** (supra), the Supreme Court has clarified that the gross total amount received by the operator, from the subscriber, for activation of SIM card, is exigible to service tax. The petitioner is obliged to deposit service tax and whether the assessee has paid VAT to the State of Haryana, for this period, is irrelevant.

9. Counsel for the Union of India further submits that the amount paid by the petitioner

to the Haryana VAT Department may not be construed as a final determination of the petitioner's liability towards service tax or a discharge of the petitioner's liability.

10. We have heard counsel for the parties and perused the impugned orders.

11. The petitioner is a telecom service provider and as a part of its business, activates SIM cards. A dispute whether this business activity is a 'sale' exigible to sales tax or a 'service' exigible to service tax, came up for consideration and was decided by the Supreme Court in ***State of UP and another*** (supra), by holding that activation of SIM cards is a sale and exigible to VAT. The petitioner was, therefore, assessed to tax under the Haryana VAT Act, 2003 (hereinafter referred to as 'the Act'), by assessment orders dated 22.02.2006, 26.03.2008 and 22.02.2006 (Annexures P-3A, P-3B and P-3C) and deposited VAT.

12. The question whether activation of SIM cards is a service or a sale came up for consideration before a larger Bench of the Supreme Court in ***Bharat Sanchar Nigam Limited and another*** (supra) and was answered by holding that activation of SIM cards is a 'service' and not a 'sale'. The petitioner is, therefore, liable to pay service tax on the activation of SIM cards and not VAT. The Union of India has, consequently, raised a demand for service tax for the period during which the petitioner paid VAT.

13. The petitioner prayer to be precise is that as the State of amount so levied and collected may be refunded to the petitioner or remitted to the Union of India. The State of Haryana, on the other hand, while not denying that it has no authority to levy VAT on the activation of SIM cards, contends that it has no statutory power, to refund this amount and as assessment orders Annexures P-3A, P-3B and P-3C have attained finality, a writ cannot be issued to set aside these orders or direct the State to refund this amount to the petitioner or remit it to the Union of India.

14. The first question that requires an answer is whether the State of Haryana has collected Value Added Tax on activation of SIM cards, without authority of law. The State of Haryana does not deny that in ***Bharat Sanchar Nigam Limited*** (supra), the Supreme Court has held that activation of SIM cards is a service and not a sale. The State of Haryana also does not deny that the collection of VAT on activation of SIM cards is not relatable to any statutory provision. As postulated by Article 265 of the Constitution of India a tax shall not be levied except by authority of law i.e., a tax shall be valid only if it is relatable to statutory power emanating from a statute. The collection of VAT on the sale of SIM cards, not being relatable to any statutory provision, must be held to be without authority of law and as a consequence non-est.

15. We have crossed the first hurdle, namely, that the State of Haryana has no statutory authority to levy VAT on the activation of SIM cards, with ease and now proceed to answer the second question, namely, whether the Haryana Value Added Tax Act contains any provision that empowers the State to refund the tax?

16. A bare perusal of Section 20 of the Haryana Value Added Tax Act, 2003, reveals that it does not provide for refund of tax in the scenario, obtaining in the present case. Thus, the question that remains is whether after having held that the State of Haryana is not statutorily empowered to collect and levy VAT on the activation of SIM cards and the VAT Act does not permit refund in a situation as obtaining in the present case, may a writ be issued to direct the State to refund the tax and or to quash assessment orders, or is this court devoid of power to adopt such a course?

17. As a general rule, a high prerogative writ, shall not issue where a statute prescribes a complete procedure for redressal of grievances. But this general rule must admit to certain exceptions, particularly where the collection of tax is without authority of law. A court, in such

a situation, must rise above these inherent impediments and ensure that the State does not levy or appropriate tax without authority of law and if so collected is called upon to refund the amount or deposited. We draw support for our opinion from a judgment of the Supreme Court in ***U.P. Pollution Control Board and others v. Kanoria Industrial Ltd. and another, (2001) 2 SCC, 549***. The controversy in ***U.P.Pollution Control Board and others(supra)*** was that the respondents were required to pay water cess under the Water(Prevention and Control of Pollution) Cess Act, 1977 (hereinafter referred to as 'the 1977 Act'). The respondents raised a protest that since sugar industries and distilleries are not industries covered by Entry 15 of Schedule I of the Act, they are not Government rejected their objections. The respondents paid the cess but some of them filed writ petitions challenging the levy of the cess, which were dismissed. Thereafter, the Supreme Court in ***Saraswati Sugar Mills v. Haryana State Board, (1992)1 SCC 418,*** reversed the decision of the High Court by holding that sugar manufacturing industries do not fall in Entry 15 of Schedule I of the Act. The respondents made a representation to the Board seeking refund of the amounts collected without authority of law and in support of their plea relied upon the judgment in *Saraswati Sugar Mills* (supra), but as the respondents did not receive a positive response, they filed a writ petition, which was contested on the ground that the respondents are not entitled to refund, as the amounts paid have already been deposited with the Government of India.

18. After considering the rival submissions, a writ was issued , directing the Board to refund the sums realised from the respondents, subject to verification of the amount stated to have been paid by them. The U.P. Pollution Control Board filed a special leave petition. After considering whether a writ can be issued to direct refund of a tax/cess collected without authority of law, the Supreme court held that where levy and collection of tax/cess is unconstitutional or without authority of law, a writ seeking refund of the tax/cess collected without authority of law is maintainable. A relevant extract from the judgment reads as follows:

> *17. Again in AIR para 9, the Court held:*
>
> > *"We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases be appropriately raised and considered in the exercise of writ jurisdiction."*
>
> *This judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax / cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an*

automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.(Emphasis supplied)

19. Before recording the aforesaid opinion, the Supreme Court relied upon a judgment in ***Solonah Tea Co. Ltd. v. Supdt. of Taxes, Nowgong, (1988) 1 SCC, 401*** and referred to a relevant paragraph from the said judgment, which reads as follows:

> *"6.The only question that falls for consideration here is whether in an application under Article 226 of the Constitution the Court should have directed refund. It is the case of the appellant that it was after the judgment in the case of Loong Soong Tea Estate the cause of action arose. That judgment was passed in July 1973. It appears thus that the High Court was in error in coming to the conclusion that it was possible for the appellant to know about the legality of the tax sought to be imposed as early as 1963, when the Act in question was declared ultra vires as mentioned hereinbefore. Thereafter the taxes were paid in 1968. Therefore the claim in November, 1973 was belated. We are unable to agree with this conclusion. As mentioned hereinbefore the question that arises in this case is whether the Court should direct refund of the amount in question. Courts have made a distinction between those cases where a claimant approaches a High Court seeking relief of obtaining refund only and those where refund is sought as a consequential relief after striking down of the order of assessment etc. Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law." (emphasis supplied)*

20. A reference was also made to a judgment in ***Shree Baidyanath Ayurved Bhawan (P) Ltd. v. State of Bihar, (1996) 6 SCC, 86***, wherein it was held as follows:-

> "10. *The writ petition was not a run-of-the-mill case. It was a case where the respondent-State had not acted as this Court had expected a high constitutional authority to act, in furtherance of the order of this Court. That is something that this Court cannot accept. The respondent-State was obliged by this Courts order to refund to the writ petitioners, including the appellants, the amounts collected from them in the form of the levy that was held to be illegal. If there was good reason in law for rejecting the refund claim, it should have been stated. Not to have responded to the appellants refund claim for 11 years and then to have turned it down without reason is to have acted disrespectfully to this Court. Even assuming,therefore, that this was a writ petition only for money, the writ petition fell outside the ordinary stream of writ petitions and, acting upon it, the High Court should have ordered the refund."*

21. A considered appraisal of the ratio of the aforesaid judgments, leaves no ambiguity that the factual situation so permitting, particularly where the levy and collection of tax is without authority of law, Article 226 of the Constitution of India would come to the aid of an aggrieved party, even where the assessment order has not been challenged by appeal or revision, to undo a collection of tax made without authority of law. As held by the Supreme Court, no State has the right to receive or retain taxes or monies realised from citizens without authority of law. To hold otherwise would, in our considered opinion, perpetuate an un-constitutional levy, an unconstitutional collection of a tax, and an unconstitutional retention of monies.

22. At this stage, we would also refer to a Division Bench judgment of this Court in ***Fizz Dinks P. Ltd. v. State of Haryana and others, (2001) 123 STC 183 (P&H)***, wherein after

considering a similar controversy, it was held as follows:

> *"6. In our opinion, the objection raised by the respondents to the maintainability of the writ petition on the ground that finality attached to the orders dated May 25, 1993 and May 8, 1997 cannot be undone at this belated stage by applying the ratio of the decision rendered by the Supreme Court in the year 2000 deserves to be rejected in view of the law laid down by the Supreme Court in U.P. Pollution Control Board v. Kanoria Industrial Ltd. (2001)2 JT SC 103. One of the questions considered in that case was whether the declaration of law made by the Supreme court in a later decision can be made basis for reopening the orders which have become final. While answering the question in the affirmative, their Lordships of the Supreme court observed as under:-*
>
> > *"Another reason to defeat the claim for refund put forth is that the respondents have filed writ petitions challenging unsuccessfully the validity of levy in question and those orders have become final inasmuch as no appeal against the same has been filed. The contention is put forth either on the basis of resjudicata or estoppel. It is no doubt true that these principles would be applicable when a decision of a Court has become final. But in matters arising under public law when the validity of a particular provision of levy is under challenge, this Court has explained the legal position in Shenoy and Co. v. Commercial Tax Officer, Circle II, Bangalore (1985) 60 STC 70 (SC); (1985) 2 SCC 512 that when the Supreme Court declares a law and holds either a particular levy as valid or invalid it is idle to contend that the law laid down by this Court in that judgment would bind only those parties who are before the Court and not others in respect of whom appeal had not been filed. To do so is to ignore the binding nature of a judgment of this Court under article 141 of the Constitution. To contend that the conclusion reached in such a case as to the validity of a levy would apply only to the parties before the court is to destroy the efficacy and integrity of the judgment and to make the mandate of article 141 illusory. When the main judgment of the High Court has been rendered ineffective, it would be applicable even in other cases, for exercise to bring those decisions in conformity with the decisions of the Supreme Court will be absolutely necessary. Viewed from that angle, we find this contention to be futile and deserves to be rejected."*

23. Our opinion as to the exercise of power under Article 226 of the Constitution of India having been fortified by judgments of the Supreme Court in ***U.P. Pollution Control Board and others***, ***Saraswati Sugar Mills***, ***Solonah Tea Co. Ltd.***, ***Shree Baidyanath Ayurved (P) Ltd.*** and by a Division Bench judgment in ***Fizz Dinks P. Ltd. v. State of Haryana and others*** (supra), we find no reason to accept the arguments addressed by the State of Haryana, that a writ cannot or should not issue to direct refund of a tax levied, collected and retained, without authority of law.

24. A point raised by the State of Haryana, that we must deal with is that as the assessment orders persist and the statute does not empower the State to order refund, a direction to that effect submission disregards the fact that the levy, the collection and retention of VAT by the State of Haryana, is without authority of law. The levy and collection of tax, pursuant to assessment orders dated 22.2.2006, 26.3.2008 and 22.2.2006 (Annexures P-3A, P-3B and P-3C) not being relatable to a statutory power emanating from a Statute and, therefore, violative of Article 264 of the Constitution of India and a nullity. The mere fact that orders have been passed levying and collecting tax would not confer legitimacy, on the acts of the State of Haryana in seeking to retain the amount of tax collected and retained, without

authority of law. The State of Haryana would have been justified in raising such a plea if the judgment in ***Bharat Sanchar Nigam Limited*** *(*supra) had been held to be prospective. A perusal of the aforesaid judgment reveals that the declaration of law is not prospective and like all general declarations of law, would be deemed to apply from the inception of the statute. The judgment having clearly held that VAT cannot be collected on activation of SIM cards, the assessment orders levying and collecting VAT, are from their inception a nullity and, therefore, the levy and collection of VAT is without authority of law and violative of Article 265 of the Constitution of India.

25. The argument that refund of this amount would amount to unjust enrichment of the petitioner is without foundation in fact or in law. The Union of India has raised a demand for service tax for the period for which the State of Haryana has levied and collected VAT. If the petitioner is called upon to pay VAT and service tax, it would be the case of double taxation. Even otherwise all that we propose to do is to direct the State of Haryana to forward this amount to the Union of India.

26. Having held as above and taking into consideration that the transaction is subject to service tax, we allow the writ petition by holding that:

(a) the assessment orders dated 22.2.2006, 26.3.2008 and 22.2.2006 (Annexures P-3A, P-3B and P-3C) are a nullity;

(b) the State of Haryana shall transfer the amount of VAT collected from the petitioner to the Service Tax Department of the Union of India;

(c) the amount of VAT transferred by the State of Haryana to the Service Tax Department of Union of India shall not be deemed to be a full and final discharge of the petitioner's liability to pay service tax, which shall depend upon adjudication by the authority concerned.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

VATAP-47-2014

CEBON INDIA LIMITED

Vs.

STATE OF HARYANA AND ANOTHER

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

24th April, 2015

HF ▶ Revenue

EXEMPTION – EXEMPTED UNIT – EXPANSION – WHETHER LIABLE TO BE ASSESSED JOINTLY WITH ORIGINAL UNIT- ORIGINAL UNIT (UNIT 1) EXEMPTED – EXPANDED UNIT (UNIT 2) SEPARATELY REGISTERED FOR CLAIMING FURTHER EXEMPTION – EXEMPTION TO UNIT 2 DENIED – DEMAND RAISED AGAINST UNIT 2 VIDE ASSESSMENT ORDER – CONTENTION RAISED BY APPELLANT THAT DUE TO DENIAL OF EXEMPTION TO UNIT 2 BOTH UNITS 1&2 FORMED A SINGLE ENTITY AND WERE LIABLE TO BE ASSESSED JOINTLY AND NOT SEPARATELY – HELD, EXEMPTION IS GRANTED TO A UNIT AND NOT TO THE COMPANY - DISTINCTION BETWEEN COMPANY AND UNIT AS DRAWN IN RULES POINTED OUT – WHETHER SECOND UNIT IS GRANTED SEPARATE REGISTRATION OR NOT IS IRRELEVANT IN DETERMINING WHETHER THE UNIT TO WHICH EXEMPTION IS GRANTED HAS ACHIEVED PRODUCTION FIGURE – CLUBBING OF THE TWO UNITS FOR PURPOSE OF ASSESSMENT DISALLOWED - APPEAL DISMISSED – RULE 29 A OF HGST RULES, 1975

The appellant had set up an industrial unit and had obtained exemption for the same u/s 13 of the Act r/w Rule 28- A from 1996- 2003. Later, an expanded unit (unit 2) was set up in the same vicinity for which further exemption was applied for. For this purpose separate registration was obtained in respect of unit 2. Due to requirements of Rule 28 A not being met, application for unit 2 was rejected. The DETC had cancelled exemption certificate of the existing unit also. However, in 2002 , exemption of the original unit was restored. The assessment for the year 1997-98 was framed for unit 2 (expanded unit) and a demand of Rs 2,05,176/- was raised. The appellant contended that since exemption application for unit 2 was rejected, both the units remained a single entity and the tax returns filed for the expanded unit could only be assessed jointly with the returns of the original unit and the production capacity and the actual production of both units ought to be considered while determining whether requirements of Rule 28-A were complied with or not. The appellant did not file returns for unit 2 and instead tried to avail the benefit of exemption granted to first unit.

Dismissing the appeal, it is held by the High Court that requirement of sub-rule 11 of 28-A have to be met. The exemption is to be sought by a unit interalia of a company and is granted to the unit not to the company. The court has pointed out the difference between the unit and

the company as drawn throughout the Rules. It is irrelevant whether registration in respect of 2nd unit is granted or not. Even if not granted or subsisting, it will be irrelevant in determining whether the unit for which exemption is granted has achieved the production figures and other requirements. Therefore, clubbing of the two units is not allowed in the present case.

Case referred:

State of Haryana and others V/s Bharti Tele Tech Ltd. 2014 (3) SCC 556

Present: Mr. Piyush Kant Jain, Advocate, and Mr. Suresh Kumar Yadav, Advocate, for the appellant.

Ms. Mamta Singla Talwar, AAG, Haryana.

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S.J. VAZIFDAR, A.C.J.

The above seven appeals are filed under Section 36(1) of the Haryana Value Added Tax Act, 2003 against a common order dated 22.10.2013 passed by the Haryana Tax Tribunal. The appeals are, therefore, disposed of by a common order and judgement. We will for convenience refer to the facts from VATAP-47-2014.

2. The above seven VATAPs No. 47 to 53 pertain to the assessment years 1997-1998, 1996-1997, 1998-1999, 1997-1998, 1996-1997, 1995-1996 and 1995-1996, respectively. There are two appeals each for the three assessment years 1995-1996, 1996-1997 and 1997-1998 as there were separate assessments under the Central Sales Tax Act and the Haryana General Sales Tax Act. For the assessment year 1998-1999, the assessment was only under the Haryana General Sales Tax Act and there is, therefore, only one appeal in respect thereof.

3. The appellant had set up an industrial unit at Gurgaon in the State of Haryana. The appellant is a registered dealer under the Haryana General Sales Tax Act, 1973 and the Central Sales Tax Act, 1956. The appellant was allowed exemption from payment of tax under Section 13-B of the Haryana Sales Tax Act read with Rule 28-A of the Haryana General Sales Tax Rules, 1975 for a period of seven years from 04.04.1996 to 03.04.2003 for an amount of Rs. 283.76 lacs.

4. The appellant's case is that it subsequently made an additional fixed capital investment of Rs. 1.57 crores which increased its production capacity. The appellant applied for the grant of a further exemption from payment of tax in relation to the expansion unit. The appellant contends that it had obtained the separate registration in respect of the expanded unit bearing Registration Certificate No. 18200737 only for the limited purpose of becoming eligible to avail the exemption and started filing separate returns for its two units referred to as Unit No. 1 and Unit No. 2. On taking instructions, Mr. Piyush Kant Jain, learned counsel appearing on behalf of the appellant states that the second unit/expanded unit was a separate independent unit, although in the same area/vicinity/plot.

5. The appellant admits that while the application for the second unit was under process, its manufacturing activities had to be suspended allegedly due to unavoidable circumstances. The exemption for Unit No. 2 was not allowed by the authorities. Although the exemption for the original/first unit was also withdrawn, it was restored by the Appellate Authority by an order dated 11.12.2002. The appellant contends that upon rejection of the application for exemption with respect to the Unit No. 2/expansion unit, both the units formed but a single entity and the tax returns filed for the expansion unit could only be assessed jointly with

the returns of the original unit and the production capacity and the actual production of both the units ought to be considered while determining whether the requirements of Rule 28-A and in particular sub Rule (11) thereof were complied with or not.

6. The appellant contends that respondent No. 2/Excise and Taxation Officer-cum-Assessing Authority wrongly framed separate ex-parte assessments for Unit No. 2/the expanded unit by an order dated 27.01.1999 in respect of assessment years 1997-1998 under the Haryana Sales Tax Act and raised an additional demand of Rs. 2,05,176/-. The appellant filed an appeal against the assessment order before the Joint Excise and Taxation Commissioner (Appeals), Faridabad which was disposed of by an order dated 25.08.2009. The appellant thereafter filed a further appeal before the Haryana Tax Tribunal which was rejected by the impugned order dated 22.10.2013.

7. The appellant contends that this appeal raises the following substantial questions of law:-

"(i) Whether the dealer is bound to be assessed to tax separately after the rejection of claim for further exemption qua expansion of the existing unit for which a separate registration was taken for limited purpose of becoming eligible for applying for further exemption?

(ii) Whether Rule 28A of the Sales Tax Rules prohibits extending benefits of exemption from payment of tax on sale of products of expanded capacity within the overall limit of exemption granted to the original unit?"

8. Section 13-B of the Haryana Sales Tax Act reads as under:-

*"**13B- Powers to exempt certain class of industries** - The State Government may, if satisfied that it is necessary or expedient so to do in the interest of industrial development of the State, exempt such class of industries from the payment of tax, for such period either prospectively or retrospectively and subject to such conditions as may be prescribed."*

9. Rule 28A of the Haryana General Sales Tax Rules, 1975 reads as under:-

"28A (2) For the purpose of this Chapter, unless the context otherwise requires.

*(c) "**New Industrial Unit**" means a unit which is or has been set up in the State of Haryana and comes or has come into commercial production for the result of purpose or transfer of old machinery except when purchased in the course of import into the territory of India or when the cost of old machinery does not exceed 25% of the total cost of machinery re-establishment, amalgamation, change of lease, change of ownership, change in constitution, transfer of business, reconstruction or revival of existing unit;*

*(d) "**expansion/diversification of industrial unit**" means a capacity set up or installed during the operative period which creates additional productions / manufacturing facilities for manufacture of the same product/products as of the existing unit (expansion) or different products (diversification) at the same or new location, and*

(i) in which the additional fixed capital investment made during the operative period exceeds 25% of the fixed capital investment of the existing unit, and

(ii) which results into increase in annual production by 25% of the installed capacity of the existing unit in case of expansion.

X X X X X X

*(f) '**eligible industrial unit**' means :-*

(i) a New Industrial Unit or expansion or diversification of the existing unit, which-

(I) has obtained certificate of registration under the Act.

X X X X X X

*(j) "**eligibility certificate**" means a certificate granted in form S.T.72 by the appropriate Screening Committee to an eligible industrial unit for the purpose of grant of exemption deferment;*

*(k) "**exemption certificate**" means a certificate granted in form S.T.73 by the Deputy Excise and Taxation Commissioner of the District to the eligible industrial unit holding eligibility certificate which entitles the unit to avail of exemption, from the payment of sales or purchase tax or both, as the case may be.*

X X X X X X

(11)(a) The benefit of tax-exemption/deferment under this rule shall be subject to the condition that the beneficiary/industrial unit after having availed of the benefit:-

(i) shall continue its production at least for the next five years not below the level of average production for the preceding five years; and (ii) shall not make sales outside the State for next five years by way of transfer of consignment of goods manufactured by it.

(b) In case the unit violates any of the conditions laid down in clause (a), it shall be liable to make, in addition to the full amount of tax-benefit availed of by it during the period of exemption/deferment, payment of interest chargeable under the Act as if no tax exemption/deferment was ever available to it;

Provided that the provisions of this clause shall not come into play if the loss in production is explained to the satisfaction of the Deputy Excise and Taxation Commissioner concerned as being due to the reasons beyond the control of the unit.

Provided further that a unit shall not be called upon to pay any sum under this clause without having been given reasonable opportunity of being heard."

10. As we mentioned earlier, on 07.11.1996, the appellant had applied for exemption under Rule 28-A. In accordance with Rule 28-A, the appellant made an application on behalf of the expansion unit for the grant of eligibility certificate for tax exemption/deferment for a period of seven years from the date of exemption. 19.02.1996 was stated to be the date of going into commercial production.

11. On 09.09.1998, the appellant was granted registration certificate No. 18200737 in respect of Unit No. 2/the expansion unit, whereas for the first unit registration certificate No. 1815049 had been granted.

12. On account of the manufacturing activities of the original unit having been suspended and the appellant having been unable to meet the requirements of Rule 28-A the application for exemption of Unit No. 2/expansion unit was rejected by a communication dated 05.08.1999. The Joint Director in the said communication noted that the Higher Level Screening Committee had observed that the appellant had not appeared before the Committee; that the report of the DETC noted that the unit had not yet completed the documents; that the unit was lying closed and that the DETC had even cancelled the exemption certificate of the existing unit as the existing unit and the expansion unit were lying closed. The committee decided not to grant benefit of sales tax exemption to the expansion unit and decided to reject the application. On 11.12.2002, the appeal was allowed and the exemption in respect of the original unit continued.

13. Admittedly, the appellant's application for exemption with respect to Unit No. 2 had been rejected and the appellant did not challenge the same. The appellant had only succeeded in getting the exemption of the original unit/Unit No. 1 restored. Admittedly, the appellant had not filed any return for Unit No. 2 on the basis that it was a separate unit and instead sought to take the benefit of exemption granted to the first unit. Mr. Jain, the learned counsel appearing on behalf of the appellant, contended that on account of the rejection of the exemption in respect of the Unit No. 2/expansion unit, it remained a part of the appellant-company and, therefore, its production must be taken into account while ascertaining whether the condition of exemption in respect of the first/original unit was complied with or not as required by Rule 28-A (11).

14. The submission is liable to be rejected in view of the judgement of the Supreme Court in *State of Haryana and others Vs. Bharti Tele Tech Limited, 2014 (3) SCC 556*. It was contended before the Supreme Court, as it was before us that as the assessee had established another unit as an expansion unit which had come into commercial production with effect from 27.03.1998 and for the purpose of determining the level of production after 12.12.1998 the production figures of the expansion unit were also required to be taken into account. The Supreme Court held as under:-

> *"16. The said decision in R.K. Mittal Mills case, as we perceive, was rendered in a totally different context. In the present case, we are not concerned with the withdrawal of eligibility certificate. We are concerned with the consequences that have been enumerated in clause (b) of sub-rule (11) of Rule 28-A which clearly stipulates that in case of violation of clause 11 (a) (i) of sub-rule (11), the assessee shall be liable for making, in addition to the full amount of tax-benefit availed of by it during the period of exemption/deferment, with interest chargeable under the Act. Thus, reliance placed by the High Court on the said decision is misconceived and inappropriate.*
>
> *17. The nub of the matter is whether production of two different units can be combined together to meet the requirement of the postulate enshrined under the Rule. The production of the beneficiary unit had failed to fulfil the stipulation incorporated in sub-rule (11)(a)(i) of Rule 28-A of the Rules. It is also the undisputed position that the production of the expanded unit has been computed and clubbed with the first unit to reflect the meeting of the criterion. The competent authority has come to a definite conclusion that the expanded capacity had been created to show that the rate of production is maintained but it is fundamentally a subterfuge. The authority has also taken into consideration the different items produced and how there has been loss of production of EPBT in the first unit. The High Court has failed to appreciate the relevant facts and, without noticing that the respondent assessee had clubbed the production of the units, lancinated the orders passed by the forums below.*
>
> *19. Mr. Jain has laid immense emphasis on the term "expansion" of the existing unit. The term "expansion" has been defined in clause (d) of sub-rule (2) of Rule 28-A which reads thus:-*
>
> *"28-A. (2)(d) 'expansion/diversification of industrial unit' means a capacity set up or installed during the operative period which creates additional productions/manufacturing facilities for manufacture of the same product/products as of the existing unit (expansion) or different products (diversification) at the same or new location –*
>
> *(i) in which the additional fixed capital investment made during the operative period exceeds 25% of the fixed capital investment of the existing unit; and*

(ii) which results into increase in annual production by 25% of the installed capacity of the existing unit in case of expansion."

20. On a careful reading of the aforesaid provisions, it is quite clear as day that they deal with the eligibility to get the benefit of exemption/deferment from the payment of tax. On a studied scrutiny of clause (f)(i)(I), it is manifest that it is incumbent on the unit to obtain certificate of registration under the Act. The submission of Mr. Jain is that the second unit has obtained the registration certificate under the Act and, hence, the production of the said unit, being eligible, is permitted to be included. Needless to say, obtainment of registration certificate is a condition precedent to become eligible but that does not mean that the production of the said unit will be taken into account for sustaining the benefit of the first unit. They are independent of each other as far as sub-rule (11) of Rule 28-A is concerned. We are disposed to think so as the grant of exemption has a sacrosanct purpose.

21. The concept of exemption has been introduced for the development of industrial activity and it is granted for a certain purpose to a unit for certain types of goods. Exemption can be granted under the Rules or under a notification with certain conditions and also ensure payment of taxes post the exemption period. The concept of exemption is required to be tested on a different anvil, for it grants freedom from liability. In the case at hand, as we understand, it is "unit" specific. The term "unit" has not been defined. The grant of exemption unit wise can be best understood by way of example. An entrepreneur can get an exemption of a unit and thereafter establish number of units and try to club together the production of all of them to get the benefit for all. It would be well-nigh unacceptable, for what is required is that each unit must meet the condition to avail the benefit.

27. In the case at hand, as we have already held that clubbing is not permissible. It amounts to a violation of the conditions stipulated under subrule (11)(a)(i) of Rule 28-A and, therefore, the consequences have to follow and as a result, the assessee has to pay the full amount of tax benefit and interest. The approach of the High Court is absolutely erroneous and it really cannot withstand close scrutiny."

15. Mr. Jain contended that in the case before the Supreme Court, the original unit which had been granted exemption had ceased to exist and, therefore, the ratio of the judgement is inapplicable to the case before us. The submission is not well founded. The ratio of the judgement would equally apply to a unit which, though not closed, does not meet the requirements of sub Rule (11) of Rule 28-A. The question whether the requirements of sub Rule (11) have been met or not does not depend on whether the unit is closed or not. The question is whether the requirements of sub Rule (11) have been met or not. If they have not been met, the reasons for not meeting the requirements are totally irrelevant.

16. The exemption is to be sought by and in respect of a unit, inter alia, of a company and is granted to the unit. The distinction between the juristic entity, namely, the company and a unit thereof has been drawn throughout the Rules. The Rules we quoted earlier are only a few illustrations of this. The exemption is given to the unit and not to the company. The refusal of the exemption to the second unit makes no difference in determining whether the provisions of sub Rule (11) of Rule 28-A had been met by the unit to which the exemption was granted. For this reason, it is irrelevant whether the registration certificate in respect of the second unit is granted or not and if granted whether it is subsisting or not. Even if it is not subsisting or not granted, it would be irrelevant while determining whether the unit in respect of which exemption is granted has achieved the production figures and has met the other requirements.

17. The appeals are, therefore, dismissed.

PUNJAB & HARYANA HIGH COURT

CWP NO. 4595 OF 2015

LIFE LONG INDIA LTD
Vs.
STATE OF HARYANA & OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND GURMIT RAM, J

30th March, 2015

HF ▶ Petitioner

STAY OF RECOVERY – SECURITY – APPEAL PENDING BEFORE TRIBUNAL – TRIBUNAL NOT BEING CONSTITUTED, WRIT FILED FOR INTERIM RELIEF – SECURITY OFFERED TO BE FURNISHED BY A FIXED DATE – STAY OF RECOVERY PROCEEDINGS PRAYED FOR – HELD, RECOVERY TO BE STAYED IN THE EVENT OF FURNISHING OF SECURITY TILL DECISION OF RESPONDENTS REGARDING ITS ADEQUACY – ADVERSE DECISION TO LEAD TO INITIATION OF RECOVERY PROCEEDINGS ONE WEEK THEREAFTER – PETITIONER RESTRAINED FROM DISPOSING OF ITS IMMOVABLE PROPERTY TILL PENDENCY OF APPEAL.

An appeal had been filed before the Tribunal regarding stay of recovery proceedings. As the Tribunal was not constituted then, the appeal couldn't proceed at that stage. Hence, a writ was filed before High Court. The Hon'ble High Court has ordered that if the petitioner furnishes security by 15/4/2015, the recovery proceedings would be stayed. The proceedings wouldn't be initiated till the respondents decide whether the security offered is adequate or not. In the event of the decision being adverse to the petitioner, the recovery proceedings would be initiated one week thereafter. The petitioner was refrained from disposing of its immovable property till the pendency of appeal.

Case referred:

M/s Kohinoor Foods Ltd. V The State of Haryana and others CWP No. 3961 of 2015

Present: Mr. Rajiv Agnihotri, Advocate for the petitioner

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S.J. VAZIFDAR, A.C.J.

1.The petitioner has filed an appeal before the Tribunal. However, the Tribunal under the Haryana Value Added Tax Act, 2003 has not yet been constituted. The constitution of the

Tribunal also depends upon certain other proceedings which have been filed unconnected to the present writ petition. In the circumstances, the appeal that had been filed by the petitioner cannot proceed at this stage. In lieu thereof, it is not possible for the petitioner to seek interim relief before the Tribunal. Considering the order passed in similar matter including order dated 04.03.2015 in Civil Writ Petition No.3961 of 2015 *(M/s Kohinoor Foods Ltd. v. The State of Haryana and others*), we dispose of this writ petition by the following order:

2. In the event of the petitioner furnishing by15.04.2015 security contemplated under Section 33(5) of the said Act, recovery proceedings be not initiated. The respondents shall consider whether the security, if offered by the petitioner, is satisfactory or not. In the event of security being offered by 15.04.2015, the recovery proceedings shall not be initiated till the decision of the respondents on the question as to whether the security is adequate or not and for a period of one week thereafter, in the event of the decision being adverse to the petitioner. However, pending the appeal the petitioner shall not dispose of its immovable properties or encumber the same in any manner whatsoever.

PUNJAB & HARYANA HIGH COURT

CWP NO. 4529 OF 2015

LIFE LONG MEDITECH LTD
Vs.
STATE OF HARYANA & OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND GURMIT RAM, J

30TH March, 2015

HF ▶ Petitioner

ENTERTAINMENT OF APPEAL – SECURITY/BONDS- DISMISSAL OF APPEAL BY FIRST APPELLATE AUTHORITY DUE TO FAILURE TO FURNISH BONDS U/S 33(5) OF THE ACT – WRIT FILED AS TRIBUNAL NOT CONSTITUTED THEN TO CHALLENGE THE IMPUGNED ORDERS – PETITIONER WILLING TO FURNISH BONDS- FIRST APPELLATE AUTHORITY DIRECTED TO HEAR APPEAL ON MERITS ON FURNISHING OF BONDS BY THE FIXED DATE AS REQUIRED UNDER LAW – *SEC 33(5) OF HARYANA VAT ACT*

The first appellate authority had dismissed the appeal on the ground of failure to furnish the bonds as required u/s 33 of the Act. Since the Tribunal was not constituted then, the impugned orders are challenged by way of writ. The petitioner is willing to furnish the bonds in the present case. It is directed that the first appellate authority would hear the appeal on merits if the petitioner furnished the bonds on or before 15/4/15.

Present: Mr. Rajiv Agnihotri, Advocate for the petitioner

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S.J.VAZIFDAR,ACTINGCHIEFJUSTICE

The petitioner has challenged an order of the first appellate authority, *i.e.*, Joint Excise and Taxation Commissioner(Appeals), Faridabad, dismissing the appeal on the ground that the petitioner had failed to furnish the bonds as required by Section33(5) of the Haryana Value Added Tax Act, 2003.

2. The order is challenged by way of this petition as the Tribunal has not been constituted as yet. In several matters, we had permitted the petitioners, as an interim measure, to file the bonds as required by Section 33(5) of the said Act instead of furnishing a guarantee or depositing the amount. Those were the matters in which the petitioners had also challenged

the findings of the first appellate authority. In the present case, the petitioner is willing to furnish the bonds in accordance with Section 33(5) of the said Act.

3. In that view of the matter, it would not be necessary to accept the statement and let the petitioner await the constitution of the Tribunal. The matter may be heard by the first appellate authority in view of the petitioner having agreed to furnish thebonds.

4. The writ petition is, therefore, disposed of by directing that in the event of the petitioner furnishing the bonds in accordance with Section 33(5) of the said Act on or before 15.04.2015, the first appellate authority shall hear the appeal on merits.

PUNJAB & HARYANA HIGH COURT

VATAP NO. 11 OF 2012

UNITED SPIRITS LTD.
Vs.
STATE OF HARYANA AND ANOTHER

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

31st March, 2015

HF ▶ Appellant / assesee

UNJUST ENRICHMENT – PURCHASE OF GOODS ON ALLEGED PAYMENT OF TAX – DEEMED INCLUSION OF SUCH TAX AT THE TIME OF SALE OF TAXFREE GOODS – QUESTION OF UNJUST ENRICHMENT DOES NOT ARISE AS THE DEALER HAS ALREADY PAID THE TAX – CONVERSELY IF THE GOODS ARE PURCHASED WITHOUT PAYMENT OF TAX – QUESTION OF INCLUSION OF TAX IN SALE PRICE DOES NOT ARISE – NO CASE OF UNJUST ENRICHMENT – APPEALS ALLOWED – STATE DIRECTED TO REFUND THE AMOUNT

The appellant who is a manufacturer of liquor, purchased the raw material i.e. ethyl alcohol which was tax-free. The appellant was held liable for purchase tax, as the appellant is last purchaser of taxable goods within the State. The appellant, however, claimed that selling dealer is seeking exemption under the Industrial Policy of the State, and as such purchases of appellant would not be exigible to tax. The appeal of the appellant was rejected up to Tribunal as the selling dealer, i.e. Haryana Organics could not obtain necessary exemption upto decision by the Tribunal. However, subsequently, the writ petition filed by Haryana Organics for grant of exemption was allowed by the High Court and accordingly, the appellant filed a Review Application before the Tribunal. The Tribunal came to a conclusion that the appellant is no longer liable to pay the tax but the Review Application was rejected on the ground of unjust enrichment.

On appeal before the High Court, it is held that the reasoning adopted by the Tribunal is perverse. Looking at either way, there is no unjust enrichment as the solitary basis for the Tribunal to hold that the appellant has collected the tax is the factum of inclusion of tax by the seller of ethyl alcohol to the appellant. One the Tribunal had observed that appellant had paid the tax to his seller, the question of unjust enrichment in his hands does not arise. Conversely, if the appellant has not paid the tax at the time of purchase, the question of including the same in the sale price of liquor would not arise. Accordingly in none of these events, the appellant can be denied the benefit on the ground of unjust enrichment.

The appeals were thus allowed and the State was directed to refund the amount within 12 weeks.

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

Ms. Mamta Singla Talwar, AAG, Haryana.

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S.J. VAZIFDAR, A.C.J.

1. These appeals are against the order of the Haryana Tax Tribunal rejecting the appellant's application for review under Section 41 of the Haryana General Sales Tax Act, 1973 (in short 'the Act'). The facts in both the appeals are similar. The appeals are therefore, disposed of by this common order and judgment. For convenience, we will refer to the facts from VATAP No. 11 of 2012.

2. The appeal is admitted on the substantial question of law raised in para no. 3 of the appeal which read thus:

> *"(1) Whether the department is justified in levying the tax upon the selling dealer of appellant i.e. M/s. Haryana Organics as well as the appellant for the same transaction?*
>
> *(2) Whether the Tribunal was justified in coming to a conclusion that the price of goods sold by the appellant/assessee included the tax despite the fact that this finding has never been given by any of the lower authorities nor it was confronted by the assessee during the course of arguments before this Hon'ble Tribunal?*
>
> *(3) Whether the authorities under the act can levy any tax on the ground of undue enrichment, even though there is no provision for the same?"*

3. The substantial question of law really is whether the Tribunal was justified in rejecting the appellant's claim on the ground of unjust enrichment.

The appellant manufactures liquor. M/s. Haryana Organics sold ethyl alcohol to the appellant. Ethyl alcohol is taxable under the Act whereas liquor was not taxable at the relevant time namely the assessment year 1998-99.

In respect of the said sales, M/s. Haryana Organics issued certificates including for the assessment years 1998-99 and 1999-2000 certifying that the rate of spirit supplied during the said period was inclusive of sales tax and other government levies as applicable to them. In view thereof, the appellant did not issue ST-15 certificates.

M/s. Haryana Organics issued the said certificate dated 12.03.2001 confirming that it was entitled to exemption under Section 13-B of the Act read with Rule 28-A of the Haryana General Sales Tax Rules, 1975. The application for exemption was, however, rejected. M/s. Haryana Organics challenged the rejection by filing CWP No. 18240 of 1997, was disposed of by a learned Single Judge by an order and judgment dated 22.10.2002 [2003 (132) STC 493 P&H]. The learned Judge held that the respondents therein were not justified in denying the exemptions to the petitioners and remanded the matter to the High Level Screening Committee for fresh determination of the claim of M/s. Haryana Organics in the light of the observations made therein. The respondents' appeal against the said order was dismissed by an order and judgment of the Division Bench dated 03.03.2009 (2009) 39 VST 616 (P & H).

Thereafter, the respondents, in view of the orders in CWP No. 18240 of 1997, considered the matter afresh and issued the eligibility certificate in favour of M/s. Haryana Organics. The certificates granted sales tax exemption of `496.82 lacs for a period of 9 years from the date of commercial production namely 31.03.1994 to 30.03.2003. In order words, the exemption was granted in respect of the assessment year 1998-99 and 1999-2000, which are

relevant in the above appeals.

4. While the proceedings were pending between M/s. Haryana Organics and the respondents regarding the former's application for exemption under Section 13-B of the Act read with Rule 28-A:

(i) assessment orders had been passed in respect of M/s. Haryana Organics. In view of the exemption having been subsequently granted, M/s. Haryana Organics challenged the demand; and

(ii) an assessment order dated 10.04.2001 was made in respect of the appellant for the assessment years 1998-1999 and 1999-00. The appellant was assessed to purchase tax on the ground that neither the appellant nor M/s. Haryana Organics had in fact paid the same and that M/s. Haryana Organics was not an exempted unit under the said Act. On 23.12.2002, the Tribunal dismissed the appeal against the assessment order.

However, as we mentioned earlier, the learned Single Judge by the order and judgment dated 22.10.2002 had allowed the said writ petition CWP No. 18240 of 1997 filed by M/s. Haryana Organics and directed the respondents to consider the application for exemption afresh.

4. As we mentioned earlier, the Tribunal had by the order dated 23.12.2002, upheld the levy of purchase tax upon the appellant as the appellant was the last purchaser of taxable goods to be used for the purpose of manufacturing non taxable goods. In view of this order, the appellant filed the above review application before the Tribunal. As we also mentioned earlier, thereafter the respondents issued the eligibility certificate in favour of M/s. Haryana Organics for 9 years which included the assessment years 1998-99 and 1999-2000 which are relevant in this appeal.

5. The Tribunal by the impugned order, held that in view of M/s. Haryana Organics subsequently becoming entitled to the exemption, the review application was maintainable. The Tribunal, therefore, admitted the review petition. The Tribunal also came to the conclusion that the appellant was no longer liable to pay the tax. However, the review was rejected on the ground of unjust enrichment. The Tribunal held:

> *"9.....So far as purchases of alcohol effected from M/s. Haryana Organics during the year 1998-99 is concerned, by admission of both, the seller and the purchaser, the price of the alcohol charged was inclusive of sales tax applicable at the relevant time, therefore, it would be legally justifiable to presume that as a prudent businessman, the applicant-assessee ought to have factored the element of tax in the price of alcohol (purchased by him) in the price of liquor manufactured and sold by him. Thus from the angle of exemption is eventually granted to M/s. Haryana Organics or not for the relevant period. In this view of the matter, the review is rejected."*

6. The reasoning adopted by the Tribunal is perverse. Looked at either way, there is no question of unjust enrichment. The Tribunal has proceeded on the basis of the appellant's contention that the purchase price paid by the appellant included the sales tax element and, therefore, inferred that the appellant must have added the element of tax in the price of alcohol sold to the consumers.

7. Assuming that the tax had been paid by the appellant and had been recovered from the consumers, the matter would end there. The appellant would not be burdened with any tax itself. However, the appellant was compelled to deposit the entire purchase tax element with the Assessing Authorities as a condition precedent to the maintainability of its appeal. Far from being unjustly enriched the appellant in this manner is actually out of the pocket to the extent

of the amount paid as a condition precedent to the maintainability of the appeal. In the event of the same being refunded, there would be no question of unjust enrichment.

8. Conversely assuming that the appellant had not paid the tax, it would be reasonable to presume on the same line of reasoning adopted by the Tribunal that the appellant had not recovered the amount from the consumers. In any event, the Tribunal has not come to any finding against the appellant to the effect that it actually recovered the amount from the consumers. There would be no justification for us to speculate to this effect in the appellant's appeal. In that event also, the appellant would be out of pocket to the extent of the amount deposited by it as a condition precedent for the maintainability of its appeal. The amount, therefore, must even in that event be refunded.

9. In the circumstances, both the appeals are allowed. The amount shall be refunded by the respondents within 12 weeks from today.

PUNJAB & HARYANA HIGH COURT

CWP NO. 5730 OF 2014

CHD DEVELOPERS LTD

Vs.

STATE OF HARYANA AND OTHERS

AJAY KUMAR MITTAL AND JASPAL SINGH, JJ

22nd April, 2015

HF ▶ Assessee/Dealers

Revenue/ General Principles

WORKS CONTRACT – DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE – PROPERTY IN GOODS PASSED TO BUYERS IN THE SHAPE OF IMMOVABLE PROPERTY – ARTICLE 366(29A) – CONSTITUTE WORKS CONTRACT – EVEN IF SOME PORTION OF LAND IS ALSO SOLD ALONGWITH IT – AMOUNTS TO DEEMED SALE – STATE COMPETENT TO LEVY TAX.

WORKS CONTRACT – MEASURE OF TAX - DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE – ONLY VALUE OF GOODS CAN BE TAXED – STATE ENTITLED TO PRESCRIBE FORMULA FOR DEDUCTION OF LABOUR AND LAND BY FIXED PERCENTAGE WHERE BOOKS OF ACCOUNTS ARE NOT MAINTAINED OR IMPROPER – TAXABLE EVENT IS TRANSFER OF PROPERTY WHICH TAKES PLACE AT THE TIME OF INCORPORATION - VALUE OF GOODS AT THE TIME OF INCORPORATION CAN ONLY BE TAXED.

WORKS CONTRACT – MEASURE OF TAX - DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE - ACTIVITY OF CONSTRUCTION UNDERTAKEN BY DEVELOPER IS WORKS CONTRACT ONLY FROM THE STAGE HE ENTERS INTO A CONTRACT WITH FLAT BUYER – IF FLAT IS SOLD AFTER CONSTRUCTION THEN THERE IS NO WORKS CONTRACT – GOODS CAN NOT BE DEEMED TO HAVE BEEN SOLD BY THE BUILDER – GOODS TRANSFERRED AFTER THE AGREEMENT IS ENTERED INTO WITH THE FLAT BUYER CAN ONLY BE MADE TO CHARGEABLE TO TAX.

WORKS CONTRACT – MEASURE OF TAX - DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE – NO TAX CAN BE CHARGED FROM THE DEVELOPER IN RESPECT OF GOODS INCORPORATED IN THE WORKS CONTRACT ON WHICH SUB-CONTRACTOR HAS ALREADY PAID THE TAX.

WORKS CONTRACT - CIRCULARS - DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE – RELATES TO LEVY OF TAX ON DEVELOPERS – PROVIDES FOR MEASURE OF TAX AND DEDUCTION TOWARDS LABOUR AND OTHER LIKE CHARGES – NO

ILLEGALITY.

PRINCIPLES OF STATUTORY INTERPRETATION – WORKS CONTRACT – RULES OF READING DOWN – SUCH MEANING SHOULD BE ASSIGNED TO THE PROVISION WHICH WOULD MAKE IT EFFECTIVE AND ADVANCE THE PURPOSE OF ACT – SHOULD BE DONE WITHOUT DOING ANY VIOLENCE TO THE PROVISIONS OF THE ACT – RULE OF READING DOWN IS TO CONSTRUE A PROVISION HARMONIOUSLY AND TO STRAIGHTEN OR IRONING OUT CREASES TO MAKE A STATUTE WORKABLE.

WORKS CONTRACT – MEASURE OF TAX - DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE - EXPLANATION (i) TO SECTION 2(1)(zg) OF THE ACT - DEFINES 'SALE PRICE' - PROVIDES FOR DEDUCTION ON ACCOUNT OF LABOUR, MATERIAL AND SERVICES RELATED CHARGES FROM THE GROSS TURNOVER- NOT A CHARGING PROVISION- IT IS IN THE DEFINITION CLAUSE- PROVISION DOES NOT SUFFER FROM ANY VICE OR DEFECT OF UNCONSTITUTIONALITY.

WORKS CONTRACT – MEASURE OF TAX - DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE -THE PROVISIONS OF LAW INSOFAR AS THOSE SEEK TO CHARGE SALES TAX ON ANY AMOUNT OTHER THAN THE VALUE OF GOODS TRANSFERRED IN THE COURSE OF EXECUTION OF WORKS CONTRACT, THE PROVISION WOULD BE ULTRAVIRES THE CONSTITUTION OF INDIA - TAX IS TO BE COMPUTED ON A VALUE NOT EXCEEDING THE VALUE OF TRANSFER OF PROPERTY IN GOODS AND AFTER THE DATE OF ENTERING INTO AGREEMENT FOR SALE WITH THE BUYERS-WHEREVER THE DEDUCTIVE METHOD IS TO BE EMPLOYED, THEN IT HAS TO BE ENSURED THAT TAX IS CHARGED ONLY ON THE VALUE OF TRANSFER OF PROPERTY IN GOODS ON AND AFTER THE DATE OF ENTERING INTO AN AGREEMENT FOR SALE WITH THE BUYERS - DEDUCTIVE METHOD - SHOULD ORDINARILY INCLUDE A RESIDUARY CLAUSE IN CONSONANCE WITH THE MANDATE OF LAW SO AS TO COVER ALL SITUATIONS WHICH CAN BE ENVISAGED.

WORKS CONTRACT – MEASURE OF TAX - DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE - VALUE OF IMMOVABLE PROPERTY OR ANYTHING DONE PRIOR TO THE DATE OF ENTERING OF THE AGREEMENT OF SALE IS TO BE EXCLUDED - VALUE OF GOODS - WOULD BE THE VALUE OF THE GOODS AT THE TIME OF INCORPORATION IN THE WORKS EVEN WHERE PROPERTY IN GOODS PASSES LATER- RULE 25(2) OF THE RULES IS HELD TO BE VALID BY READING IT DOWN TO THE EXTENT INDICATED HEREINBEFORE AND ALSO SUBJECT TO THE STATE GOVT. REMAINING BOUND BY ITS AFFIDAVIT FILED IN THE COURT - STATE GOVT. SHALL BRING NECESSARY CHANGES IN THE RULES IN CONSONANCE WITH THE ABOVE OBSERVATIONS.

WORKS CONTRACT – SUB-CONTRACTOR – SECTION 42 - JOINT AND SEVERAL LIABILITY OF CONTRACTOR AND SUBCONTRACTOR – ONLY TO SAFEGUARD REVENUE IN CASE OF DEFAULT BY SUB-CONTRACTOR - SAID PROVISION CANNOT BE SAID TO BE ARBITRARY, DISCRIMINATORY OR UNREASONABLE.

WORKS CONTRACT – DEVELOPERS ENGAGED IN THE CONSTRUCTION OF FLATS FOR SUBSEQUENT SALE – SECTION 9 & RULE 49 - COMPOSITION SCHEME – LUMPSUM TAX – OPTIONAL SCHEME – ONCE OPTED THE DEALER CANNOT QUESTION THE METHOD OF CALCULATION OF LIABILITY – CIRCULAR TO DEAL WITH COMPOSITION SCHEME CANNOT BE FAULTED AS WELL.

CONSTITUTION OF INDIA – WRIT – ALTERNATIVE REMEDY - THE VIRES OF VARIOUS PROVISIONS OF THE ACT, RULES AND CIRCULARS WERE UNDER CHALLENGE - REMEDY OF WRIT PETITION CANNOT BE SHUT DOWN - ONE OF THE ACCEPTED EXCEPTIONS TO THE RULE OF ALTERNATIVE REMEDY - INDIVIDUAL ISSUES REGARDING NON-TAXABILITY OF

TRANSACTIONS ON MERITS - PARTIES WOULD BE AT LIBERTY TO RAISE ALL THOSE ISSUES BEFORE THE ASSESSING AUTHORITY/REVISIONAL AUTHORITY.

The petitioners who are developers engaged in the business of development and sale of apartments/flats/units, approached the High Court for seeking a writ in the nature of mandamus for declaring Explanation (i) to Section 2(1)(zg) of Haryana VAT Act 2003 and Rule 25(2) of Haryana VAT Rules, 2003 to be ultravires the Constitution of India insofar as they include the value of land for charging VAT on developers. The challenge was also made to the notices issued for assessment, circulars issued by the Department and orders of assessment.

The High Court has held:

On the taxability of such agreements/ transactions

Insofar as the agreement between developers/builders/promoters and the prospective purchasers to construct a flat and thereafter sell the same with some portion of land, would constitute a works contract and therefore, the State is empowered to levy tax on such contracts. For this purpose, the court has relied upon the judgments of Supreme Court in the case of K. Raheja Development Corporation vs State of Karnataka, (2005)5 SCC 162 and a Larger Bench case in Larsen & Toubro Ltd. vs State of Karnataka, 65 VST 1 (SC). It was held that the States are empowered to levy sales tax on the sale of goods in an agreement of sale of flat which also has a component of a deemed sale of goods.

On the Measure of tax in such transactions:

Where the developer/builder/promoter/contractor or the sub-contractor maintains proper books of account, it shall be the value of the goods incorporated in the works contract as per books of account. On the other hand, where the developer/contractor/sub-contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence, it would be permissible for the State Legislature to prescribe a formula for determining the charges for labour, service and cost of land by fixing a particular percentage of the works contract and to allow deduction of the amount thus determined from the value of the works contract for assessing the value of the goods involved in the execution of the works contract. The taxable event is the transfer of property in the goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works. The value of the goods which can constitute the measures for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works. The activity of construction undertaken by the developer etc. would be works contract only from the stage he enters into a contract with the flat purchaser. However, the deduction permissible under various heads would depend upon facts of each case on the basis of material available on record. It is clarified that where the agreement is entered into after the completion of the flat or the unit, there would be no element of works contract but in a situation, where agreement is entered into before the completion of construction, it would be a works contract. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser even if building is intended to be sold after construction would be of no consequence. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State

government. Taxing the sale of goods element in a works contract under Article 366(29A)(b) read with Entry 54 List II of Schedule VII of the Constitution of India is permissible even after incorporation of goods provided tax is directed to the value of the goods at the time of incorporation and does not purport to tax the transfer of immovable property. No tax can be charged from the developer/builder/promoter or contractor in respect of the value of goods incorporated in the works contract after the agreement with the flat purchaser on which the sub-contractor has already paid the tax.

On the validity of circulars issued by State Government:

Insofar as validity of instructions dated 7.5.2013, 4.6.2013 and 10.2.2014, Instructions No. 952/ST-1 dated 7.5.2013 issued by State is concerned, it provides that the agreements/contracts entered by developers with prospective buyers for sale of apartments/flats before the completion of construction constitutes works contract and thus VAT was imposable on such transactions. Clause 4 of the said circular relates to measure of tax and deduction towards labour and other like charges. Circular dated 4.6.2013 was issued regarding making of assessments on builders and developers. In view of legal position enunciated hereinabove, there is no illegality in the issuance of circulars dated 7.5.2013 and 4.6.2013.

On the principles of Interpretation regarding constitutionality of a provision:

The Rule of interpretation requires that such meaning should be assigned to the provision which would make the provisions of the Act effective and advance the purpose of the Act. This should be done wherever possible without doing any violence to the language of the provision. A statute has to be read in such a manner so as to do justice to the parties. The rule of reading down is to construe a provision harmoniously and to straighten crudities or ironing out creases to make a statute workable.

On the validity of Explanation (i) to Section 2(1)(zg):

Explanation (i) to Section 2(1)(zg) of the Act which defines 'sale price' provides for deduction on account of labour, material and services related charges from the gross turnover as defined under Section 2(1)(u) of the Act while arriving at the "sale price" in a works contract. It is not a charging provision which creates any liability for assessing VAT in a "works contract". It is in the definition clause of the Act and the provision does not embrace within its ambit something which is otherwise prohibited by law. Thus, the said provision does not suffer from any vice or defect of unconstitutionality.

On the inclusion of 'LAND' & Immovable Property in the taxable turnover under HVAT Act:

While analyzing the provisions with regard to calculation of taxable turnover relating to transfer of goods involved in execution of such works contract, the provisions of law insofar as those seek to charge sales tax on any amount other than the value of goods transferred in the course of execution of works contract, the provision would be ultravires the Constitution of India. The tax is to be computed on a value not exceeding the value of transfer of property in goods and after the date of entering into agreement for sale with the buyers. Wherever the deductive method is to be employed, then it has to be ensured that tax is charged only on the value of transfer of property in goods on and after the date of entering into an agreement for sale with the buyers. Wherever deductive method has been prescribed under the Rules, it should ordinarily include a

residuary clause in consonance with the mandate of law so as to cover all situations which can be envisaged.

Accordingly, the value of immovable property or anything done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer would be the value of the goods at the time of incorporation in the works even where property in goods passes later for the purpose of levy of tax. Consequently, rule 25(2) of the Rules is held to be valid by reading it down to the extent indicated hereinbefore and also subject to the State Govt. remaining bound by its affidavit filed in the Court. The court has also observed that State Govt. shall bring necessary changes in the Rules in consonance with the above observations.

On the validity of Section 42

Insofar as challenge to Section 42 is concerned, the said provisions only safeguard the interest of Revenue in the event of failure on the part of sub-contractor to discharge his liability of tax in respect of transaction entered by the sub-contractor with the contractor. Accordingly, the said provision cannot be said to be arbitrary, discriminatory or unreasonable in any manner.

On the validity of Section 9 and Rule 49

Equally, the challenge to validity of Section 9 of the Act and Rule 49 of Rules, cannot be accepted. Rule 49 of the Rules and Section 9 of the Act provides for scheme of lumpsum tax under Composition Scheme which is purely optional in nature. The dealers not under any bounden duty to subscribe to the Scheme and once he has opted for Composition Scheme which is optional, then he cannot question the method of determining his tax liability under those provisions. The circular to deal with Composition Scheme can also not be faulted.

On the Alternative Remedy:

Insofar as the preliminary objection with regard to alternative remedy is concerned, since the vires of various provisions of the Act, Rules and Circulars were under challenge, the remedy of writ petition cannot be shut down. This is one of the accepted exceptions to the rule of alternative remedy. Insofar as the individual issues regarding non-taxability of transactions on merits are concerned, the parties would be at liberty to raise all those issues before the Assessing authority/revisional authority in accordance with law.

Conclusion:

To conclude, the assessment order passed by Assessing Authority or revisional authority are liable to be set aside with liberty to the appropriate authority to pass fresh orders in the light of legal principles enunciated hereinbefore. In the cases where only notices have been issued, the competent authority shall be entitled to proceed further and pass order in accordance with law keeping in view the interpretation laid down by the Court. The writ petitions are thus partly allowed.

Present: Mr. Ashok Aggarwal, Senior Advocate with

Mr. Puneet Aggarwal, Advocate,

Mr. Sandeep Goyal, Advocate,

Mr. Rishab Singla, Advocate, for the petitioner (s)

(in CWP No. 5730 and 7575 of 2014).
Mr. Manav Bajaj, Advocate for
Mr. Sumeet Goel, Advocate for the petitioner
(in CWP No. 6845 of 2014).
Mr. Rajiv Agnihotri, Advocate for the petitioner(s)
(in CWP Nos. 7440, 7441 and 7614 of 2014).
Mr. Gajendra Maheshwari, Advocate and
Mr. Puneet Siddhartha, Advocate for the petitioner(s)
(in CWP Nos. 7720, 8338, 8339, 12387 and 12429 of 2014).
Mr. Bhupeshwar Jaswal, Advocate for
Mr. Mukul Aggarwal, Advocate for the petitioner
(in CWP No. 7832 of 2014).
Mr. Ashwani Chopra, Senior Advocate with
Mr. Pankaj Gupta, Advocate for the petitioner
(in CWP No. 7834 of 2014).
Mr. Shammi Kapoor, Advocate and
Ms. Megha Suri, Advocate for the petitioner
(in CWP No. 7908 of 2014).
Mr. Rajesh Goyal, Advocate for
Mr. Pritam Saini, Advocate for the petitioner
Mr. Amar Pratap Singh, Advocate and
Mr. Amrinder Singh, Advocate for the petitioner (s)
(in CWP Nos. 9314, 9364, 9370, 9456, 11072, 110911 and
13684 of 2014).
Mr. Sanjay Singh, Advocate for
Mr. Karanvir Singh Khehar, Advocate for the petitioner
(in CWP No. 11696 of 2014).
Mr. Vikram Jeet Singh, Advocate for
Mr. Aman Pal, Advocate for the petitioner
(in CWP No. 12170 of 2014).
Ms. Tanisha Peshawaria, DAG, Haryana with
Mr. M.K. Dutta, Advocate for State of Haryana.

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AJAY KUMAR MITTAL, J.

1. This order shall dispose of a bunch of 65 petitions bearing CWP Nos. 5730, 5731, 5746, 5751, 5753, 5754, 5755, 6043, 6044, 6050, 6051, 6119, 6132, 6135, 6142, 6143, 6148, 6149, 6165, 6199, 6224, 6250, 6363, 6845, 7138, 7440, 7441, 7575, 7614, 7720, 7832, 7833, 7834, 7908, 8093, 8338, 8339, 9314, 9342, 9364, 9370, 9456, 9748, 10027, 10029, 10030, 10342, 10404, 10405, 10408, 10409, 10411, 10412, 10413, 10422, 11072, 11091, 11696, 12107, 12387, 12429, 12667, 13684, 18075 of 2014 and 5120 of 2015 as according to learned counsel for the parties, the issues involved herein are identical. For brevity, the facts are being extracted from CWP No. 5730 of 2014.

2. In this writ petition filed under Articles 226/227 of the Constitution of India, the petitioner has prayed for issuance of a writ in the nature of mandamus declaring Explanation (i) to Section 2(1)(zg) of the Haryana Value Added Tax Act, 2003 (in short "the Act") and Rule 25 (2) of the Haryana Value Added Tax Rules, 2003 (hereinafter referred to as "the Rules") (Annexure P-1 Colly) in particular and other related provisions in so far as they include the value of land for charging Value Added Tax (for brevity "VAT") on developers to be *ultra vires* the Constitution of India in so far as it violates Article 246 of the Constitution of India read with Schedule VII, List II, Entry 54; for issuance of a writ in the nature of certiorari for quashing the notices (Annexure P-3 Colly) issued by respondent No.3 for charging tax on sale of flats/apartments/units and to make assessments of VAT; for quashing the circulars dated 4.6.2013 and 10.2.2014 (Annexure P-2 Colly) being in violation of the provisions of the Act and for issuance of a writ of mandamus directing respondent No. 4 not to charge and to refund the tax already paid in so far as it related to the value of materials sought to be charged to VAT. Besides, in some writ petitions, assessment orders passed by the assessing authority whereas in other writ petitions, the revisional order passed by the revisional authority on the basis of circulars and aforesaid provisions have also been assailed. In some cases, validity of Section 42 and Section 9 of the Act read with Rule 49 of the Rules has also been challenged.

3. Briefly stated, the facts necessary for adjudication of the instant writ petition as narrated therein may be noticed. The petitioner is a developer engaged in the business of development and sale of apartments/flats/units. Interested buyers enter into a flat buyers agreement. The property is ultimately sold by execution of sale deed on payment of stamp duty on total consideration. A circular dated 7.5.2013 was issued by the Excise and Taxation Commissioner, Haryana stating therein that the developers entering into agreements for sale of constructed apartments or flats prior to or during construction were chargeable to VAT. Consequently, a circular dated 4.6.2013 was issued regarding making of assessments on builders and developers. Subsequently, vide circular dated 10.2.2014, the circular dated 7.5.2013 was varied and value of the land was sought to be included for imposition of VAT. Notices (Annexure P-3 Colly) for re-assessment for the year 2010-11 under Section 17 of the Act were issued for imposing tax on the transaction of sale of flats, floors and villas amounting to ` 42,98,90,718/- as being under assessed. The petitioner filed reply (Annexure P-4) to the said notices. However, no response was received in this regard. The developer being engaged in the sale of immovable property where stamp duty was paid and also there being no mechanism provided under the Act for computation of tax, the imposition of tax insisted by the authorities was unconstitutional and beyond the provisions of the Act and Rules. Hence, the present writ petitions. Upon notice, respondents No.2 and 3 contested the writ petitions by filing written statement. It was pleaded therein that the issue regarding applicability and levy of VAT on builders and developers engaged in the activities of construction of building, flat and commercial properties and selling the same to the prospective buyers which the petitioners are contesting by way of the present writ petitions has already been settled by the Apex Court in **M/s Larsen & Toubro Limited v. State of Karnataka (2013) 46 PHT 269 (SC)** wherein it

was held that the builders and developers etc. engaged in the activities of the construction of building, flat and commercial properties were covered in the definition of "works contract" and were liable to sales tax laws of the State. The definition of 'works contract' contained in the Act is similar to that of VAT Act of Karnataka. Petitioner- M/s CHD Developers Limited is also a builder/developer/promoter who was engaged in the development of residential/commercial properties. A variety of agreements were entered into by the petitioner (s) with its prospective buyers for construction and sale of flats/apartments/villas/commercial projects against valuable consideration. Hence, the activity was covered by the definition of the expression 'works contract' as contained in Section 2(1) (zt) of the Act. Further, the definition of 'sale' as contained in clause (ze) of Section 2(1) of the Act covers the activities of 'works contract' which is similar to that of the VAT Act of Karnataka. The definition of "sale in the State" as contained in clause (zf) of sub-section (1) of Section 2 of the Act also covers the activities of 'works contract' which reads as under:-

> *"(zf) "Sale in the State" in relation to a sale as defined in sub-clause (ii) of clause (ze) means transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract in the State."*

4. In view of the above and the law settled in **M/s Larsen & Toubro Limited's case (supra)**, the respondents were satisfied that the petitioner has incurred liability for payment of VAT under the Act and accordingly, they have issued notice asking the petitioners to furnish requisite details to enable them to quantify correct tax liability under the Act. It was further pleaded that the respondents have initiated assessment proceedings under the Act to determine the actual tax liability of the petitioners and had provided reasonable opportunity of being heard to represent during the course of assessment proceedings. The petitioners have remedy to challenge the order passed under the Act. Further, this Court vide order dated 19.1.2012 passed in CWP No. 16751 of 2011 [reported as (2013) 57 VST 453] relegated the petitioner therein to the appellate authority to challenge the assessment order before it. The respondents knowing well that sale of land was not taxable under the Act being immovable goods, issued notice only for computing the tax liability on sale of goods liable to tax involved in the execution of the works contract under the Act and no notice proposing levy of tax on value of land has been issued by them. According to the respondents, the circulars dated 7.5.2013 (Annexure P-2), dated 4.6.2013 and dated 10.2.2014 were issued by respondent No.2 which related to works contractors and developers/ builders so as to remove some confusion amongst the departmental officers in determining the gross turnover and deductions allowable therefrom and consideration which was liable to tax. The said circulars in no way interfere with the quasi judicial functions of the Assessing Officers. It was further pleaded that there is transfer of property in goods in the said execution of the contract and the transfer is for a consideration to be paid in stages. Such transfer of property in goods was covered under clause (zt) of subsection (1) of Section 2 of the Act. Therefore, the petitioner was contractor and the prospective buyer a contractee. The other averments made in the writ petitions were denied and a prayer for dismissal of the same was made.

5. Learned counsel for the petitioners submitted that the builders/developers were not works contractors as they were engaged in sale of immovable property. It was argued that the provisions of Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Haryana Value Added Tax Rules were *ultra vires* the Constitution of India as under Entry 54 List II of Seventh Schedule to the Constitution of India, the State was empowered to charge tax on transfer of property in goods in execution of works contract whereas under its garb, they seek to charge tax on a value which was far in excess of the value of goods transferred in the course of execution of works contract including value of immovable property and expenses unrelated with transfer of property in goods. It was next submitted that it is well settled that all the

elements on which the State Legislature did not have power to charge VAT or sales-tax have to be specifically excluded by way of express and specific provisions and if any of the elements remain unspecified, the provisions shall be *ultra vires* the Constitution. Reference was made to definition of sale price in Section 2(ad) of UP VAT Act, 2008 which allows deduction for charges for labour, services and other prescribed amounts while Rule 9 of the Rules framed thereunder relates to determination of turnover of sale of goods involved in execution of works contract where deduction of proportionate amount of cost of land and amount representing the cost of establishment and other similar expenses is provided for. Support was also gathered from Rule 3 of Delhi VAT Rules, 2005 which provides for taxing works contract after excluding charges towards cost of land and other expenses elaborately referred in sub-rule 3 of Rule 3. It was urged that when the State had no power to charge tax on anything except value of transfer of property in goods, by its own admission, the provisions under the Act and Rules were indeed leading to inclusion of value addition in immovable property thereof whereas the Supreme Court in **M/s Larsen & Toubro Limited's case (supra)** had held that the State had the power to charge tax only on value additions in goods, property in which gets transferred after entering into agreement with the buyer. It was further contended that when the definition of 'works contract' was to be read with the definition of 'sale price', it was clear that the assessment had to be framed keeping in view pure and simple works contractors and not developers. Even no tax can be charged on the developer in respect of materials transferred directly by the subcontractor as Section 42 of the Act provides for levy of tax on the developer only in cases where property had been transferred by the subcontractor who fails to discharge his liability. Further, Section 42 of the Act stipulates joint and several liability of the contractor and subcontractor involved in the execution of the works contract. Section 42(2) of the Act provides that in case the main contractor proves to the satisfaction of the assessing authority that the tax has been paid by the sub-contractor and the assessment of such tax has become final, then he shall not be liable to pay tax on the sale of such goods. According to the learned counsel, taxing the contractor and sub-contractor for the same sale amounted to double tax and there could not be two deemed sales in one works contract. It was further urged that the activity of construction undertaken by the developer would only be a works contract from the stage when the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred by the developer, after the agreement is entered into with the flat purchaser, is the only component that can be made chargeable to tax by the State under the Act. Lastly, in the alternative, learned counsel submitted that if the VAT is levied on the element of transfer of immovable property in the composite contract by bringing it within the scope of term 'works contract', then to that extent the transaction should not be treated as conveyance as the property passes not by conveyance but by the agreement which was considered to be an agreement for construction. Therefore, the stamp duty cannot be charged treating the transaction as conveyance and stamp duty, if any, paid till date, becomes refundable. The levy of VAT and stamp duty on the transfer of immovable property amounted to double taxation. In some of the writ petitions, validity of the provisions of Section 9 of the Act read with Rule 49 of the Rules have also been questioned.

6. On the other hand, learned State counsel stressing preliminary objection regarding maintainability of writ petition on the plea of alternative remedy drew support from the judgments in **State of Haryana and others v. M/s Alfa Surgical P. Ltd. 2001 (124) STC 417 (SC), Commissioner of Income Tax, Gujarat v. Vijaybhai N. Chandrani 2013 (14) SCC 661, M/s Alcatel India Ltd., New Delhi v. State of Haryana, (2003) 22 PHT 418 (P&H)** and **Larsen & Toubro Limited v. State of Haryana and others, (2013) 57 VST 453 (P&H).** Challenging the merits of the claim of the petitioners as well, it was urged that the method of calculation of value of land for the purposes of levying VAT adopted by the State was totally in conformity with the principles laid down by the Apex Court in **Larsen & Toubro** and

Raheja Builders' s cases (supra). It was further contended that the Act which is in complete consonance with Entry 54, List II, Seventh Schedule of the Constitution, provides for levy of tax on goods which expression does not include immovable property. Further, the State had furnished an affidavit specifically stating that there was no proposal to tax land component in the case of developers/builders. It was argued that the other provisions of the Act and the Rules, the validity of which have been challenged by the petitioners, were in conformity with law.

7. We have heard learned counsel for the parties.

8. Noticing the contentions of learned counsel for the parties, the following primary issues emerge for our consideration:-

(i) Whether the developers and builders are works contractors and the agreement between the developer/builder/promoter and the prospective purchaser to construct a flat and thereafter sell the same with some portion of land, authorises the State to impose VAT thereon?

(ii) If the answer to the first issue is in the affirmative, whether the method of valuation of VAT on such agreements, can directly or indirectly, include the value of land by following the method of calculation of the taxable turnover in the manner expressed by the Commissioner vide circulars dated 7.5.2013, 4.6.2013 and 10.2.2014 and also in terms of Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Rules?

(iii) Whether the provisions of Section 42 of the Act and also Section 9 of the Act read with Rule 49 of the Rules would qualify to be legal and valid?

(iv) Whether the alternative remedy of appeal etc. would debar this Court to entertain the present writ petitions?

9. Adverting to first issue, necessarily one has to make reference to the following:-

(a) Statutory provisions

(b) Legislative history relating to taxability of 'works contract' and constitutional provisions.

10. Learned counsel for the petitioners drew the attention of this Court to the relevant provisions of the Act. The Act came into force in the State of Haryana w.e.f. 1.4.2003. It purports to levy VAT at each stage. A dealer would now pay tax after deducting the tax paid on purchases made during a quarter from the tax collected by him on sale of goods during that quarter. Section 2 of the Act defines various terms which finds mention therein. According to Section 2(1)(zg) of the Act, “sale price” means the amount payable to a dealer as consideration for the sale of any goods, less any sum allowed at the time of sale as cash or trade discount according to the practice, normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof and the expression “purchase price” shall be construed accordingly. Explanation (i) appended thereto, which is material for resolving controversy involved herein, provides that in relation to the transfer of property in goods (whether as goods or in some other form) involved in execution of a works contract, sale price shall mean such amount as is arrived at by deducting from the amount of valuable consideration paid or payable to a person for the execution of such works contract, the amount representing labour and other service charges incurred for such execution, and where such labour and other service charges are not quantifiable, the amount of such charges shall be calculated at such percentage as may be prescribed.

11. Section 2(1)(zn) of the Act defines "taxable turnover" to mean that part of the gross turnover which is left after making deductions therefrom in accordance with the provisions of section 6; plus purchase value of goods liable to tax under sub-section (3) of section 3.

Under Section 2(1)(zt) of the Act "works contract" includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the assembling, construction, building, altering, manufacturing, processing, fabrication, installation, fitting out, improvement, repair or commissioning of any movable or immovable property.

"Goods" have been described under Section 2(1)(r) of the Act as under:-

"(r) "goods" means every kind of movable property, tangible or intangible, other than newspapers, actionable claims, money, stocks and shares or securities but includes growing crops, grass, trees and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

The definition of "gross turnover" falls under Section 2(1)(u) of the Act in the following terms:-

"(u) "gross turnover" when used in relation to any dealer means the aggregate of the sale prices received or receivable in respect of any goods sold, whether as principal, agent or in any other capacity, by such dealer and includes the value of goods exported out of State or disposed of otherwise than by sale;

Explanation. – (i) The aggregate of prices of goods in respect of transactions of forward contracts, in which goods are actually not delivered, shall not be included in the gross turnover.

(ii) Any amount received or receivable or paid or payable on account of variation, escalation or deescalation in the price of any goods sold previously to any person but not exactly determinable at that time, shall, subject to such conditions and restrictions, as may be prescribed, be included in, or excluded from, the gross turnover, as the case may be, in the manner prescribed.

(iii) Any amount collected by the dealer by way of tax shall not be included in the gross turnover and where no tax is shown to have been charged separately, it shall be excluded from the taxable turnover (denoted by 'TTO') taxable at a particular rate of tax in per cent (denoted by 'r') by applying the following formula –

$$tax = \frac{r \times TTO}{100 + r}$$

illustration – If TTO is 220 and r is 10 (per cent), tax will be 20."

12. Section 3 of the Act relates to 'Incidence of tax' which is as follows:-

***"3.** (1) Every dealer who would have continued to be liable to pay tax under this Act of 1973 had this Act not come into force, and every other dealer whose gross turnover during the year immediately preceding the appointed day exceeded the taxable quantum as defined or specified in the Act of 1973, shall, subject to the provisions of sub-section (4), be liable to pay tax on and from the appointed day on the sale of goods effected by him in the State.*

(2) & (3) XX XX XX

(4) The tax levied under sub-sections (1), (2) and (3) shall be calculated on the taxable turnover, determined in accordance with the provisions of section 6, at the rates of tax applicable under section 7, and where the taxable turnover is taxable at different rates

of tax, the rate of tax shall be applied separately in respect of each part of the taxable turnover liable to a different rate of tax.

(5) to (7) XX XX XX"

13. Reference was also made to Section 6 of the Act which provides for determination of taxable turnover. It reads thus:-

"(1) Subject to the provisions of sub-section (2), in determining the taxable turnover of a dealer for the purposes of this Act, the following deductions shall be made from his gross turnover, namely: -

(a) turnover of sale of goods outside the State;

(b) turnover of sale of goods in the course of inter- State trade and commerce;

(c) turnover of sale of goods in the course of the import of the goods into the territory of India;

(d) turnover of sale of goods in the course of the export of the goods out of the territory of India;

(e) turnover of export of goods out of State;

(f) turnover of disposal of goods otherwise than by sale;

(g) turnover of sale of exempted goods in the State;

(h) turnover of sale of goods to such foreign diplomatic missions/consulates and their diplomats, and agencies and organisations of the United Nations and their diplomats as may be prescribed; and

(i) turnover of sale of goods returned to him, subject to such restrictions and conditions as may be prescribed, and to the remainder shall be added the purchases taxable under subsection (3) of section 3, if any,

Note. - 1. In this sub-section "turnover" means. –

(i) for the purpose of clauses (a), (b), (c), (d), (g) and (h), the aggregate of the sale prices of goods which is part of the gross turnover;

(ii) for the purpose of clauses (e) and (f), the aggregate of value of goods exported out of State or disposed of otherwise than by sale, as the case may be, which is part of the gross turnover; and

(iii) for the purpose of clause (i), the aggregate of the sale prices of goods which is or has been part of gross turnover (including under the Act of 1973).

Note. - 2. If the turnover in respect of any goods is included in a deduction under any clause of this subsection, it shall not form part of deduction under any other clause of the sub-section.

(2) The deductions mentioned in sub-section (1) shall be admissible on furnishing to the assessing authority in such circumstances, such documents or such proof, in such manner as may be prescribed.

(3) Save as otherwise provided in sub-section (1), in determining the taxable turnover of a dealer for the purposes of this Act, no deduction shall be made from his gross turnover.

14. Section 9 of the Act relates to payment of lump sum tax in lieu of tax which reads as under:-

*"**9.** (1) The State Government may, in the public interest and subject to such conditions as it may deem fit, accept from any class of dealers, in lieu of tax payable under this Act, for any period, by way of composition, a lump sum linked with production capacity or some other suitable measure of extent of business, or calculated at a flat rate of gross receipts of business or gross turnover of purchase or of sale or similar other measure, with or without any deduction therefrom, to be determined by the State Government, and such lump sum shall be paid at such intervals and in such manner, as may be prescribed, and the State Government may, for the purpose of this Act in respect of such class of dealers, prescribe simplified system of registration, maintenance of accounts and filing of returns which shall remain in force during the period of such composition.*

(2) No dealer in whose case composition under sub-section (1) is in force, shall issue a tax invoice for sale of goods by him and no dealer to whom goods are sold by such dealer shall be entitled to any claim of input tax in respect of the sale of the goods to him.

(3) A dealer in whose case composition under subsection (1) is made and is in force may, subject to such restrictions and conditions, as may be prescribed, opt out of such composition by making an application containing the prescribed particulars in the prescribed manner to the assessing authority, and in case the application is in order, such composition shall cease to have effect on the expiry of such period after making the application as may be prescribed."

15. Section 42 of the Act provides for levy of tax on the developer even in cases where property had been transferred by the sub-contractor. The said Section reads thus:-

*"**42. Joint and several liability of certain class of dealers.** -(1) Where a works contractor appoints a sub-contractor, who executes the work contract, whether in whole or in part, the contractor and the subcontractor shall both be jointly and severally liable to pay tax in respect of transfer of property in goods whether as goods or in some other form involved in the execution of the works contract by the subcontractor.*

(2) If the contractor proves to the satisfaction of the assessing authority that the tax has been paid by the sub-contractor on the sale of the goods involved in the execution of the works contract by the subcontractor and the assessment of such tax has become final, the contractor shall not be liable to pay tax on the sale of such goods but he shall be entitled to claim input tax, if any, in respect of them if the same has not been availed of by the sub-contractor.

(3) Where an agent purchases or sells any goods on behalf of a principal, such agent and the principal shall both be jointly and severally liable to pay tax in respect of the purchase or sale of goods by the agent.

(4) If the principal on whose behalf the agent has purchased or sold the goods proves to the satisfaction of the assessing authority that the tax on such goods had been paid by the agent and the assessment of such tax has become final, then, the principal shall not be liable to pay tax on such goods but he shall be entitled to claim input tax, if any, in respect of them if the same has not been availed of by the agent."

16. Rules 25(2) and 49 of the Rules were also referred to by the learned counsel for the petitioners. Rule 25 (2) of the Rules provides for certain exclusions to be made while computing the taxable turnover for a works contractor:-

*"**25. Computation of taxable turnover.**-(2)(a) In case of turnover arising from the execution of the works contract or job work, the amount representing the taxable turnover shall exclude the charges towards labour, services and other like charges subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing payment of charges to the satisfaction of the Taxing Authority.*

(b) For the purpose of clause (a) of sub-rule (2), the charges towards labour services for execution of works shall include,-

(i) labour charges for execution of works;

(ii) charges for planning and architects fees;

(iii) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract;

(iv) cost of establishment of the contractor to the extent it is relatable to supply of labour and services;

(v) other similar expenses relatable to supply of labour services;

(vi) profit earned by the contractor to the extent it is relatable to supply of labour and services subject to furnishing of a profit and loss account of the works sites: Provided that where the amount of charges towards labour, services and other like charges are not ascertainable from the books of accounts of the dealer or the dealer fails to produce documentary evidence in support of such charges, the amount of such charges shall be calculated at the percentages of valuable consideration specified in the table given below:

Table

XX XX XX XX"

17. Rule 49 of the Rules deals with lump-sum tax as under:-

***"49. Lump sum scheme in respect of contractors.** (1) A contractor liable to pay tax under the Act may, in respect of a work contract awarded to him for execution in the State, pay in lieu of tax payable by him under the Act on the transfer of property (whether as goods or in some other form) involved in the execution of the contract, a lump sum calculated at four per cent of the total valuable consideration receivable for the execution of the contract, by making an application to the appropriate assessing authority within thirty days of the award of the contract to him, containing the following particulars:*

(1) Name of the applicant contractor:

(2) TIN:

(Append application for registration, if not registered or not applied for registration)

(3) Name of the contractee:

(4) Date of award of the contract;

(5) Place of execution of the contract:

(6) Total cost of the contract:

(7) Period of execution: and appending therewith a copy of the contract or such part thereof as relates to total cost and payments.

(2) The application shall be signed by a person authorised to make an application for registration. On receipt of the application, the assessing authority shall, after satisfying itself him that the contents of the application are correct, allow the same.

(3) The lump sum contractor shall be liable to make payment of lump sum quarterly calculated at four per cent of the payments received or receivable by him during the quarter for execution of the contract. The payment of lump sum so calculated shall be made within thirty days following the close of the quarter after deducting therefrom the amount paid by the contractee on behalf of the contractor under section 24 for that quarter. The treasury receipt in proof of payment made and certificate(s) of tax deduction and payment obtained from the contractee shall be furnished with the quarterly return.

(4) The lump sum contractor shall file returns at quarterly intervals in Form VAT-R6 within a month of the close of the quarter and shall pay lump sum, if any, due from him according to such return after adjusting the amount paid under sub-rule (4).

(5) The lump sum contractor shall be entitled to make purchase of goods for use in execution of the contract both on the authority of declaration in Central Form C as well as Form VAT-D1 prescribed under clause (a) of sub-section (3) of section 7 and for this purpose he shall be deemed as a manufacturer.

(6) The lump sum contractor shall maintain complete account of, declarations in Central Form C and Form VAT-D1 used by him and, the utilisation of the goods purchased on the authority of these forms. He shall be required to make use of declaration(s) in Form D3 for carrying goods of which he shall keep account. He shall also keep complete account of, payments receivable by him for the execution of the contract and, the payments actually received by him.

(7) A lump sum contractor shall have to pay lump sum in respect of every works contract awarded to him after the award of the contract in respect of which he first elected to pay lump sum and he shall continue to pay tax in respect of contracts awarded before as if he is not a lump sum contractor.

(8) A lump sum contractor may at any time by appearing before the appropriate assessing authority himself or through an authorised agent express in writing his intention to opt out of the scheme of payment of lump sum in lieu of tax payable under the Act. Such contractor in respect of the contracts awarded to him thereafter shall not be liable to pay lump sum in lieu of tax payable under the Act but in respect of the other contract(s) he shall continue to pay lump sum in lieu of tax payable under the Act till the completion of each of such contract(s).

(9) A lump sum contractor may, when rate of lump sum is revised, opt out of the scheme of payment of lump sum in lieu of tax payable under the Act by appearing before the appropriate assessing authority himself or through an authorised agent within ninety days of such revision and expressing in writing his intention to opt out of the scheme of payment of lump sum. Such contractor shall be liable to pay lump sum for the period before the revision in lump sum

rate at the un-revised rate and in respect of transfer of property in any goods, whether as goods or in some other form, involved in the execution of the contract(s) thereafter he shall be liable to pay tax as a contractor not being a lump sum contractor."

18. In order to appreciate rival submissions, legislative history of the taxability of 'works contract' needs to be noticed.

19. The power to levy sales tax was conferred on the legislatures of States by Entry 54 of List II of the Seventh Schedule to the Constitution of India. The entry as originally enacted, read thus:-

"54. Taxes on the sale or purchase of goods other than newspapers."

20. After the judgment of the Apex Court in **Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1953 SC 252,** Parliament passed the Constitution (Sixth Amendment) Act, 1956 which received the assent of the President on 11.9.1956. By the said amendment, Entry 92-A in List I of the Seventh Schedule to the Constitution of India was added in the following terms:-

"92-A.Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce." In List II existing Entry 54 was substituted by the following entry:-

"54. Taxes on the sale or purchase of goods other than newspaper subject to the provisions of Entry 92- A of List I."

21. The question whether the cost of the goods supplied by a building contractor in the course of the construction of building could be subjected to payment of sales tax was resolved by the Apex Court in **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. 1955 SCR 379** which was an appeal filed against the decision of the High Court of Madras in Gannon Dunkerley & Co. (Madras) Ltd. v. The State of Madras. In this case the Apex Court held that on a true interpretation of the expression "sale of goods" meant an agreement between the parties for the sale of the very goods in which eventually property passed. In a building contract where the agreement between the parties was that the contractor should construct the building according to the specifications contained in the agreement and in consideration therefor received payment as provided therein, there was neither a contract to sell the materials used in the construction nor the property passed therein as movables. The Supreme Court further held that the expression "sale of goods" was at the time when the Government of India Act, 1935 was enacted, a term of well- recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic and should be interpreted in Entry 48 in List II in Schedule VII of the Government of India Act, 1935 as having the same meaning as in the Sale of Goods Act, 1930. It was concluded that in a building contract which was one, entire and indivisible, there was no sale of goods and it was not within the competence of the Provincial Legislature under Entry 48 in List II in Schedule VII of the Government of India Act, 1935, to impose a tax on the supply of the materials used in such a contract treating it as a sale. The Supreme Court had noted in subsequent decisions that the said decision though was rendered on the basis of the provisions in the Government of India Act, 1935 was equally applicable to the provisions found in Entry 54 of List II of Schedule VII of the Constitution. By virtue of this decision, no sales tax could be levied on the amounts received under a works contract by a building contractor even though he had supplied goods for the construction of the buildings.

22. In the year 1982 Parliament passed the 46th Amendment amending the Constitution in several respects in order to bring many of the transactions, in which property in goods passed but were not considered as sales for the purpose of levy of sales tax, within the scope of

the power of the States to levy sales tax. By the 46th Amendment a new clause, namely clause (29A) was introduced in Article 366 of the Constitution. Clause (29A) of Article 366 of the Constitution reads thus:

> *"366, Definitions.--In this Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say-*
>
> > *(29-A) 'tax on the sale or purchase of goods' includes—*
> >
> > *(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;*
> >
> > *(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
> >
> > *(c) a tax on the delivery of goods on hirepurchase or any system of payment by installments;*
> >
> > *(d) a tax on the transfer of the right to use any goods. for any purpose (whether or not for a specified period)for cash, deferred payment or other valuable consideration;*
> >
> > *(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;*
> >
> > *(f) a tax on the supply, by way of or as part. of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."*

23. Prior to the Forty Sixth Amendment Composite Contracts were not exigible to States sales tax under Entry 54, List II of Schedule VII. After the 46th Amendment the works contract which was an indivisible one, by a legal fiction created in Article 366(29A)(b), was altered into a contract which was divisible into one for sale of goods and the other for supply of labour and services. Thus, it has become possible for the States to levy sales tax on the value of goods involved in a works contract in the same way in which the sales tax was leviable on the price of the goods and materials supplied in a building contract which had been entered into in two distinct and separate parts.

24. Before proceeding further it would be necessary to analyze sub-clause (b) of clause 29-A of Article 366 of the Constitution. Article 366 is the definition clause of the Constitution. It provides that in the Constitution unless the context otherwise requires, the expressions defined in that article have the meanings respectively assigned to them in that article. The expression 'goods' is defined in clause (12) of Article 366 of the Constitution as including all materials, commodities and articles. Sub-clause (b) of clause (29-A) states that 'tax on the sale or purchase of goods' includes among other things a tax on the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). While referring to the transfer, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29-A), the latter part of clause (29-A) stipulates that 'such' transfer, delivery or supply of any goods' shall be deemed to be a sale of those goods by the person

making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made. Hence, a transfer of property in goods' under sub clause (b) of clause (29-A) is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and a purchase of those goods by the person to whom such transfer is made. The introduction of new definition in clause (29-A) of Article 366 of the Constitution had enlarged the scope of 'tax on sale or purchase of goods' wherever it occurred in the Constitution to include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clause (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax. The expression 'tax on the sale or purchase of goods' in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution.

25. Interpreting the provisions of Article 366(29A) of the Constitution of India, the Constitution Bench of the Apex Court in **Builders' Association of India and others v. Union of India (1989) 2 SCC 645** had laid down as under:-

> *"39. In view of the foregoing statements with regard to the passing of the property in goods which are involved in works contract and the legal fiction created by clause (29-A) of Article 366 of the Constitution it is difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of the works contract, but a conglomerate, that is the entire building that is actually constructed. After the 46th Amendment it is not possible to accede to the plea of the States that what is transferred in a works contract is the right in the immovable property.*
>
> *40. We are surprised at the attitude of the States which have put forward the plea that on the passing of the 46th Amendment the Constitution had conferred on the States a larger freedom than what they had before in regard to their power to levy sales-tax under Entry 54 of the State List. The 46th Amendment does no more than making it possible for the States to levy sales tax on the price of goods and materials used in works contracts as if there was a sale of such goods and materials. We do not accept the argument that sub-clause (b) of Article 366(29A) should be read as being equivalent to a separate entry in List II of the Seventh Schedule to the Constitution enabling the States to levy tax on sales and purchases independent of Entry 54 thereof. As the Constitution exists today the power of the States to levy taxes on sales and purchases of goods including the "deemed" sales and purchases of goods under clause (29A) of Article 366 is to be found only in Entry 54 and not outside it. We may recapitulate here the observations of the Constitution Bench in the case of **Bengal Immunity Company Ltd. (supra)** in which this Court has held that the operative provisions of the several parts of Article 286 which imposes restrictions on the levy of sales tax by the States are intended to deal with different topics and one could not be projected or read into another and each one of them has to be obeyed while any sale or purchase is taxed under Entry 54 of the State List.*
>
> *41. We, therefore, declare that sales tax laws passed by the Legislatures of States levying taxes on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract are subject to the restrictions and conditions mentioned in each clause or sub-clause of Article 286 of the Constitution. We, however, make it clear that the cases argued before and considered by us relate to one specie of the generic concept of 'works contracts'. The case-book is full of the*

illustrations of the infinite variety of the manifestation of "works-contracts"- Whatever might be the situational differences of individual cases, the constitutional limitations on the taxing power of the State as are applicable to "works contracts" represented by "building-contracts" in the context of the expanded concept of "tax on the sale or purchase of goods" as constitutionally defined under Article 366 (29A), would equally apply to other species of "works contracts" with the requisite situational modifications.

42. The Constitutional-Amendment in Article 366 (29A) read with the relevant taxation entries has enabled the State to exert its taxing power in an important area of social and economic life of the community. In exerting this power particularly in relation to transfer of property in goods involved in the execution of "works-contracts" in building activity, in so far as it affects the housing projects of the underprivileged and weaker sections of society, the State might perhaps, be pushing its taxation power to the peripheries of the social limits of that power and, perhaps, even of the constitutional limits of that power in dealing with unequals. In such class of cases 'building activity' really relates to a basic subsistential necessity. It would be wise and appropriate for the State to consider whether the requisite and appropriate classifications should not be made of such building activity attendant with such social purposes for appropriate separate treatment. These of course are matters for legislative concern and wisdom."

26. Approving the aforesaid decision, another Constitution Bench in **Gannon Dunkerley and Co. and others v. State of Rajasthan and others (1993) 1 SCC 364** had concluded as under:-

"49. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying, scales for deduction on account of cost of labour and services for various types of works contracts.

50. A question has been raised whether it is permissible for the State Legislature to levy tax on deemed sales falling within the ambit of Article 366 (29-A)(b) by prescribing a uniform rate of tax for all goods involved in the execution of a works contract even

though different rates of tax are prescribed for sale of such goods. The learned Counsel for the contractors have urged that it would not be permissible to impose two different rates of tax in respect of sale of the same article, one rate when the article is sold separately and a different rate when there is deemed sale in connection with the execution of a works contract. On behalf of the States it has been submitted that it is permissible for the State to impose a particular rate of tax on all goods involved in the execution of a works contract which may be different from the rates of tax applicable to those goods when sold separately. In the field of taxation the decisions of this Court have permitted the legislature to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes. See East India Tobaco Co. v. State of Andhra Pradesh, 1983(1) SCR 404, at p. 411, P.M. Ashwathanarayan Shetty and Ors. v. State of Karnaiaka and Ors., 1988 Supp. (3) SCR 155 at p. 188; Federation of Hotel & Restaurant Association of India v. Union of India, : [1989]178 ITR 97(SC) ; and Kerala Hotel & Restaurant Association and Ors. v. State of Kerala and Ors.: [1990] 1SCR 516. Imposition of sales tax at different rates depending on the value of the annual turnover was upheld in S. Kodar v. State of Kerala : [1975] 1 SCR 121 . Similarly, imposition of purchase tax at different rates for sugar mills and khandsari units was upheld in Ganga Sugar Co. Ltd. v. State of U.P. and Ors., : [1980] 1SCR 769 . In our opinion, therefore, it would be permissible for the State Legislature to tax all the goods involved in the execution of a works contract at a uniform rate which may be different from the rates applicable to individual goods because the goods which are involved in the execution of the works contract when incorporated in the works can be classified into a separate category for the purpose of imposing the tax and a uniform rate may be prescribed for sale of such goods.

51. The aforesaid discussion leads to the following conclusions:-

(1) In exercise of its legislative power to impose tax on sale or purchase of goods under Entry 54 of the State List read with Article 366 (29-A)(b), the State Legislature, while imposing a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is not competent to impose a tax on such a transfer (deemed sale) which constitutes a sale in the course of inter-State trade or commerce or a sale outside the State or a sale in the course of import or export.

(2) The provisions of Sections 3, 4 and 5 and Sections 14 and 15 of the Central Sales Tax Act, 1956 are applicable to a transfer of property in goods involved in the execution of a works contract covered by Article 366(29-A)(b).

(3) While defining the expression 'sale' in the sales tax legislation it is open to the State Legislature to fix the situs of a deemed sale resulting from a transfer falling within the ambit of Article 366(29-A)(b) but it is not permissible for the State Legislature to define the expression "sale" in a way as to bring within the ambit of the taxing power a sale in the course of interstate trade or commerce, or a sale outside the State or a sale in the course of import and export.

(4) The tax on transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract falling within the ambit of Article 366(29-A)(b) is leviable on the goods involved in the execution of a works contract and the value of the goods which are involved in execution of the works contract would constitute the measure for imposition of the tax.

(5) In order to determine the value of the goods which are involved in the execution of a works contract for the purpose of levying the tax referred to in Article 366(29-A)(b), it is permissible to take the value of the works contract as the basis and the value of the goods involved in the execution of the works contract can be arrived at by deducting expenses incurred by the contractor for providing labour and other services from the value of the works contract.

(6) The charges for labour and services which are required to be deducted from the value of the works contract would cover (i) labour charges for execution of the works, (ii) amount paid to a sub-contractor for labour and services; (iii) charges for obtaining on hire or otherwise machinery and tools used for execution of the works contract; (iv) charges for planning, designing and architect's fees; and (v) cost of consumables used in execution of the works contract; (vi) cost of establishment of the contractor to the extent it is relatable to supply of labour and services, (vii) other similar expenses relatable to supply of labour and services; and (viii) profit earned by the contractor to the extent it is relatable to supply of labour and services.

(7) To deal with cases where the contractor does not maintain proper accounts or the account books produced by him are not found worthy of credence by the assessing authority the legislature may prescribe a formula for deduction of cost of labour and services on the basis of a percentage of the value of the works contract but while doing so it has to be ensured that the amount deductible under such formula does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. It would be permissible for the legislature to prescribe varying scales for deduction on account of cost of labour and services for various types of works contract.

(8) While fixing the rate of tax it is permissible to fix a uniform rate of tax for the various goods involved in the execution of a works contract which rate may be different from the rates of tax fixed in respect of sales or purchase of those goods as a separate article."

27. On another occasion, where the developers were undertaking to build for the prospective purchasers on payment of the price in various installments set out in the agreement for such construction/development, the issue of taxability under VAT was considered by a two Judge Bench of the Apex Court in **K. Raheja Development Corporation v. State of Karnataka (2005) 5 SCC 162**, wherein it was held as under:-

"19. To consider whether the Appellants are executing works contract one needs to look at a typical Agreement entered into with the purchaser. The relevant clauses are clause (q), (r) of the recitals and clauses 1, 5(c) and 7, which read as follows:

"(q) (i) Construction of the said multi-storeyed building;

(ii) Sale of the units in the aforesaid multi-storeyed building to different persons in whose favour ultimately a Deed of Conveyance would be obtained by the Holders, directly from the Vendors, of an undivided fractional interest in the said land (i.e. the area of 5910.17 sq. metres described in the First Schedule hereunder written) and such owner of units would own, on ownership basis, the respective units on condition that an Agreement would be entered into between the Holders on the one hand and the persons (desiring to acquire on ownership basis a unit in such multi-storeyed building) on the other hand and it would be

an essential, integral and basic concept, term and condition of the proposed transaction (which would be by way of a package deal not capable of being segregated or separated or terminated one without the corresponding effect on the other) that K. Raheja Development Corporation as the Land-holder would agree to sell to such persons an undivided fractional interest in the said land described in the First Schedule hereunder written on condition that they i.e. M/s K. Raheja Development Corporation as Developers on behalf of and as Developers of such person would construct for, as a unit ultimately to belong to such person a unit or units that would be so mutually selected and settled by and between K. Raheja Development Corporation and the person concerned;

r) The Prospective Purchaser is interested in acquiring ownership rights in respect of unit/s Nos. 1101 on the eleventh floor/s of the said multi-storeyed building named `Raheja Towers' and also car parking space/s No./s nil in the basement/ground floor of the said building (hereinafter referred to as `the said Unit')"

XX XX XX

1. As and by way of a package deal :

a) K. Raheja Development Corporation, (as Holders) agree to sell to the Prospective Purchaser an undivided 0.42% share, right, title and interest in the said land described in the First Schedule hereunder written (with no right to the Prospective Purchaser to claim any separate sub-division and/or right to exclusive possession of any portion of the said land) for a lump sum agreed and quantified consideration of Rs.3,25,000/- (Rupees three lacs twenty five thousand only) to be paid by the Prospective Purchaser to the Holders at the time and in the manner stated in Clause 2 hereof;

b) K. Raheja Development Corporation, (as Developers) agree to build the said building named `Raheja Towers', having the specifications and amenities therein set out in the Second Schedule hereunder written and as Developers for the prospective Purchaser, the Developers shall build for and as unit/s to belong to the Prospective Purchaser, the said premises (details whereof are set out in the Third Schedule hereunder written) for a lump sum agreed and quantified consideration of Rs. 5,07,000/- (Rupees five lacs seven thousand only) to be paid by the Prospective Purchaser to the Developers at the time and in the manner set out in Clause 3 hereof. The said premises shall have the amenities set out in the Fourth Schedule hereunder written.

XX XX XX

5. The undermentioned terms and provisions are express conditions to be observed, performed and fulfilled by the Prospective Purchaser, on the basis of which this Agreement has been entered into by the Holders/Developers and the due and proper fulfillment whereof are to be conditions precedent to any title being created and/or being capable of being documented by the Prospective Purchaser in the aforesaid fractional interest in the land described in the First Schedule hereunder written and/or in the said premises:

a) XX XX XX

b) XX XX XX

c) The overall control and management of the project and the development and completion of the said building shall be with the Developers and furthermore the Developers are and shall continue to be in possession of the said land and building and shall be entitled to a lien thereon and that the Prospective Purchaser shall not be entitled to claim or demand from the Holders possession of any portion of the said land or to claim or demand from the Developers possession of the said premises unless and until the Prospective Purchaser has paid in full through the Holders the full consideration money payable to the Holders under Clause 2 above and the full consideration money payable to the Developers under Clause 3 above.

XX XX XX

7. If the Prospective Purchaser commits default in payment of any of the instalments of consideration aforesaid on their respective due dates (time being the essence of the contract) and/or in observing and performing any of the terms and conditions of this Agreement, the Holders/Developers shall be at liberty, after giving 15 days notice specifying the breach and if the same remains not rectified within that time, to terminate this Agreement, in which event, a sum equivalent to 10% of the amounts that may till then have been paid by the Prospective Purchaser to the Holders and the Developers respectively shall stand forfeited. The Holders and the Developers shall, however, on such termination, refund to the Prospective Purchaser the balance amounts of the installments of part payment, if any, which may have till then been paid by the Prospective Purchaser to the Holders and the Developers respectively but without any further amount by way of interest or otherwise. On the Holder/Developers terminating this Agreement under this Clause, they shall be at liberty to dispose off the said Unit/s and the said fractional interest in the land to any other person as they deem fit, at such price as they may determine and the Prospective Purchaser shall not be entitled to question such sale, disposal or to claim any amount from them."

20. Thus the Appellants are undertaking to build as developers for the prospective purchaser. Such construction/development is to be on payment of a price in various installments set out in the Agreement. As the Appellants are not the owners they claim a "lien" on the property. Of course, under clause 7 they have right to terminate the Agreement and to dispose off the unit if a breach is committed by the purchaser. However, merely having such a clause does not mean that the agreement ceases to be a works contract within the meaning of the term in the said Act. All that this means is that if there is a termination and that particular unit is not resold but retained by the Appellants, there would be no works contract to that extent. But so long as there is no termination the construction is for and on behalf of purchaser. Therefore, it remains a works contract within the meaning of the term as defined under the said Act. It must be clarified that if the agreement is entered into after the flat or unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete it would be a works contract."

28. The correctness of the judgment in **K. Raheja Development Corporation's case (supra)** was doubted on a later occasion in **Larsen & Toubro Ltd's case (supra)** and it was felt by the Apex Court that the decision was required to be reconsidered by a larger Bench. The three Judges Bench of the Supreme Court in **Larsen & Toubro Ltd's case (supra)** upholding

the view expressed in **K. Raheja Development Corporation's case (supra),** summarised the legal position as under:-

> *"(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled: (one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.*
>
> *(ii) For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.*
>
> *(iii) Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29- A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".*
>
> *(iv) Building contracts are species of the works contract.*
>
> *(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.*
>
> *(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.*
>
> *(vii) A transfer of property in goods under clause 29- A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.*
>
> *(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366 (29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract. Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.*
>
> *(ix) The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.*

(x) Article 366(29-A)(b) serves to bring transactions where essential ingredients of "sale" defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(xi) Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods."

29. The Supreme Court crystallizing the legal principles, in other words, had opined that the agreement between the promoter/builder/ developer and the flat purchaser to construct a flat and thereafter sell the flat with some portion of land, does involve activity of construction which would be covered under the term "works contract". The term "works contract" encompasses a contract in which one of the parties is obliged to undertake or to execute works. The activity of construction has all the attributes, elements and characteristics of works contract though essentially it may be a transaction of sale of flat. To put it differently, so long as construction is for and on behalf of the purchaser, it remains a "works contract" under the Act.

30. Further, the essential conditions to be fulfilled for sustaining levy of tax on the goods deemed to have been sold in execution of a "works contract" are as under:-

(i) there must be a works contract,

(ii) the goods should have been involved in the execution of a works contract, and

(iii) the property in those goods must be transferred to a third party either as goods or in so me other form.

These conditions are fulfilled in a building contract or any contract to do construction. In a contract to build a flat, necessarily there will be an element of sale of goods included therein and therefore, building contracts are species of the works contract. Still further, a contract comprising of both a works contract and a transfer of immovable property, such contract is not denuded of its character of being a works contract. Article 366 (29A)(b) of the Constitution of India does contemplate a situation where the goods may not be transferred in the form of goods but may be transferred in some other form which may even be in the form of immovable property. No doubt, there is no legislative competence in the State legislature to levy tax on the transfer of immovable property under Entry 54 of List II of the Seventh Schedule. However, the States are empowered to levy sales tax on the sale of goods in an agreement of sale of flat which also has a component of a deemed sale of goods.

31. Once it is concluded that the developer/builder/promoter are covered under the works contract while entering into an agreement between them and the flat purchaser to construct a flat and ultimately to sell the flat with the fraction of land, we proceed to examine the broad principles for determining the taxable turnover relating to transfer of goods involved in the execution of such works contract. Where the developer/builder/promoter/contractor or the sub-contractor maintains proper books of account, it shall be the value of the goods incorporated in the works contract as per books of account. On the other hand, where the developer/builder/ promoter/contractor/sub-contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence, it would be permissible for the

State Legislature to prescribe a formula for determining the charges for labour, service and cost of land by fixing a particular percentage of the works contract and to allow deduction of the amount thus determined from the value of the works contract for assessing the value of the goods involved in the execution of the works contract. The taxable event is the transfer of property in the goods involved in the execution of a works contract and the said transfer of property in such goods takes place when the goods are incorporated in the works. The value of the goods which can constitute the measures for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in the works. The activity of construction undertaken by the developer etc. would be works contract only from the stage he enters into a contract with the flat purchaser. However, the deduction permissible under various heads would depend upon facts of each case on the basis of material available on record. It is clarified that where the agreement is entered into after the completion of the flat or the unit, there would be no element of works contract but in a situation, where agreement is entered into before the completion of construction, it would be a works contract. If at the time of construction and until the construction was completed, there was no contract for construction of the building with the flat purchaser, the goods used in the construction cannot be deemed to have been sold by the builder since at that time there is no purchaser even if building is intended to be sold after construction would be of no consequence. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government. Taxing the sale of goods element in a works contract under Article 366 (29A)(b) read with Entry 54 List II of Schedule VII of the Constitution of India is permissible even after incorporation of goods provided tax is directed to the value of the goods at the time of incorporation and does not purport to tax the transfer of immovable property. No tax can be charged from the developer/builder/promoter or contractor in respect of the value of goods incorporated in the works contract after the agreement with the flat purchaser on which the subcontractor has already paid the tax.

32. Next, it was claimed by learned counsel for the petitioners that the State of Uttar Pradesh has framed rule 9 of UPVAT Rules, 2005 and Delhi State under Rule 3 of Delhi VAT Rules, 2005 have introduced specific provisions for charging VAT on transaction of the developers etc. whereas there is no such provision in the rules. The developer who does not carry on construction activities itself but creates sub contractors for that work, would not be liable for any tax under the Act. It would be the liability of the sub-contractor alone on account of works contract undertaken by him. Elaborating further, it was urged that in the case of a developer's transaction of sale of a flat to a buyer, if the tax can be charged, it can only be on the value of materials incorporated into the works on and after the date of entering into agreement for sale of immovable property and cannot be directed on the value of immovable property. However, the Act and the Rules do not contain *inter alia* any deduction on account of the following:-

(a) Immovable property, and

(b) value of all other expenses which are not relatable to the supply of goods such as

(1) EDC,

(2) IDC

(3) change of land use charges

(4) charges for sanctioning of maps

(5) charges for processing of maps

(6) Marketing expenses, etc.

(7) finance charges

(8) stamp duty

(9) legal expenses

(10) labour cess

(11) scrutiny fee

(12) charges for various approvals such as fire, forest, environment, aviation etc.

(13) another charges/cost/expenses not relatable to transfer of property in goods.

(14) Similar expenses which does not involve any transfer of property in goods in execution of works contract but are incidental in carrying on the business of the developer etc.

33. Still further, as urged by learned counsel, Explanation (i) to Section 2(1)(zg) of the Act provides exclusion only in respect of labour and other service charges. Likewise Rule 25(2) of the Rules also provides for deductions on that account alone. It is, therefore, clear that on application of these provisions to a developer etc., the value of immovable property and other expenses incidental thereto which are integral part of the transaction of sale of flat, would not be excluded and the net effect of which would be that rather than being a tax on value of materials transferred, the provisions lead to taxing of value of immovable property and expenses not relateable to value of materials. Rule 25(2) of the Rules only provide for deductive method in the event of labour and services but does not reduce the value of immovable property. The legality of both the provisions was put to test by the learned counsel for the petitioners.

34. Grievance was also raised relating to validity of Instructions dated 7.5.2013, 4.6.2013 and 10.2.2014 (Annexure P-2 Colly). Instructions No. 952/ST-1 dated 7.5.2013 (Annexure P-2) issued by respondent No.2 provides that the agreements/contracts entered by developers with prospective buyers for sale of apartments/ flats before the completion of construction constitutes 'works contract' and thus VAT was imposable on such transactions. Clause 4 of the said circular relates to measure of tax and deduction towards labour and other like charges. Circular dated 4.6.2013 was issued regarding making of assessments on builders and developers. In view of legal position enunciated hereinbefore, there is no illegality in the issuance of circulars dated 7.5.2013 and 4.6.2013. However, Circular issued on 10.2.2014 relates to lump sum tax under composition tax scheme and has been dealt with while analyzing the provisions of Section 9 of the Act and Rule 49 of the Rules.

35. Examining the validity of Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Rules, it would be essential to notice that in order to avoid declaration of unconstitutionality, the Courts have adopted such principles of interpretation which would result in sustaining the statute. The Constitution Bench of the apex Court in the **State of Madhya and others v. M/s Chhotabhai Jethabhai Patel and Co. and another, AIR 1972 SC 971** in para 10 had held as under: "It is settled law that where two constructions of a legislative provision are possible one consistent with the constitutionality of the measure impugned and the other offending the same, the Court will lean towards the first if it be compatible with the object and purpose of the impugned Act, the mischief which it sought to prevent ascertaining from relevant factors its true scope and meaning."

36. Further, another Constitution Bench of the Supreme Court in **Sunil Batra v. Delhi Administration and others, AIR 1978 Supreme Court 1675**, in para 38 had observed as

under: "Constitutional deference to the Legislature and the democratic assumption that people's representatives express the wisdom of the community lead courts into interpretation of statutes which preserves and sustains the validity of the provision. That is to say, courts must, with intelligent imagination, inform themselves of the values of the Constitution and, with functional flexibility, explore the meaning of meanings to adopt that construction which humanely constitutionalizes the statute in question. Plainly stated, we must endeavour to interpret the words in Ss.30 and 56 of the Prisons Act and the paragraphs of the Prison Manual in such manner that while the words belong to the old order, the sense radiates the new order. The luminous guideline in Civil Writ Petition No.6573 of 2007 17 Weems v. United States (1909) 54 L Ed 793 at p.801 sets our sights high: "Legislation, both statutory and constitutional is enacted, it is true, from an experience of evils, but - its general language should not, therefore, be necessarily confined to the form that evil had, therefore, taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it". The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulae. Rights declared in the words might be lost in reality. And this has been recognised. The meaning and vitality of the Constitution have developed against narrow and restrictive construction."

37. The rule of interpretation requires that such meaning should be assigned to the provision which would make the provision of the Act effective and advance the purpose of the Act. This should be done wherever possible without doing any violence to the language of the provision. A statute has to be read in such a manner so as to do justice to the parties. Moreover, the Apex Court in **B. R. Enterprises v. State of U.P., (1999) 9 SCC 700, Calcutta Gujarathi Education Society v. Calcutta Municipal Corporation (2003) 10 SCC 533** and **M.Nagraj v. Union of India (2006) 8 SCC 212** has interpreted the rule of reading down statutory provisions to mean that a statutory provision is generally read down so as to save the provision from being pronounced to be unconstitutional or ultra vires. The rule of reading down is to construe a provision harmoniously and to straighten crudities or ironing out creases to make a statute workable.

38. Explanation (i) to Section 2(1)(zg) of the Act which defines “sales price” provides for deduction on account of labour, material and services related charges from the gross turnover as defined under Section 2(1)(u) of the Act while arriving at the “sale price” in a works contract. It is not a charging provision which creates any liability for assessing VAT in a “works contract”. It is in the definition clause of the Act and the provision does not embrace within its ambit something which is otherwise prohibited by law. Thus, the said provision does not suffer from any vice or defect of unconstitutionality.

39. Now we proceed to analyze Rule 25 of the Rules. The said rule provides for exclusions in respect of labour, services and other like charges and does not provide any mechanism for exclusion of the value of land. Wherever developer/builder/promoter or the sub contractor who carries on construction work in a works contract maintains proper accounts, it shall be on the basis of actual value addition on account of goods utilized in the property. Rule 25(2) of the Rules provides for deduction of charges towards labour, services and other like

charges and where they are not ascertainable from the books of accounts maintained by a developer etc., the percentage rates are prescribed in the table provided in the said rule. It is necessarily required to provide mechanism to tax only the value addition made to the goods transferred after the agreement is entered into with the flat purchaser. The 'deductive method' thereunder does not provide for any deduction which relate to the value of the immovable property. The legislature has not made any express provision for exclusion of value of immovable property from the works contract and its method of valuation has been left to the discretion of the rule making authority to prescribe.

40. The State had filed an affidavit dated 24.4.2014 of Shri B.L. Gupta, Additional Excise and Taxation Commissioner, Haryana, wherein paras 3 to 8 read thus:-

> *"3. That it is affirmed that the developers/work contractors, being assessed as normal VAT dealers, are entitled to all deductions admissible as per Law/Rules.*
>
> *4. That as per the provisions contained in the Haryana VAT Act, 2003 and the rules framed thereunder, the tax is to be levied on transfer of property in goods involved in the execution of works contract. It is clarified that the definition of the word 'goods', as available in Section 2(1) (r) of the Haryana Value Added Tax Act, 2003, does not include immovable property, that is, land.*
>
> *5. That the Act ibid, which is relatable to entry 54, List II Seventh Schedule of the Indian Constitution does provide for levy of tax on sale or purchase of goods except newspaper.*
>
> *6. That having regard to above, neither any tax is leviable nor can it be levied on price of land involved in execution of works contract.*
>
> *7. That the respondents, being law abiding officers, cannot violate the above constitutional mandate.*
>
> *<u>NON-VAT DEALER (WORKS CONTRACTORS):</u>*
>
> *8. That there is, however, some difference as regards levy vis-a-vis non-VAT dealer i.e. works contractor operating under composition/lump sum scheme provided under section 9 of the Act and rule 49 of the Rules made thereunder. It is submitted that such works contractors, who opt for the benefit of the scheme aforesaid, are required to pay a lump sum in lieu of tax on the total valuable consideration receivable for the execution of works contract. In other words, no deduction whatsoever (including value of land), is admissible from total value consideration as the scheme is intended to provide administrative convenience and simplicity for both the assessee and the department. In such lump sum scheme, an easily observable yard stick, such as total valuable consideration in this case, is taken to compute the quantity of tax to be paid. It is submitted that the law does not oblige or force any works contractor to exercise this option against his will. He is fully free to exercise his option. If the scheme aforesaid does not suit him, he can very well refrain from the same. The provisions, referred to above, upon application of strict interpretation principle to fiscal statute, leaves no manner of doubt that such a contractor is not entitled to any deduction whatsoever."*

41. The assertion in the affidavit in the absence of any specific provision in the statute or the rule would not give it a statutory flavour as the action of the respondent in furnishing the affidavit dated 24.4.2014 would not meet the test of requisite amendment in the Rules as it has to be done by the competent authority in accordance with law. Though it may be observed that

the State Government shall remain bound by the affidavit dated 24.4.2014 filed by it in this Court.

42. The Apex Court in **Larsen & Toubro's case (supra)** while considering the legality of Rule 58 of the Maharasthra Value Added Tax Rules, 2005 (in short "the MVAT Rules 2005") under similar circumstances, had applied the principle of reading down a provision for upholding its constitutional validity. Rule 58 of the MVAT Rules 2005, *inter alia*, provide for determination of sale price and of purchase price in respect of sale by transfer of property in goods (whether as good or in some other form) involved in the execution of a works contract. Sub rule (1) and (1A) thereof which is relevant, reads thus:-

> *"(1) The value of the goods at the time of the transfer of property in the goods (whether as goods or in some other form) involved in the execution of a works contract may be determined by effecting the following deductions from the value of the entire contract, in so for as the amounts relating to the deduction pertain to the said works contract:--*
>
> *(a) labour and service charges for the execution of the works;*
>
> *(b) amounts paid by way of price for sub-contract , if any, to subcontractors;*
>
> *(c) charges for planning, designing and architect's fees;*
>
> *(d) charges for obtaining on hire or otherwise, machinery and tools for the execution of the works contract;*
>
> *(e) cost of consumables such as water, electricity, fuel used in the execution of works contract, the property in which is not transferred in the course of execution of the works contract;*
>
> *(f) cost of establishment of the contractor to the extent to which it is relatable to supply of the said labour and services;*
>
> *(g) other similar expenses relatable to the said supply of labour and services, where the labour and services are subsequent to the said transfer of property;*
>
> *(h) profit earned by the contractor to the extent it is relatable to the supply of said labour and services: Provided that where the contractor has not maintained accounts which enable a proper evaluation of the different deductions as above or where the Commissioner finds that the accounts maintained by the contractor are not sufficiently clear or intelligible, the contractor or, as the case may be, the Commissioner may in lieu of the deductions as above provide a lump sum deduction as provided in the Table below and determine accordingly the sale price of the goods at the time of the said transfer of property.*
>
> *TABLE*

Sr. No.	*Type of works contract*	*Amount to be deducted from the contract price (expressed as a percentage of the contract price*
(1)	*(2)*	*(3)*
1 to 15	*XX XX XX*	*XX XX*

> *(1A) In case of a construction contract, where alongwith the immovable property, the land or, as the case may be, interest in the land, underlying the immovable property is to be conveyed, and the property in the goods (whether as goods or in some other form) involved in the execution of the construction contract is also transferred to the purchaser such transfer is liable to tax under this rule. The value of the said goods at*

the time of the transfer shall be calculated after making the deductions under sub-rule (1) and the cost of the land from the total agreement value. The cost of the land shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995, as applicable on the 1st January of the year in which the agreement to sell the property is registered:

XX XX XX."

43. Under sub-rule (1) to Rule 58 of the MVAT Rules, 2005, the State Government has prescribed the deductive method of taxing the works contract relating to building contracts. It broadly specifies the deduction which are admissible from the entire contract, *inter alia,* on account of labour, service charges, charges for planning, designing, architect fees and similar other expenses specified therein. The rates for deductions are specified in the table where the contractor has not maintained proper accounts which enables proper evaluation of the different deductions noted hereinbefore. However, sub rule (1A) in Rule 58 of the MVAT Rules, 2005 was inserted therein by a notification dated 01.06.2009. The rule has provided that in the case of construction contracts where the immovable property, land or as the case may be, interest therein is to be conveyed and the property in the goods involved in the execution of the construction contract is also transferred, then it is such transfer of goods alone which is liable to tax. The value of the goods at the time of transfer is to be calculated after making the deduction of the cost of the land from the total agreement value. The method for determining the cost of the land has also been specified thereunder. It stipulates that the cost of the land shall be determined in accordance with the guidelines appended to the Annual Statement of Rates prepared under the provisions of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995 on Ist January of the year in which the agreement to sell the property is registered. The rule provides for measure of determination of the tax. It does not create any liability to tax as a charging provision. The Supreme Court in **Larsen & Toburo's case (supra)** specifically read down Rule 58 which were computational provision whereby exclusion of value of land on the basis of circle rates and ceiling on such deduction had been provided. The Apex Court noticed as follows:- "The value of the goods which can constitute the measure of the levy of the tax has to be the value of the goods at the time of incorporation of goods in the works even though property in goods passes later. Taxing the sale of goods element in a works contract is permissible even after incorporation of goods provided tax is directed to the value of goods at the time of incorporation and does not purport to tax the transfer of immovable property. The mode of valuation of goods provided in Rule 58 (1-A) has to be read in the manner that meets this criteria and we read down Rule 58(1-A) accordingly. The Maharashtra Government has to bring clarity in Rule 58(1-A) as indicated above. Subject to this, validity of Rule 58(1-A) of the MVAT Rules is sustained."

44. In case the provisions of law are seeking to charge sales tax on any amount other than the value of goods transferred in course of execution of works contract, the provisions would be *ultra vires* the Constitution of India. The tax is to be computed on a value not exceeding the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. However, the 'deductive method' requires all the deductions to be made therefrom to be specifically provided for to ensure that tax is charged only on the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. Where 'deductive method' has been prescribed under the rules for ascertaining the taxable turnover, ordinarily it should include a residuary clause in consonance with the mandate of law so as to cover all situations which can be envisaged.

45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the

agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property. Consequently, Rule 25(2) of the Rules is held to be valid by reading it down to the extent indicated hereinbefore and subject to the State Government remaining bound by its affidavit dated 24.4.2014 The State Government shall bring necessary changes in the Rules in consonance with the above observations.

46. Adverting to the issue of challenge to Section 42 of the Act is concerned, according to the learned counsel for the petitioners the assessing VAT liability on the developer when the goods have been transferred by the sub-contractor was in clear contravention of States 's power vide Entry 54 List II of Seventh Schedule. Therefore, the provision wherein the tax was to be assessed in the hands of the developers even where the property was transferred by the sub-contractor was clearly untenable in law and was liable to be quashed.

47. Under sub-section (1) of Section 42 of the Act, where the works contractor gets the construction work executed through a subcontractor, whether in whole or in part, it shall be the joint and several liability of the contractor and the sub-contractor. Sub-section (2) of Section 42 thereof clarifies that a contractor shall not be under any liability to pay tax in respect of a "works contract", if the same has been paid by a sub-contractor and that his assessment has become final. This provision only safeguards the interest of the revenue in the event of failure on the part of the sub contractor to discharge his liability of tax in respect of transaction entered by the sub contractor with the contractor. The provision, thus, cannot be said to be arbitrary, discriminatory or unreasonable in any manner. The contention of the learned counsel for the petitioners in this behalf is, thus, repelled.

48. Equally, the challenge to validity of Section 9 of the Act and Rule 49 of the Rules in CWP No. 7720 of 2014 (M/s ABW Suncity v. State of Haryana) cannot be accepted. Rule 49 of the Rules and Section 9 of the Act provides for scheme of lump sum tax under composition tax scheme which is purely optional in nature. The dealer is not under any bounden duty to subscribe to this scheme. Similar provision under the 1973 Act was upheld by Division Bench of this Court in **Tirath Ram Ahuja v. State of Haryana (1991) 83 STC 523.** Section 9 of the Act read with Rule 49 of the Rules and the circular dated 10.2.2014 provide for determination of the tax under composition scheme which is optional and are not the charging provisions for the levy of VAT. Once a dealer opts for composition scheme which is optional, he gets various advantages and privileges which otherwise are not available to ordinary VAT dealers. In such a situation, in view of the judgment of the Apex Court in **Koothattukulam Liguous v. Deputy Commissioner of Sales Tax, (2014) 72 VST 353,** the method of determining tax liability under these provisions could not be questioned by such a dealer. In view of the above, circular dated 10.2.2014 cannot be faulted.

49. Lastly, ordinarily we would have sustained the preliminary objection of alternative remedy but in view of primary challenge to the validity of Explanation (i) to Section 2(1)(zg) of the Act and Rule 25(2) of the Rules, we felt the necessity to examine the issue in these petitions.

50. The plethora of case law is a pointer to the proposition that wherever alternative remedies are available, the writ court should be loath in interfering in such matters. However, certain exceptions have been carved out by various judicial pronouncements of the Apex Court and also the High Courts.

51. A Division Bench of this Court in **Jindal Strips Limited and another v. State of Haryana and others (1996) 100 STC 45** after considering the various pronouncements of the

Apex Court and other High Courts on the subject in extenso, laid down the exceptions to alternative remedy in the matter relating to exercise of writ jurisdiction as under:-

> *"From the various judicial precedents, enumerated above, this Court is of the considered opinion that availability of an alternative remedy for nonentertainment of a petition under Article 226 of the Constitution cannot be of universal application. It is true that ordinarily when the statute provides an alternative remedy, and particularly when there is complete machinery for adjudicating the rights of the parties, which by and large depend upon the facts, the High Court should refrain from entertaining and adjudicating upon the rights of the parties, but to this principle, there are certain exceptions and a citizen, who can successfully cover this case in either of the exceptions, cannot be shown the exit door of his entry to the High Court and be compelled to go before the authorities concerned. Some of the exceptions under which a petition may lie under Article 226 of the Constitution before the High Court without availing of an alternative remedy are when the very provisions of the statute are challenged as being ultra vires of the Constitution or repugnant to the Act itself. Obviously, the authorities constituted under the Act having jurisdiction to entertain an appeal or revision, howsoever high in the hierarchy of the department cannot quash the provisions of the Act/statute being ultra vires. They are bound to follow the Act and the provisions contained therein. The other exception is when the highest authority under the Act has taken a particular view on a question of law and the said view is known to all the subordinate authorities as also when a different or contrary view has not been expressed by the High Court or the Supreme Court. In such an event, the remedy of appeal or revision would be a remedy popularly known as from cesure to cesure or from pole to pole. Subordinate authorities are bound to follow the view expressed by the highest authority in the department constituted under the Act to deal with the appeal or revision, as the case may be. The third exception can be when the order, complained of, is wholly illegal and without jurisdiction. Such an order normally would be when it is totally contrary to the provisions of the statute or when there is no power with the authorities constituted under the Act to pass the order. Yet another exception can be when the orders are actuated on extraneous considerations or mala fides of the highest dignitaries in the State and the allegations are not frivolous and on the contrary are shown, prima facie, to be in existence. Yet another exception can be when the alternative remedy is not equally efficacious. Yet another exception can be when the matter is not decided in limine and it is taken after several years for hearing and decided on merits and meanwhile the period of limitation prescribed under the statute for filing an appeal has expired. The exceptions can be multiplied but the court does not wish to be exhaustive in detailing all the exceptions. As mentioned above, by and large, it will be dependent upon the facts and circumstances of each case."*

52. The principle of law enunciated in the pronouncements relied upon by learned State counsel for alternative remedy is concerned, are well recognized. However, in the facts and circumstances enumerated hereinbefore, the remedy of writ jurisdiction cannot be shut down particularly when the vires of Explanation (i) to Section 2(1)(zg) of the Act, Rule 25(2) of the Rules and circulars issued by the Excise and Taxation Commissioner have been challenged in the writ petitions. In so far as the petitioners have raised individual issues regarding non-taxability of their transactions on merits, it shall be open for them to raise all these issues before the Assessing Authority/revisional authority in accordance with law. It shall also be open to the petitioners to agitate their grievance regarding refund of stamp duty, if any, before appropriate authority in accordance with law.

53. To conclude, in some of the writ petitions challenge has been laid by the petitioners to the assessment order passed by the Assessing Authority relying upon circular issued by the Excise and Taxation Commissioner whereas in others, the order of the revisional authority on the same premises has been assailed. Still further, in certain cases, the petitioners have approached this Court at the stage of issuance of notices for framing of assessments itself. In our opinion, in all these matters, the assessment orders and revisional orders passed by the concerned authorities are liable to be set aside with liberty to the appropriate authority to pass fresh orders in the light of the legal principles enunciated hereinbefore. We order accordingly. In so far as cases where only notices have been issued, the competent authority shall be entitled to proceed further and pass order in accordance with law keeping in view the aforesaid interpretation noticed above. The writ petitions are, thus, partly allowed in the above terms.

PUNJAB & HARYANA HIGH COURT

CWP 7580 OF 2015

GARG CONSTRUCTION CO

Vs.

STATE OF HARYANA AND ANOTHER

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

23rd April, 2015

HF ▶ Petitioner- assessee

REFUND – NON COMPLIANCE OF ORDER -EXCESS TAX PAID ORDERED TO BE REFUNDED BY ASSESSING AUTHORITY – NON COMPLIANCE OF ORDER BY RESPONDENTS – WRIT FILED – RESPONDENTS DIRECTED TO GRANT REFUND WITHIN A FIXED PERIOD SUBJECT TO ANY OTHER ORDER PASSED IN RESPECT OF ASSESSMENT ORDERS – WRIT DISPOSED OF

As per the assessment order dated 31/3/2014, the petitioner was to be granted refund of excess tax paid by it. However, the amount due was not refunded. A writ was filed in this regard. The respondents have been directed that the petitioner be refunded the amount on or before 31.5.15. This order is passed subject to any other orders passed in respect of assessment order dated 31.3.2014. The writ is disposed of.

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

*****

S.J. VAZIFDAR, A.C.J.

Notice of motion.

Service of the notice upon the respondents is waived as Ms. Mamta Singla Talwar, learned Assistant Advocate General, Haryana accepts notice on their behalf.

2. With the consent of the parties, the petition is taken up for final hearing and disposed of at this stage.

3. The petitioner's only grievance is that the respondents have not paid over the excess tax paid by them as ordered to be refundable by the Excise and Taxation Commissioner-cum-Assessing Authority, Kurukshetra by the assessment order dated 31.03.2014 (Annexure P1). The respondents are directed to refund the amount as per the said order dated 31.03.2014 (Annexure P1) on or before 31.05.2015. This, however, is subject to any other orders that may have been passed in respect of the order dated 31.03.2014 (Annexure P1).

4. No order as to costs.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP-7788 OF 2015

HARYANA POWER GENERATION CORPORATION LTD.
Vs.
STATE OF HARYANA AND ANOTHER

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

24th April, 2015

HF ▶ Petitioner- State undertaking

APPEAL – ENTERTAINMENT OF – SURETY BOND – APPEAL PENDING BEFORE FIRST APPELLATE AUTHORITY – WRIT FILED – DIRECTION GIVEN TO FIRST APPELLATE AUTHORITY TO ENTERTAIN APPEAL ON MERITS IF SURETY BOND FURNISHED BY THE DATE FIXED – PETITIONER BEING AN UNDERTAKING MANAGED BY STATE ITSELF, NO COERCIVE ACTION TO BE TAKEN PURSUANT TO DEMAND – WRIT DISPOSED OF – *SEC 33(5) OF HARYANA VAT ACT*

In the case, direction is issued to the first appellate authority before which the appeal is already pending, to hear the appeal on merits in the event of petitioner furnishing the surety bond as required under sec 33 of the Act. It is also ordered that no coercive action should be taken against the petitioner pursuant to the demand as it is an undertaking managed and controlled by the state itself. The writ is disposed of.

Present: Mr. K.L. Goyal, Senior Advocate, with

Mr. Sandeep Goyal, Advocate, for the petitioner.

Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana.

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S.J. VAZIFDAR, A.C.J.

This writ petition is similar to CWP-7789-2015 except that in the present case the appeal is pending before the first appellate authority itself.

2. The writ petition is, therefore, disposed of by directing the first appellate authority to decide the petitioner's appeal on merits in the event of the petitioner furnishing the surety bond as required by Section 33(5) of the Act by 10.05.2015 or such extended date as may be stipulated by the first appellate authority.

3. The petitioner is an undertaking controlled and managed by the State of Haryana itself. In these circumstances, pending disposal of the appeal, no coercive action shall be taken pursuant to the demand.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP 7789 OF 2015

HARYANA POWER GENERATION CORPORATION LTD.
Vs.
STATE OF HARYANA AND ANOTHER

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

24th April, 2015

HF ▶ Petitioner

APPEAL- ENTERTAINMENT OF – SURETY BOND – DISMISSAL OF APPEAL BY FIRST APPELLATE AUTHORITY DUE TO FAILURE TO FURNISH SURETY BOND – TRIBUNAL NOT CONSTITUTED TO DECIDE THE APPEAL FILED AGAINST THE IMPUGNED ORDER – WRIT FILED – PETITIONER WILLING TO FURNISH SECURITY – FIRST APPELLATE AUTHORITY DIRECTED TO DISPOSE OF THE APPEAL ON MERITS IF SURETY FURNISHED BY THE DATE FIXED – NO COERCIVE ACTION TO BE TAKEN AGAINST PETITIONER IN VIEW OF IT BEING A STATE UNDERTAKING – WRIT DISPOSED OF – SEC 33 (5) OF THE HVAT ACT

The first appellate Authority had dismissed the appeal due to non – furnishing of security as required u/s 33 of the Act. An appeal against the impugned order was pending before Tribunal since it was not constituted then. Therefore, a writ was filed .The petitioner was now willing to furnish the security. Disposing of the petition, the court has issued a direction to the first appellate authority to hear the appeal on merits in the event of security being furnished by the date fixed or such extended date as stipulated by the authority. Also, it is directed that since the petitioner was an undertaking of the state, no coercive action to be taken till pendency of appeal pursuant to the demand.

Present: Mr. K.L. Goyal, Senior Advocate, with
Mr. Sandeep Goyal, Advocate, for the petitioner.
Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana.

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S.J. VAZIFDAR, A.C.J.

The only reason that the petitioner has filed this writ petition is that the Tribunal has not been constituted under the Haryana Value Added Tax Act, 2003 (in short the Act). The only order challenged before the Tribunal is of dismissal of the petitioner's appeal before the first appellate authority for not having furnished the surety bond as required by Section 33(5) of the Act. The petitioner is now ready and willing to furnish the same.

2. In these circumstances, the writ petition is disposed of by directing the first appellate authority to dispose of the petitioner's appeal on merits in the event of the petitioner furnishing

the surety bond in accordance with Section 33(5) of the Act on or before 10.05.2015 or such extended date as may be stipulated by the first appellate authority.

3. The petitioner is an undertaking controlled and managed by the State of Haryana itself. In these circumstances, pending disposal of the appeal, no coercive action shall be taken pursuant to the demand.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP-7297 OF 2015

PADAM MOTORS PVT. LTD.
Vs.
THE STATE OF HARYANA AND OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

21st April, 2015

HF ▶ Petitioner

STAY OF RECOVERY – SECURITY – APPEAL PENDING BEFORE TRIBUNAL – WRIT FILED AS TRIBUNAL NOT CONSTITUTED – DIRECTION ISSUED TO RESPONDENTS TO DECIDE IF SECURITY OFFERED ADEQUATE – RECOVERY TO BE STAYED TILL PENDENCY OF SUCH DECISION PLUS ONE WEEK THEREAFTER – PETITIONER REFRAINED FROM DISPOSING OF ITS IMMOVABLE PROPERTY TILL THEN – WRIT DISPOSED OF

As the Tribunal was not constituted and the appeal filed by the petitioner was pending before Tribunal, a writ is filed before High Court against the notice dated 1/4//2015 for stay of recovery. The Hon'ble High Court has issued a direction to respondents to decide whether security offered by petitioner was adequate or not. Till such decision was taken, no recovery was to be made pursuant to the notice dated 1/4/2015. The petitioner has been refrained from disposing of its immovable property or encumbering the same in any manner till then. The writ is disposed of.

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

Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana.

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S.J. VAZIFDAR, A.C.J.

As in several other cases, the only reason that this petition has been filed is because the Tribunal under the Haryana Value Added Tax Act, 2003 has not been constituted. The appeal filed by the petitioner, therefore, cannot proceed before the Tribunal at this stage. The petition is disposed of by passing an order similar to the one passed in several other matters including CWP-5616-2015.

2. The writ petition is, therefore, disposed of by directing the concerned officer of the respondents to decide whether the security offered by the petitioner is adequate or not. Till such decision is taken and for a period of one week thereafter, the recovery shall not be made

pursuant to the notice dated 01.04.2015. Till then, in any event, the petitioner shall not dispose of its immovable properties or encumber the same in any manner whatsoever.

PUNJAB & HARYANA HIGH COURT

CWP 14863 OF 2013

RUBBER RECLAIM COMPANY OF INDIA PVT. LTD.
Vs.
STATE OF HARYANA AND OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

27th April, 2015

HF ▶ Revenue

RES JUDICATA – VIRES – WHETHER CHALLENGEABLE FOR SECOND TIME WHEN ISSUE STANDS CLOSED BY APEX COURT – SALE TAX EXEMPTION WITHDRAWN AND DEMAND RAISED – CHALLENGE AGAINST ASSESSMENT ORDER AND VIRES OF RULE 28(A) – WRIT ALLOWED WITHOUT ADJUDICATING ISSUE OF VIRES – SLP FILED BY STATE – ORDER OF HIGH COURT SET ASIDE WITHOUT ADJUDICATING QUESTION OF VIRES – WRIT FILED BEFORE HIGH COURT ONCE AGAIN CHALLENGING VIRES – HELD, IN VIEW OF ORDER OF SUPREME COURT AND NO LIBERTY HAVING BEEN GRANTED TO PETITIONER TO RE AGITATE THE ISSUE OF VIRES – NEITHER LIBERTY SOUGHT BY PETITIONER TO LEAVE THE QUESTION OF VIRES OPEN –ISSUE HAVING STOOD FINALLY CLOSED, QUESTION OF VIRES NOT TO ARISE FOR SECOND TIME – FOLLOWING PRINCIPLE OF RES JUDICATA HIGH COURT BARRED TO ADJUDICATE ON MATTER ALREADY ADJUDICATED BY SUPREME COURT – WRIT DISMISSED.

The petitioner company had been granted sale tax deferment from 1992 to 1997 and sale tax exemption to the tune of Rs 68 lacs under Rule 28A of HGST Rules, 1975.

A notice was issued for violating conditions of Rule 28 A of the Act alleging that dispatch of goods on consignment basis was made during exemption period , thereby raising a demand of tax exempted and interest. The petitioner challenged the notice and vires of the Rules. The court directed the assessing authority to give an opportunity of hearing to the petitioner. However, a demand was raised vide assessment order dated 2005 under the CST Act, 1985 to the tune of Rs 5433480/- and exemption was withdrawn. This order was again challenged before High Court alongwith challenge to vires of the provision which was allowed without going into vires of the rule and on the ground that interstate transfer of consignment was not sale. The SLP filed by the state against the order was allowed and order of High Court was set aside holding that if there is violation of any conditions of the rule, exemption certificate can be cancelled and sale tax authorities can call upon for payment of tax with interest. The withdrawl of exemption was upheld and assessing authority was directed to pass fresh assessment order after opportunity of being heard was given to the petitioner. No order was, however passed on the issue of vires.

A writ is filed challenging the vires again before High Court. As per the orders of the Supreme court, no liberty was granted to re agitate the issue of vires. The issue infact stands closed.

Once the Civil Appeal has been allowed, the question of raising the issue afresh does not arise by challenging vires for the second time. Since the matter is already adjudicated between the parties by the Apex court, the jurisdiction of the High Court is barred by the principle of constructive Res judicata in the facts and circumstances of the case. The writ is dismissed.

Case referred:

State of Haryana and another Vs Rubber Reclaim Co. of India (2013) 14 SCC 763

M. Nagabhushana Vs. State of Karnataka (2011) 3 SCC 408

Present: Mr.Sumeet Mahajan, Senior Advocate with
Mr.Rohit Khanna, Mr.Suman Jyoti Khaitan, Mr.Vikas Kumar and
Mr.Amit Kohar, Advocates for the petitioner
Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana
for the respondents.

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G.S.SANDHAWALIA, J.

1. In the present writ petition, the petitioner-company has raised challenge to Rule 28-A(11)(A)(II)(B) of the Haryana General Sales Tax Rules, 1975 (hereinafter referred to as "the Rules") as ultra vires the Sick Industrial Company (Special Provisions) Act, 1985 (hereinafter referred to as "the SICA") and prohibiting the respondents from raising any demand on the petitioner as per exemption certificate dated 1.2.1994.

2. The pleaded case of the petitioner-company is that it was duly registered under the provisions of the Act and having registration certificate dated 17.5.1966. The petitioner-company had suffered heavy losses as on 31.3.1990 to the tune of Rs.113.45 lacs against the paid capital of Rs.18.86 lacs and reserves of Rs.53.39 lacs. Accordingly, it had approached the Board for Industrial and Financial Reconstruction (BIFR) under the provisions of SICA and direction had been issued on 15.3.1991 (Annexure P/1) for package of revival to which the financial institutions were also parties including the Haryana Financial Corporation.

3. The petitioner-company was granted sales tax deferment for five years from 1.4.1992 to 31.3.1997 along with various other reliefs as per letter dated 21.12.1992 (Annexure P/2) by the State and sales tax exemption to the tune of Rs.68 lacs was also granted.

4. A notice dated 4.5.1998 (Annexure P/6) was issued to the petitioner-company that it had violated the conditions contained in Rule 28-A of the Act and it was liable to pay the whole amount of tax exemption with interest. The petitioner had approached this Court in Civil Writ Petition No.6689 of 1998 challenging the said notice and the vires of the Rules. The said writ petition was disposed on 13.5.1998 (Annexure P/7) without going into question of vires with a direction to the petitioner-company to file reply to the show cause notice and the Assessing Authority would consider the matter after giving the petitioner company an opportunity of hearing. Subsequently, vide assessment order dated 16.3.2005 (Annexure P/8), the liability of the petitioner-company was assessed under the Central Sales Tax Act, 1956 to the tune of Rs.54,33,480/-.

5. The said order was challenged before this Court by filing Civil Writ Petition No.6688 of 1999 which was allowed on 31.3.2010 (Annexure P/10) without going into the vires of the Act and on the ground that inter State transfer of consignment was not transaction

of sale. The State preferred Special Leave Petition No.25465 of 2011 against the said decision of the Division Bench of this Court which was allowed on 23.1.2013 (Annexure P/12) and the order of the Division Bench was set aside. Since the vires had never been adjudicated upon, the present writ petition has been filed on 8.4.2013.

6. Learned senior counsel for the petitioner-company has sought to argue the matter on the ground that once the petitioner-company was sick and it was only an inter State transfer the benefit of exemption could not have been withdrawn.

7. The State has placed reliance upon the rule to submit that since the petitioner-company had started taking transfer of consignments which was contrary to the statutory conditions, and the exemption was rightly withdrawn and that since 1998 multiple litigations had been raised to avoid the tax liability, The principal amount itself was Rs.68 lacs plus interest. The petitioner-company was well aware of the exemption granted and after having availed the benefit it could not challenge the conditions imposed upon it.

8. After hearing counsel for the parties, we are of the view that the present writ petition as such cannot be entertained once the matter has itself been decided interse the parties by the Apex Court itself. It is not disputed the initially the dispute was raised on 4.5.1998 (Annexure P/6) wherein a show cause notice was issued to the petitioner-company that they had dispatched goods on consignment basis amounting to Rs.95 lacs (approx.) and also consignment sales to the tune of Rs.4 crores (approx.) during the period of exemption. The petitioner-company had approached this Court and it had been given liberty to file reply to the show cause notice. Thereafter, liability was assessed vide assessment order dated 16.3.2005 (Annexure P/8) under the Central Sales Tax Act, 1956 to the tune of over Rs.54 lacs and exemption also was sought to be withdrawn and dealer was accordingly assessed as a normal dealer. The assessment order was sought to be challenged apart from challenging the vires of the Rules by filing Civil Writ Petition No.6688 of 1999 and also pleading that the company had been declared sick which was decided by this Court vide order dated 31.3.2010 (Annexure P/10). The decision of this Court dated 31.3.2010 in favour of the petitioner-company was set aside by the Apex Court vide order in **State of Haryana and another Vs. Rubber Reclaim Co. of India (2013) 14 SCC 763** by specifically noting that if there was a violation of any one of the conditions of the Rule, the sales tax authorities are at liberty to cancel the exemption certificate and call upon the assessee to make payment of the tax with interest. Further direction was issued to the assessing authority to pass fresh assessment order for the periods in dispute after affording opportunity of hearing to the assessee. The order withdrawing the exemption was accordingly upheld. The relevant observations read as under:-

> *"12. If there is a violation of anyone of the conditions stipulated in Sub Rule 11(i) and (ii), the sales tax authorities are at liberty to cancel the exemption certificate issued under the scheme and call upon the assessee to make payment of the exemption availed with interest thereon.*
>
> *13. Having noticed the relevant rules, we will revert back to the facts in the present case. The assessee-company had availed benefit of the sales tax exemption under the Exemption Scheme issued by the State Government. The Eligibility Certificate for sales tax exemption provides for certain conditions which requires to be complied by the assessee-company to take benefit of exemption under the Scheme. The condition no.7 of the Eligibility Certificate provides that the certificate can be cancelled if there is contravention of any condition mentioned in the certificate or Rule 28-A, after affording an opportunity to the party of being heard. In the show cause notice it is specifically alleged that the assessee had dispatched good on consignment basis during the assessment period 1995-1996, 1996-1997 and 1997-1998 and therefore the assessee has breached Rules 28-A of the Rules, 1975 and in particular Sub-rule 11*

(a)(ii) of the Rules, 1975 which prescribes that the benefit of tax exemption shall be subject to the condition that the assessee having availed the benefit of tax exemption shall not make sales outside the State for next five years by way of transfer or consignment of goods manufactured by it. Since the assessee did not dispute the specific contravention pointed out by the assessing authority after cancelling the exemption certificate issued has quantified the tax liability and the interest payable thereon. The order so passed, in our view, is in consonance with the scheme of exemption notified by the State Government and also in accordance with the rules prescribed under Section 13B of the Act.

14. The High Court while allowing the petition filed by the assessee has proceeded on a wrong assumption, that, the assessing authority has levied tax on inter-state and on consignment transfer and accordingly has quashed the assessment order passed by the assessing authority. In view of our conclusion stated earlier, we cannot sustain the judgment and order passed by the High Court. Accordingly, we allow this appeal and set aside the impugned order.

15. We are informed by learned counsel for the parties that in the light of the judgment and order passed by the High Court, the assessing authority has completed the assessments for the period in question. Since we have set aside the judgment and order of the High Court, we direct the assessing authority to pass fresh assessment order for the periods in dispute after affording opportunity of hearing to the assessee."

9. A perusal of the above order of the Apex Court would go on to show that no liberty was granted to the petitioner-company to re-agitate the issue of the vires of the Rules which is now sought to be questioned by filing the present civil writ petition. We do not subscribe to the argument that issue regarding the vires of the Rules had never been adjudicated upon because it was open to the petitioner-company to seek liberty from the Apex Court to leave the said question open and to take permission to file a fresh petition or get the matter remanded. Rather in view of the observations of the Apex Court made above the issue in our opinion finally stands closed for all intents and purposes. Once the Civil Appeal has been allowed, the question of raising the issue afresh does not arise by challenging the vires for the second time. The State is well justified to argue that the matter has been delayed since 1998 and challenges have been laid to the show cause notice and the recovery of outstanding dues has been delayed by resorting to litigation. Accordingly, we are of the view the present writ petition in which amendment has also been sought by wanting to place on record the sales tax returns which has seriously been opposed by the State, in our opinion, would also be not relevant for deciding the issue in controversy, and would not help the court to adjudicate on the matter in controversy. Thus, the matter between the parties having been adjudicated upon by the Apex Court itself, the jurisdiction of this Court would be barred by the principle of constructive Res-Judicata in the peculiar facts and circumstances of the case. Reliance can be placed upon the observations made by the Apex Court in **M.Nagabhushana Vs. State of Karnataka (2011) 3 SCC 408 which read as under:-**

"12. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, `interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is `nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.

13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties."

10. Accordingly, the present writ petition is dismissed.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

VATAP NO. 244 OF 2014

SHREE RATTAN JYOTI ELECTRODES INDUSTRIES
Vs.
STATE OF HARYANA

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

23rd April, 2015

HF ▶ Assessee- petitioner

EXEMPTION – ASSESSMENT – APPLICATION FOR RENEWAL OF EXEMPTION REJECTED – ASSESSMENTS FRAMED DURING PENDENCY OF APPEAL BEFORE ETC REGARDING RENEWAL APPLICATION – MATTER FINALLY REMANDED BY TRIBUNAL TO COMMISSIONER – APPEAL AGAINST ASSESSMENT ORDERS ALSO DISMISSED BY TRIBUNAL – RENEWAL ALLOWED BY COMMISSIONER SUBSEQUENT TO DISMISSAL OF APPEAL AGAINST ASSESSMENT ORDERS BY TRIBUNAL – APPEAL FILED BEFORE HIGH COURT PRAYING QUASHING OF ASSESSMENT ORDERS AS THE BASIS(REJECTION OF RENEWAL APPLICATION) ON WHICH THEY WERE FRAMED CEASED TO EXIST –ASSESSMENT ORDERED TO BE FRAMED AFRESH IN VIEW OF APPELLANT BEING EXEMPTED UNDER RULE 28B–APPEAL ALLOWED

The appellant was granted exemption u/r 28B of the HGST Rules from 1998 to 2015. The DETC rejected the renewal application for the year 1998 to 2003 against which an appeal was filed. During pendency of appeal before the ETC, the assessments were finalized. The matter of renewal of application for exemption was finally remanded to the commissioner by the Tribunal. While the matter was pending, the DETC dismissed the appeal against the assessment orders and the order was upheld by the Tribunal. Subsequently, in 2012, the Commissioner allowed renewal of application of exemption. The appellant has filed an appeal for quashing of assessment orders on the ground that the basis on which assessment order was passed and the basis on which appeals were dismissed have ceased to exist. Allowing the appeals, the matter is remanded to the assessing authority for framing fresh assessment in view of the appellant now being an exempted unit.

Present: Mr. Avneesh Jhingan, Advocate, for the appellant.

Ms. Mamta Singla Talwar, AAG, Haryana.

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S.J. VAZIFDAR, A.C.J.

1. These are appeals filed under Section 36 of the Haryana Value Added Tax Act, 2003 against the order dated 31.01.2012 of the Haryana Tax Tribunal dismissing the appellant's

appeal against the order of the Joint Excise and Taxation Commissioner (Appeals), which in turn had dismissed the appeals against the assessment order for the assessment years 2002-03 and 2003-04. The appeals are admitted on the substantial question of law raised in para no. 12(ii) of the present appeal, which reads thus:

> *"(ii) whether in the facts and circumstances of the case, the Tribunal should have kept pending the consequential proceedings to await the outcome of appeals in the main case?"*

2. The impugned order would have to be set aside and the matter remanded in view of the events that transpired after the impugned order. The appellant was granted the benefits under Rule 28(B) of the Haryana General Sales Tax Rules, 1975 (in short 'the Rules') for the period 06.05.1998 to 05.05.2015 subject to a maximum amount of about ₹13.34 lakhs. However, on 07.03.2003, the DETC rejected the renewal application for the years 1998 to 2003. Applications for renewal are to be made each year. The appellant had challenged this order. However, pending the challenge, the assessments for the said years were finalized. The Excise and Taxation Commissioner dismissed the appellant's appeal against the order of the DETC dated 07.03.2003 rejecting the application for renewal of the exemption under Rule 28(B) of the Rules. The Tribunal set aside this order and remanded the same to the Excise and Taxation Commissioner. On 19.10.2009, while the matter was pending on remand, the DETC (Appeals) dismissed the appellant's appeals against the assessment orders. On 31.01.2012, the Tribunal dismissed the appeals against the assessment orders.

3. Subsequently, the Excise and Taxation Commissioner, by an order dated 22.03.2012, allowed the appeal and renewed the exemption under Rule 28(B) subject to completion of the formalities.

4. In the circumstances, the basis on which the assessment order was passed and the basis on which the appeals against the same were dismissed ceases to exist. In other words, the assessment orders have now to be finalized afresh on the basis that the appellant is an exempted unit under Rule 28(B) of the Rules.

5. The appeals are therefore, allowed. The impugned orders are quashed and are set aside. The matters are remanded to the Assessing Authority to pass fresh assessment orders.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP NO. 15695 OF 2014

CWP NO. 15706 OF 2014

SONY INDIA PVT. LTD.
Vs.
UNION TERRITORY OF CHANDIGARH AND ANOTHER

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

27th April, 2015

HF ▶ Assessee- Petitioner

ASSESSMENT – NOTICE – SCOPE OF SEC 29(4) OF PVAT ACT – FRAMING OF ASSESSMENT AFTER EXPIRY OF LIMITATION PERIOD OF THREE YEARS – NO PROPER NOTICE SERVED PRIOR THERETO AS REQUIRED – WRIT FILED – SERVICE OF INDIVIDUAL NOTICE FOR INVOKING POWERS CONSIDERED ESSENTIAL IN VIEW OF RULE 86 – ABSENCE OF INDIVIDUAL NOTICE RENDERS THE ASSESSMENT ORDER ILLEGAL – GENERAL NOTICES PUT UP ON WEBSITE HELD TO BE INSUFFICIENT – SEC 29 (4) OF PVAT ACT; RULE 86 OF PVAT RULES

The returns for the assessment years were filed on 19/11/08 and 20/11/09. The assessment should have been completed by 20.11.11 and 20.11.12 respectively. The best judgement assessment was completed after expiry of three years i.e. on 11.7.2014 in both cases. The assessee challenged the assessment orders on the grounds of improper notices issued u/s 29(4) of PVAT Act, 2005. It is held that as per Rule 86, individual notice is to be served for invoking powers. Absence of individual notice renders assessment orders illegal and void. In this case general notice was put on website which is considered in sufficient.

Case followed:

State of Punjab Vs M/s Olam Agro India Ltd. VAT AP No. 84 of 2013

Present: Mr. J.S. Sidhu, Advocate, for the petitioner.

Mr. Sanjeev Sharma, Sr. Advocate, with

Mr. Sanjiv Ghai, Advocate, for the respondents.

S.J. VAZIFDAR, A.C.J.

1. The petitioner has challenged notices issued under Section 29 (4) of the Punjab Value Added Tax Act, 2005 (as applicable to the U.T., Chandigarh) (in short 'the Act'). The returns in respect of the above writ petitions were filed on 19.11.2008 and 20.11.2009. The last

dates for completion of the assessment under Section 29(4) were, therefore, 20.11.2011 and 20.11.2012 respectively. Admittedly, the completion of the best judgment assessment was done after the period of 3 years namely on 11.07.2014 in both the cases. Section 29(4) of the Act reads thus:

> *"SECTION 29. ASSESSMENT OF TAX:*
>
> *(4) An assessment under sub-section (2) of sub-section (3), may be made within three years after the date when the annual statement was filed or due to be filed, whichever is later;*
>
> *PROVIDED THAT where circumstances so warrant, the Commissioner may, by an order in writing, allow assessment of a taxable person or a registered person after three years, but not later than six years from the date, when annual statement was filed or due to be filed by such person, whichever is later.*

2. The present cases are covered in favour of the petitioner by a judgment dated 20.08.2013 passed by a Division Bench of this Court in a group of matters, the first of which is ***VATAP No. 84 of 2013, State of Punjab vs. M/s. Olam Agro India Ltd.*** The Division Bench held that Rule 86 of the Rules does not envisage service of a general notice or by publication on the website of the department. The Division Bench held that the service of an individual notice is a *sine qua non* for invoking powers and the absence of such individual notice renders the assessment orders illegal and void.

3. Admittedly, in the present cases, individual notices were not given. Even in the present cases, general notices were put up on the website. In view of the judgment of the Division Bench, this is insufficient.

4. Rules are, therefore, made absolute in each of the petitions in terms of prayers (i) to (iv).

5. We are informed that there is a possibility of the Section being amended.

6. Needless to add that we express no opinion in the event of the same being done.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

VATAP NO. 178 OF 2014
VATAP NO. 179 OF 2014

STEELCO INDIA

Vs.

STATE OF HARYANA

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

23rd April, 2015

HF ▶ Appellant – Assessee

CONDONATION OF DELAY – APPEAL – LIMITATION – CONDUCT OF COUNSEL – APPEALS AGAINST ASSESSMENT ORDERS FILED BEFORE FIRST APPELLATE AUTHORITY – ORDERS PASSED RECEIVED BY APPELLANT'S COUNSEL – SUBSEQUENT ACCIDENT OF COUNSEL AND UNDERGOING OF SURGERY LEADING TO DELAY IN FILING OF APPEAL BEFORE TRIBUNAL – RECOVERY PROCEEDINGS INITIATED – RESULTANTLY, APPEAL FILED ON APPELLANT'S INTIMATING COUNSEL – DISMISSAL OF APPEAL BY TRIBUNAL DUE TO DELAY IN FILING – DELAY CONDONED BY HIGH COURT FINDING FACTS MENTIONED AS SUFFICIENT CAUSE – IMPUGNED ORDERS SET ASIDE – APPEALS TO BE HEARD ON MERITS

The assessment orders were passed on 22.2.08, 23.03.09 and 23.02.08 respectively. The first appellate authority dismissed the appeals on 18.5.09, 15.3.10 and 18.5.09 respectively. The appeal was filed before Tribunal with a delay of 467, 183 and 426 days respectively. The Tribunal dismissed the appeal being barred by limitation. An appeal was filed before High Court and it was explained that the orders of the first appellate authority were received by the appellant's counsel. Subsequently, the counsel met with an accident. He underwent a surgery in September 2010 due to which he could not attend the office and file the appeal in time. The appellant came to know about the orders only when the recovery proceedings commenced. It was then that the appellant approached the counsel and got the appeals filed before Tribunal. The Hon'ble High Court has found this as a sufficient cause and condoned the delay in the interest of justice. The impugned orders are set aside and order to hear the appeals on merits is passed.

Present: Mr. Avneesh Jhingan, Advocate, for the appellants.

Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana.

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S.J. VAZIFDAR, A.C.J.

1. The appeals are admitted on the following substantial questions of law raised in paragraph 11 in each of the appeals:

> *"(i) Whether in the facts and circumstances of the case, the Tribunal was justified in refusing to condone the delay which had occurred because of the conduct of the counsel?*
>
> *(ii) Whether in the facts and circumstances of the case, the order of the Tribunal is sustainable in law dismissing the appeal as time barred especially when the affidavit of the counsel had been filed and no contrary evidence was brought on record by the department?*
>
> *(iii) Whether in the facts and circumstances of the case, justice should be denied to the appellant because of the limitation even when the matter on merits squarely stands covered in favour of the dealer by the decisions of the Punjab and Haryana High Court?"*

2.The appellants' appeals under the Haryana Value Added Tax Act, 2003 before the second appellate authority were dismissed on the ground of delay. The present appeals raise a common question arising out of common facts and are, therefore, disposed of by a common order and judgement.

3. In the above VATAPs1781792072014, the assessments orders were finalized on 22.02.2008, 23.03.2009 and 23.02.2008 respectively. The first appellate authority dismissed the appeals on 18.05.2009, 15.03.2010 and 18.05.2009 respectively. The delay in filing of the appeals before the Tribunal was of 467, 183 and 426 days respectively.

4. For instance, in VATAP2072014, the order of the first appellate authority dated 18.05.2009 was served on the appellant's counsel on 23.06.2009. Unfortunately, the counsel met with an accident on 15.07.2009. In September, 2010, he underwent a surgery. Therefore, the appeal was not filed in time as he was unable to attend the office. The appellant learnt about the orders only when the recovery proceedings commenced. The appellant thereafter approached its counsel and filed the appeal on 01.12.2010. The same counsel appeared in the other proceedings relating to the other two appeals as well. There is no reason why the appellants should face the drastic consequences of the dismissal of their appeals without the same being considered on merits. The above facts constituted more than sufficient reason for condoning the delay and hearing the appeals on merits.

5. The substantial questions of law are, therefore, decided in favour of the appellants. The impugned orders are quashed and set aside. The appeals shall be heard on merits.

6. No order as to costs.

PUNJAB & HARYANA HIGH COURT

CWP 24906 OF 2014

PERFECT MECHANICAL INDUSTRIES
Vs.
STATE OF HARYANA & OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA, J

12th May, 2015

HF ▶ Partly – Revenue and Partly Petitioner

REFUND – BANK GUARANTEE – INVOCATION – TAX AND INTEREST LEVIED ON ACCOUNT OF FAKE C FORMS PRODUCED – BANK GUARANTEE ENCASHED ON DISSMISSAL OF FIRST APPEAL – APPEAL BEFORE TRIBUNAL FILED THEREAFTER – WRIT FILED AGAINST ENCASHMENT ON BASIS OF NO PRIOR SERVICE OF NOTICE – REFUND CLAIMED ON ACCOUNT OF PENDENCY OF APPEAL BEFORE TRIBUNAL – HELD, CONSENT FOR ENCASHMENT GIVEN BY PETITIONER HIMSELF AS PER THE LETTER TO THE BANK – APPROACHING HIGH COURT ON GROUNDS OF NON SERVICE OF NOTICE OPINED TO BE DUE TO SUBSEQUENT CHANGE OF MIND AND FILING OF APPEAL BEFORE TRIBUNAL – CONDUCT OF PETITIONER KEPT IN VIEW WHILE ADJUDICATING – NO REFUND TO BE GRANTED TILL PENDENCY OF APPEAL – REFUND TO BE ALLOWED IN THE EVENT OF SUCCEEDING BEFORE TRIBUNAL.

STAY OF RECOVERY – SECURITY – PENALTY IMPOSED ON ACCOUNT OF FAKE C-FORMS PRODUCED – DISSMISSAL OF FIRST APPEAL- NOTICE ISSUED FOR RECOVERY – WRIT FILED FOR ISSUANCE OF DIRECTIONS TO RESPONDENTS AGAINST RECOVERY TILL PENDENCY OF APPEAL BEFORE TRIBUNAL – BENEFIT OF PROTECTION OF RECOVERY GRANTED TILL PENDENCY OF APPEAL IN THE EVENT OF FURNISHING OF ADEQUATE SECURITY WITHIN THE PERIOD FIXED – NO COERCIVE METHOD TO BE RESORTED TO BY THE STATE TILL THEN – WRIT DISPOSED OF.

An assessment order was passed and an additional demand was created due to non production of the declaration forms at the time of assessment. The said forms were thereafter produced but were found ingenuine. Accordingly tax an interest were imposed alongwith penalty under Section 38 r/w Section 9(2) of the CST Act. An appeal was filed before the First Appellate Authority after furnishing bank guarantee for tax and interest element. The appeal was dismissed and bank guarantee was enchased against which the writ is filed. The petitioner has contended that no prior intimation was given to him before encashment and that the amount should be refunded as the appeal regarding the matter is pending before Tribunal. The High Court has observed that as per the letter addressed to bank by the petitioner, the latter has

himself given consent for the encashment. It is opined that it was an after thought that the petitioner approach this court after dismissal of first appeal on the ground that since he had filed an appeal after dismissal of first appeal the amount should be refunded to him and it was wrongly encashed without prior notice. No refund is granted. In case the petitioner succeeds in appeal before Tribunal, the State shall refund the amount.

Also, the petitioner has prayed for the issuance of direction to the respondents no to enforce the recovery of penalty during pendency of appeal before Tribunal which is not functional at present. The petitioner is granted the benefit of protection of recovery for the amount in dispute during the pendency of appeal provided adequate security is furnish to the satisfaction of Assessing Authority u/s 33(5) of the Act within a period of 4 weeks. The writ is disposed of.

Present: Sandeep Goyal, Advocate, for the petitioner.

Ms.Mamta Singla Talwar, AAG, Haryana, for the respondents

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G.S.SANDHAWALIA J.

1. The petitioner, who is a proprietorship concern, has filed the present writ petition, for issuance of direction to the respondents not to enforce the recovery of penalty imposed under Section 9(2) of the Central Sales Tax Act, 1956 (for short, the 'CST Act') read with Section 38 of the Haryana Value Added Tax Act, 2003 (for short, the 'VAT Act'), during the pendency of the appeal before the Haryana Tax Tribunal, which is not functional at present. An additional prayer has also been made to refund the amount of tax and interest to the tune of ₹1,46,00,000/, which has been recovered by encashing the bank guarantee in terms of Section 35(5) of the VAT Act, without any intimation to the petitioner.

2. Counsel for the petitioner has vehemently submitted that the first appeal of the petitioner was dismissed on 19.11.2014 (Annexure P3) by the First Appellate Authority, namely, the Joint Excise & Taxation Commissioner and the order was supplied on 24.11.2014. The bank guarantee which had been submitted in pursuance of the liability created vide order dated 05.05.2014 (Annexure P2) was wrongfully sought to be encashed on 24.11.2014, without giving any prior intimation as per the requirement of Rule 70(3) of the Haryana VAT Rules, 2003 and therefore, it is submitted that the amount should be refunded during the pendency of the appeal which he has filed before the Tribunal on 02.12.2014, against the order of the First Appellate Authority.

3. Counsel for the State has seriously opposed the said request, in the present facts and circumstances, which, *prima facie*, we find very reasonable, keeping in view the conduct of the petitioner, as such.

4. The case of the petitioner, admittedly, is that an assessment order was passed by the assessing authority on 05.12.2013 and an additional demand of ₹72,84,261/was created due to the nonproduction of the declaration forms, i.e., C- Forms, at the time of assessment. The said forms were, thereafter, produced to the tune of ₹68,076,501/and the demand was, thus, reduced to ₹1,36,228/, which was paid by the petitioner. The alleged C-Forms, supplied subsequently, were alleged to be in respect of the goods supplied to the vehicle factory, Jabalpur, a Government of India unit, manufacturing Defence Vehicles and on enquiry, it was found that the same were not genuine. Accordingly, vide order dated 05.05.2014, tax of ₹1,46,53,414/was imposed along with interest upon the petitioner along with penalty under Section 38 read with Section 9(2) of the CST Act, totalling to the tune of ₹3,66,33,535/.

5. The petitioner preferred an appeal before the First Appellate Authority, which asked for furnishing bank guarantee for the tax and interest element and eventually, the appeal was dismissed on 19.11.2014, in pursuance to which, the bank guarantee was encashed on 24.11.2014, against which, the petitioner is, now, aggrieved for not been given prior intimation before encashing.

6. A perusal of the written statement, filed by the State, would go on to show that the bank guarantee was expiring on 29.11.2014 and in the absence of any stay, the same was got encashed on account of only a period of 45 days remaining with the respondents to take action, in the peculiar facts and circumstances, to safeguard the interest of the Revenue. It is also pertinent to mention that the bank, admittedly, informed the petitioner at that point of time, on 24.11.2014 itself regarding the demand of the unconditional invocation of the Assessing Authority cum Excise & Taxation Officer. The petitioner, at that stage, admittedly, also gave his concurrence to the encashment of the bank guarantee, as per letter dated 24.11.2014 (Annexure R2), which was addressed to the bank. The same reads as under:

> *"Dear sir You are issued a bank guarantee No.003GT01142460015 in favour of Assessing AuthoritycumExcise and Taxation officer Sector12, Faridabad (East) for Rs.1,46,00,000/(Rs.One Crore Fourty Six Lakh Only) Against FDR no50300053177422 and 503000053108098 FDR amount for Rs.1,00,00,000/. You are authorized to debit balance amount in account no50200003880781. Please cash the Bank Guarantee."*

7. A further perusal of the recovery notice under the Land Recovery Act dated 24.11.2014 (Annexure R1) would go on to show that recovery was only made regarding the bank guarantee which has already been done. In such circumstances, once the petitioner himself has given his consent for the recovery of the tax amount along with interest, in view of being unsuccessful in appeal, we are of the opinion that subsequently, the petitioner had a change of heart and has approached this Court on the ground that since he had filed the appeal thereafter, the amount should be refunded to him and it was wrongly encashed, without giving him prior notice.

8. In such circumstances, we are not inclined to grant any relief for the refund of the amount, during the pendency of the appeal. In case the petitioner is successful, he will be entitled to the said amount which the State has encashed. Needless to say anything said herein is only for the purpose of deciding the present writ petition and the appeal of the petitioner will be decided on its own merits.

9. The only issue, thus, remains is that in pursuance of notices issued (Annexure P5), whether the balance penalty amount is liable to be recovered during the pendency of the appeal before the Tribunal, which is, at present, nonfunctional. Counsel for the petitioner has submitted that the petitioner shall furnish adequate security, to the satisfaction of the Assessing Authority, in the manner prescribed under Section 33(5) of the VAT Act.

10. Accordingly, the petitioner is granted the benefit of protection of recovery of the amount in dispute, during the pendency of the appeal, subject to the Assessing Authority being satisfied regarding the furnishing of adequate security, as prescribed under Section 33(5) of the VAT Act, within a period of 4 weeks from today. In the meanwhile, the recovery of the balance amount would not be made by resorting to any coercive method by the State.

11. Writ petition is, accordingly, disposed of.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP NO. 8872 OF 2015

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RALSON (INDIA) LTD.
Vs.
UNION OF INDIA AND OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

6th May, 2015

HF ▶ None

ALTERNATE REMEDY – WRIT – EXEMPTION - NOTIFICATION REGARDING EXEMPTION ISSUED – EXEMPTION DENIED UNDER CUSTOMS ACT – DISMISSAL OF FIRST APPEAL - WRIT FILED SEEKING EXEMPTION AND MODIFICATION OF NOTIFICATION – ISSUE TO BE DECIDED IN SECOND APPEAL INSTEAD OF FILING OF WRIT – ALTERNATE REMEDY TO BE AVAILED – SEPARATE WRIT PETITION FOR RAISING OTHER CONTENTIONS OPEN TO BE FILED IN CASE OF FAILURE BEFORE TRIBUNAL – FIT CASE OF CONDONING DELAY – PETITIONER GIVEN LIBERTY FOR REVIVAL OF THE WRIT IN CASE SECOND APPEAL NOT HEARD ON MERITS – WRIT DISPOSED OF.

A writ was filed contending that the petitioner was entitled to exemption from duty under the Customs Act pursuant to the notification dated 11.09.2009. But this exemption was not granted by the authorities below and the first appeal filed by the petitioner was dismissed. On a writ before High Court:-

It has been held by the Hon'ble high Court that this issue could be decided by the appellate authority.

Also an order for directing the respondents to modify the notification was sought by the petitioner. The petitioner is disposed of by leaving the petitioner to avail the alternate remedy of the second appeal. In case it does not succeed, a separate writ petition can be filed to raise other contentions . It is held that this is a fit case for condoning the delay. But if not heard on merits by the second appellate authority, this writ could be revived.

Present: Mr. Atul Gupta, Advocate,

Mr. Amar Partap Singh, Advocate,

Mr. Bhargav Mansatta, Advocate,

Mr. Amrinder Singh, Advocate, for the petitioner.

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S.J. VAZIFDAR, A.C.J.

1. The petitioner has challenged an order dated 28.01.2015 passed by the respondent No. 5 – Commissioner (Appeals) against the order in original passed by the Additional Commissioner of Customs imposing duty under Section 28 of the Customs Act, 1962.

2. We see no reason to interfere with the order in this writ petition as the petitioner has an alternate remedy of filing a second appeal before the Tribunal.

3. It is admitted that under the notification dated 11.09.2009 issued under Section 25 of the Customs Act, 1962, no exemption has been granted in respect of the safeguard duty under Section 8C of the Customs Tariff Act, 1975. Admittedly, pursuant to this notification, duty was imposed under Section 8C of the Customs Tariff Act, 1975. The petitioner contends that it is entitled to exemption from duty even under the Customs Act in view of the Foreign Trade Policy issued under Section 5 of the Foreign Trade Development & Regulation Act, 1992. Under para 4.1.4 of the Policy, advance authorizations are exempted from the payment of basic customs duty, additional customs duty etc. It is, however, also provided that imports for supplies covered under paragraph 8.2(h)(i) will not be exempted from payment of applicable anti-dumping and safeguard duty, if any. This issue can be decided by the appellate authority. We, therefore, see no reason to entertain the writ petition.

4. The petitioner has also sought an order directing the respondents to modify the notification issued under Section 25 of the Customs Act, 1962 to grant an exemption also from the safeguard duty levied under Section 8C of the Customs Tariff Act, 1975. It was contended that this relief cannot be granted by the authorities in the event of the petitioner not succeeding before the authorities in the second appeal. The show cause notice was issued on 24.05.2013. In the event of the petitioner succeeding before the second appellate authority in respect of the contention that in view of the Foreign Trade Policy it would be entitled to exemption even from the safeguard duty under Section 8C, it would not be necessary to go into the other questions raised by the petitioner.

5. In these circumstances, the writ petition is disposed of by leaving the petitioner to avail the alternate remedy of the second appeal. It is, however, clarified that in the event of the petitioner not succeeding in the second appeal, it would be open to it to raise the other contentions by way of a separate writ petition. In the event of the second appellate authority having the power to condone the delay, this is a fit case where the delay ought to be condoned. However, in the event of the second appeal not being heard on merits, the petitioner would be at liberty to have this writ petition revived.

PUNJAB & HARYANA HIGH COURT

CWP NO. 9630 OF 2015

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SAFFRON POLYTECH PVT. LTD
Vs.
STATE OF HARYANA & OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

14th April, 2015

HF ▶ Petitioner

STAY OF RECOVERY – SECURITY – NOTICE ISSUED FOR RECOVERY – PENDENCY OF APPEAL BEFORE TRIBUNAL DUE TO IT NOT BEING CONSTITUTED – WRIT FILED – RESPONDENTS DIRECTED TO DECIDE IF SECURITY OFFERED AND ACCEPTED EARLIER STILL VALID – RECOVERY STAYED TILL PENDENCY OF SUCH DECISION AND ONE WEEK THEREAFTER – PETITIONER REFRAINED FROM DISPOSING ITS IMMOVABLE PROPERTIES TILL THEN – *SECTION 33(5) OF HVAT ACT.*

An appeal was filed against the notice for recovery before Tribunal. Since Tribunal was not constituted, a writ is filed. The writ is disposed of directing the concerned officer of the respondents to decide whether security offered and accepted earlier is adequate or not. The recovery is to be stayed till pendency of such decision and one week thereafter. The petitioner is also refrained from disposing of its immovable properties or encumbering them in any manner till then.

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

Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana.

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S.J.VAZIFDAR,ACTING CHIEF JUSTICE

1. As in several other cases, the only reason that this petition has been filed is because the Tribunal under the Haryana Value Added Tax Act, 2003 has not been constituted. The appeal filed by the petitioner, therefore, cannot proceed before the Tribunal at this stage. The petition is disposed of by passing an order similar to the one passed in several other matters including CWP56162015.

2. The writ petition is, therefore, disposed of by directing the concerned officer of the respondents to decide whether the security offered by the petitioner and accepted earlier is even now valid and adequate or not. Till such decision is taken and for a period of one week thereafter, the recovery shall not be made pursuant to the notice dated 01.04.2015. Till then, in any event, the petitioner shall not dispose of its immovable properties or encumber the same in any manner whatsoever.

PUNJAB & HARYANA HIGH COURT

CWP NO. 5625 OF 2014

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JALANDHAR IRON & STEEL MERCHANTS ASSOCIATION (REGD.)

Vs.

STATE OF PUNJAB AND OTHERS

RAJIVE BHALLA AND AMOL RATTAN SINGH, JJ

20st May, 2015

HF ▶ Petitioner - dealer

DELEGATED LEGISLATION – RULE 21(8) PVAT RULES – WHETHER ULTRAVIRES THE PROVISIONS OF THE ACT – ITC @ 4% AVAILABLE ON PURCHASE OF GOODS MEANT "FOR SALE" AS PER 1ST PROVISO TO SECTION 13 – INSERTION OF RULE 21(8) TO PROVIDE REDUCED RATE OF ITC (2%) ON "SALE" OF GOODS LYING IN STOCK W.E.F. 21.01.2014 – WRIT FILED CHALLENGING THE POWER OF STATE TO NOTIFY SUCH A RULE WITHOUT ENABLING PROVISION IN THE STATUTE ON THAT DATE – HELD ENABLING PROVISION I.E. AMENDMENT OF PROVISO TO SECTION 13 CAME INTO FORCE ON 1.4.2014 – IN BETWEEN THE PERIOD OF 21.1.2014 TO 1.4.2014 RULE COULD NOT BE NOTIFIED IN ABSENCE OF STATUTORY POWER TO EMPOWER THE STATE TO NOTIFY SUCH A RULE – WRIT ALLOWED – RULE 21(8) HELD ULTRA VIRES THE PROVISIONS OF ACT - *SECTION 13 OF PVAT ACT AND RULE 21 OF PVAT RULES*.

As per section 13(1) of PVAT Act, 2005, a taxable person i.e. a dealer was entitled to ITC on purchases made during the tax period. The 1st proviso to Section 13, before amendment stated that ITC shall not be available unless goods are "for sale" within the State or intra-State or commerce etc.

The rate of taxation on iron and steel goods was reduced from 4% to 2% w.e.f. 25.1.2014. In the exercise of its rule making powers State inserted Rule 21(8) providing for reduced ITC on Stock held on that day. This meant that the goods that had already earned ITC lying in stock with the dealer, at the time of purchase would be reduced by reference to the reduced rate of tax, in force, on the date of sale. Aggrieved by the said amendment, a writ was filed. It was contended before the High Court that on the date of coming into force of Rule 21(8), there was no enabling provision in the Act to empower the State to reduce the rate of ITC already earned by reference to the sale of goods lying in stock or the reduced rate of tax. The amendment of 1st proviso to Section 13 of the Act which empowered notifying of such a rule came into effect on 1.4.2014. Rule 21(8) could, therefore, not come into force before amendment of the 1st proviso to Section 13. Allowing the writ, it is held that the State by enacting rule 21(8) has reduced the ITC already earned from 4% to 2%. But on 21.1.2014, there was no provision in the statute that empowered the State to enact such a rule as the amendment of proviso to Section 13 which conferred the power on State to do so came into force on 1.4.2014. The subordinate legislation could not be notified in the absence of statutory power to empower a

State to notify such a rule between 21.1.2014 to 1.4.2014. Therefore, such amendment could not be enforced before 1.4.2014 to take away a vested right already determined without statutory sanction. Writ allowed.

Present: Mr. Sandeep Goyal, Advocate, and Mr. J.S Bedi, Advocate, for the petitioner.

Mr. Piyush Kant Jain, Addl. A.G, Punjab.

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RAJIVE BHALLA, J.

1. By way of this order, we shall dispose of CWP-5625-2014, CWP-6042-2014, CWP-6046-2014, CWP-6085-2014, CWP-6221-2014, CWP-6222-2014, CWP-6251-2014, CWP-7907-2014, CWP-7951-2014, CWP-8025-2014, CWP-8095-2014, CWP-8141-2014, CWP-9229-2014, CWP-26767-2014, CWP-3222015 and CWP-3712015 as counsel for the parties state that common questions of law arise for adjudication. For the sake of convenience, facts are being taken from CWP-5625 -2014.

2. The petitioner association prays for issuance of a writ of certiorari, declaring Rule 21(8) of the Punjab Value Added Tax Rules, 2005 (hereinafter referred to as the 'Rules') and clarification, Annexure P4, ultra vires and/or inapplicable to the input tax credit already earned.

3. Counsel for the petitioner submits that Section 13(1) of the Punjab Value Added Tax Act, 2005 (hereinafter referred to as the 'Act') provides that a taxable person i.e. a dealer, is entitled to input tax credit on purchases made during the tax period, subject however to such conditions as may be prescribed. The first proviso to Section 13 of the Act, before it was amended, clarified that input tax credit shall not be available unless the goods are "for sale" within the State or in the course of interState trade or commerce etc. Section 13(5) of the Act places certain impediments on the right to claim input tax credit i.e. sets out a negative list which does not apply to iron and steel merchants. Section 15 of the Act which bears the title "Net tax payable by a taxable person" provides that the net tax payable for the tax period shall be determined by deducting the amount of input tax credit available to such person and would include input tax credit carried forward from the preceding tax period, if any.

4. The input tax credit was, therefore, earned by a taxable person on the date of purchase of taxable goods during a particular tax period and fructified into a tangible right on the date of purchase, provided the goods were "for sale" etc. but did not relate to the stock in hand or any reduced rate of tax. The State of Punjab, however, reduced the rate of taxation on iron and steel goods from 4% to 2% w.e.f. 25.01.2014 and in the exercise of its rule making powers notified Rule 21(8), on 21.01.2014 but w.e.f 01.04.2014, to provide that input tax credit on goods lying in stock as input or output would earn input tax credit on the "sale" etc. of such goods "at the reduced rate of tax". The effect of this amendment is that goods that had already earned input tax credit, lying in stock with a dealer, at the time of purchase would be reduced by reference to the reduced rate of taxation, in force on the date of the sale.

5. Counsel for the petitioner further submits that on the date of coming into force of Rule 21(8) there was no enabling provision in the Act, that empowered the State to reduce the rate of input tax credit already earned by reference to the sale of goods lying in stock or the reduced rate of tax. The amendment in the Act empowering the State of Punjab, to notify such a rule i.e. the first proviso to Section 13 of the Act came into effect on 01.04.2014. The new proviso deleted the words "are for sale" and replaced them with the words "are sold".

Similarly, the words "for use in the manufacture" etc. were replaced with the words "are used in the manufacture" etc., thereby enabling the State in the exercise of its rule making power to reduce input tax credit already earned on stock in trade, by reference to the reduced rate of taxation in force on the date of sale. The amended proviso to Section 13 of the Act having come into effect from 01.04.2014, the amendment in Rule 21(8) of the Rules could not come into force before the amendment of the first proviso to Section 13 of the Act. The State of Punjab has, however, applied Rule 21(8) of the Rules, before the amendment of the proviso to Section 13 of the Act. Counsel for the petitioner refers to the tax payers' guide issued by the State of Punjab to assert that it is clearly recorded that there is no condition that goods covered by purchases should be sold or used, thereby clearly inferring an admission on the part of the State that input tax credit is not relatable to the reduced rate of tax.

6. Counsel for the petitioner further submits that the petitioner association made a representation to the Government but instead of accepting the illegality perpetuated by the amendment, a clarification has been issued which further complicates the matter.

7. Counsel for the State of Punjab submits that input tax credit is available only when the dealer further sells the goods. This apart, Section 13 of the Act clearly postulates that input tax credit can be earned in such manner and subject to such conditions as may be prescribed. The State was, therefore, well within its power to notify Rule 21(8) of the Rules and prescribe further terms and conditions for availing input tax credit. The amendment applies only to the rate prevalent on the date of sale of stock in hand and, therefore, does not in any manner affect the rights of a dealer or in any manner reduce input tax credit on transactions that have already concluded. Counsel for the State of Punjab relies upon the following judgments:

1. United Riceland Limited Vs. State of Haryana and another (2011) 2 SCC 423;
2. R.K.Garg Vs. Union of India and others (1981) 4SCC 675; and
3. Union of India and others Vs. Nitdip Textile Processors Private Limited and another (2012) 1 SCC 226.

We have heard counsel for the parties and perused provisions of the Act and the Rules.

The question that calls for an answer is whether on 21.01.2014, the Act empowered the State to notify Rule 21(8) of the Rules?

The Punjab Value Added Tax Act, 2005, provided before the first proviso to Section 13 of the Act was amended, that a person who purchases goods from another taxable person would earn input tax and would be entitled to off set this amount as "input tax credit" against his tax liability. To understand the concept of "input tax" and "input tax credit" and answer the question posed, it would be appropriate to reproduce the definitions of "input tax, input tax credit, output tax, return, return period, reverse input tax credit and the right to claim input tax credit, it would be necessary to reproduce relevant provisions of the Act and the Rules, which read as follows:

"Section 2

*(o) "**input tax**" in relation to a taxable person means value added tax (VAT), paid or payable under this Act by a person on the purchase of taxable goods for resale or for use by him in the manufacture or processing or packing of taxable goods in the State.*

*(p) "**input tax credit**" means credit of input tax (in short referred to a ITC) available to a taxable person under this Act.*

*(s) "**output tax**" in relation to a taxable person means the tax charged or chargeable or payable in respect of sale and/or purchase of goods, as the case may be, under this act;*

*(zc) "**return**" means a true and correct account of business pertaining to the return period in the prescribed form;*

*(zd) "**return period**" means the period for which returns are to be furnished by a person; (ze) "**reverse input tax credit**" means an amount of input tax credit, which is required to be reversed by a taxable person on account of:-*

- *(i) Credit note for output tax received from the seller of goods on purchases in respect of which input tax credit is claimed;*
- *(ii) Goods, returned subsequent to availing the input tax credit;*
- *(iii) Goods, subsequently not used in accordance with the conditions prescribed for availing input tax credit; and*
- *(iv) Having availed the credit required to reverse the same in accordance with the provisions of sub sections (8) and (9) of section 13.*

(zm) "tax period" means a period for which a person is required to pay tax under this Act or the rules made thereunder."

Section 13 (as it existed before the amendment)

INPUT TAX CREDIT

(1) A taxable person shall be entitled to the input tax credit, in such manner and subject to such conditions, as may be prescribed, in respect of input tax on taxable goods, including capital goods, purchased by him from a taxable person within the State during the tax period: Provided that such goods are for sale in the State or in the course of interState trade or commerce or in the course of export or for use in the manufacture, processing or packing of taxable goods for sale within the State or in the course of interState trade or commerce or in the course of export:

Provided further that a taxable person shall be entitled to partial input tax credit in any other event, as may be provided in this section in such manner and subject to such conditions as may be prescribed:

Provided further that if, purchases are used partially for the purposes specified in this subsection and the taxable person is unable to identify the goods used for such purposes, then the input tax credit shall be allowed proportionate to the extent, these are used for such purposes, in the prescribed manner:

Provided further that input tax credit in respect of purchase tax paid or payable by a taxable person under section 19, shall be allowed subject to the conditions laid therein.

(2) Input tax credit shall be allowed only to the extent by which the amount of tax paid in the State exceeds four percent on purchase of goods –

(a) sent outside the State other than by way of sale in the course of interState trade or commerce or in the course of export out of territory of India; and

(b) used in manufacturing or in packing of taxable goods sent outside the State other than by way of sale in the course of interState trade or commerce or in the course of export out of the territory of India.

(3) Where a taxable person sends any goods as such or after being partially processed for further processing on job work basis, he shall debit the ITC by four percent of the value of such goods. If such goods after processing are received back by such person,

the ITC debited at the time of despatch, shall be restored. Such person shall, however, be required to produce proper evidence in the shape of records, challans or memos or any other document evidencing receipt of such goods, whenever asked for

(4) Input tax credit on furnace oil, transformer oil, mineral turpentine oil, water methanol mixture, naphtha and lubricants, shall be allowed only to the extent by which the amount of tax paid in the State exceeds four per cent:

Provided that these goods are used in production of taxable goods or captive generation of power.

(5) A taxable person under this section, shall not qualify for input tax credit in respect of the tax paid on purchase of,

(a) automobiles including commercial vehicles, two wheelers, three wheelers and spare parts for the repair and maintenance thereof, unless the taxable person is in the business of dealing in such automobiles or spare parts;

(b) petrol, diesel, aviation turbine fuel, liquefied petroleum gas and condensed natural gas, unless the taxable person is in the business of selling such products;

(c) civil structure and immovable goods or properties;

(d) office equipment and building material, unless the taxable person is in the business of dealing in such goods;

(e) furniture fixtures including electrical fixtures and fittings, unless the taxable person is in the business of such goods;

(f) airconditioning units, air circulators and refrigeration units, unless the taxable person is in the business of dealing in such goods or where airconditioning, air circulating or refrigeration is essential for sale or storage of taxable goods or in the manufacturing process of taxable goods;

(g) weigh bridge, except when installed inside the manufacturing premises for use in the manufacturing process of taxable goods;

(h) goods used in manufacture, processing or packing of goods specified in Schedule 'A';

(i) goods used in generation, distribution and transmission of electrical energy unless such generation, distribution and transmission of electrical energy is for captive consumption, in which case, it would be allowed subject to the provisions of subsection (4) of this section;

(j) the provisions of food, beverage and tobacco products, unless the taxable person is in the business of selling food, beverage and tobacco products; and

(k) goods used for personal consumption or gifts.

(6) A person, who was earlier registered for VAT and has subsequently got himself registered for TOT, shall reverse the input tax credit availed by him before such change of option, on the stock of goods held by him on the day, when he is registered as a registered person.

(7) A person, who was earlier registered for TOT and has subsequently got himself registered for VAT, shall not be entitled for input tax credit on the stock of goods held by him on the day, when he got registered as a taxable person and shall be liable to pay TOT on such stock, if sold within thirty days from such date.

(8) A person, who exports goods out of India and has claimed refund of input tax under sub–section (2) of section 18, shall reverse the input tax credit, if any, availed by him on such goods.

(9) A person shall reverse input tax credit availed by him on goods which could not be used for the purposes specified in subsection (1) of this section or which remained in stock at the time of closure of the business.

(10) Where the selling taxable person has made any modification in respect of a sale by issuance of debit or credit note on the invoice book, the purchasing taxable person shall make necessary adjustment of input tax credit availed.

(11) Input tax credit shall be nontransferable, except where the ownership of the business of a person is entirely transferred.

(12) Save as otherwise provided hereinafter, input tax credit shall be allowed only against the original VAT invoice and will be claimed during the period in which such invoice is received.

(13) In case the original VAT invoice is lost or mutilated, the input tax credit will be available only after the designated officer has determined the credit in the prescribed manner.

(14) If upon audit or cross verification or otherwise, it is found that a taxable person has made a false input tax credit claim, the Commissioner or the designated officer, as the case may be, shall order for recovery of the whole or any part of such input tax credit, as the case may be, without prejudice to any action or penalty provided for in this Act.

(15) The onus to prove that the VAT invoice on the basis of which, input tax credit is claimed, is bonafide and is issued by a taxable person, shall lie on the claimant.

17. Section 2(o) of the Act defines "input tax" as the value added tax paid or payable on the purchase of taxable goods meant for resale or for use to manufacture, process or pack taxable goods in the State, thereby postulating that "input tax" is tax "paid" or "payable" at the rate in force at the time of purchase of taxable goods. Section 2(p) of the Act defines "input tax credit" to mean the credit of any tax available to a taxable person thereby clarifying that value added tax paid at the time of purchase of taxable goods meant for resale or "for manufacture" etc. to be credited to the account of the taxable person shall be the "input tax credit" available to such a person. Section 2(s) defines the term "output tax". Section 2(zc) defines the word "return" and Section 2(zd) defines the words "return period". Section 2(zm) defines "tax period" to mean the period for which a person is required to pay tax under the Act or the Rules.

18. Section 13 of the Act titled as "input tax credit" sets out the parameters for availing input tax credit. The first proviso (relevant for the present controversy), as it existed i.e. on the date of introduction of Rule 21(8) before it was amended w.e.f. 01.04.2014, provided that input tax credit shall not be "available" unless the goods are "for sale" within the State etc., thus, postulating that input tax credit already earned would be available if the goods are for sale etc. Section 13(5) of the Act notifies a negative list which admittedly however does not apply to the case in hand.

19. A conjoint appraisal of these provisions reveals that value added tax paid at the rate in force on the date of purchase of goods from a taxable person, becomes input tax credit on the date of purchase, if the purchased goods are for resale etc., in the manner prescribed, thereby providing that input tax credit earned by a taxable person on the date of purchase of taxable goods, at the rate of taxation in force, during a particular tax period would be his input

tax credit provided the goods are for resale/sale etc. in the State of Punjab or for interstate trade or commerce or in the course of export or for use in the manufacture, processing or packing of taxable goods for sale within the State or inter State transaction and in the course of export etc. The respondents do not deny that members of the petitioners association purchased goods for resale/sale and manufacture etc., in the State of Punjab and had already earned input tax credit, regarding the goods lying in stock, on 21.01.2014. The dispute is confined to Rule 21(8) of the Rules.

20. The State of Punjab w.e.f. 21.01.2014 reduced the rate of taxation, on these goods (iron and steel) from 4% to 2% and simultaneously amended Rule 21 of the Rules to incorporate Rule 21 (8), which reads as follows:

> *"5. In the said rules, in rule 21, after subrule (6), the following subrule shall be added, namely:*
>
> *(7) xxx xxx xxx*
>
> *(8) Where some goods as input or output are lying in the stock of a taxable person and where rate of tax on such goods is reduced from a particular date, then from that date, input tax credit shall be admissible to the taxable person on the sale of goods lying in stock or on using the goods as input for manufacturing taxable goods, at the reduced rate."*

21. A perusal of Rule 21(8) of the Rules reveals that with respect to goods lying in stock the input tax credit already earned shall be admissible at the reduced rate i.e. the rate of taxation prevalent on the date of their sale. As referred to above, the rate of taxation was reduced from 4% to 2% from 21.01.2014. The input tax credit already earned would, therefore, be availed with respect to goods lying in stock, at 2%. The petitioner members, as is apparent from the facts, had paid tax @ 4% while purchasing the goods and had earned input tax credit @ 4%. The goods having been purchased for resale within the State of Punjab, the right to avail input tax credit @ 4% per annum stood crystalised, as a determinate right subject to availing this right during the return period or by carrying it forward. The State, however, by enacting Rule 21(8) of the Rules, has reduced the admissible amount of input tax credit already earned from 4% to 2%. We cannot possibly dispute the legislative competence of the State in the exercise of its power of delegated legislation to enact such a rule but the question, as we have also noticed, is not the legislative competence of the State but is whether on 21.01.2014 there was any provision in the statute that empowered the State of Punjab to notify Rule 21(8) of the Rules to provide that goods that have already earned input tax credit would avail input tax credit at the reduced rate of taxation applicable on the date of sale thereby reducing input tax credit already earned on goods lying in stock by reference to the reduced rate of tax prevalent on the date of their sale etc.

22. A perusal of the Act reveals that on 21.01.2014 there was no provision in the Statute that empowered the State to enact a rule to provide that input tax credit already earned on goods lying in stock shall now be availed and calculated by reference to the reduced rate of taxation prevalent on the date of their sale. The amendment conferring such a power by amending the first proviso to Section 13 of the Act, admittedly, came into force on 01.04.2014 by deleting the words "are for sale" etc. and replacing them with the words "unless such goods are sold" etc., thereby for the first time linking the availing of input tax credit to the rate prevalent on the date of the "sale of goods" etc. to the rate of taxation in force on the date of sale. The amended proviso to Section 13 of the Act, reads as follows:

> *"Provided that the input tax shall not be available as input tax credit unless such goods "are sold" within the State or in the course of interState trade or commerce or in the course of export or are used in the manufacture, processing or packing of taxable*

goods for sale within the State or in the course of interState trade or commerce or in the course of export."

23. The amendment in the first proviso to Section 13 of the Act introducing the words "are sold" etc. came into effect on 01.04.2014. The State of Punjab was, therefore, empowered in the exercise of its power of delegated legislation to notify a rule linking the availing of input tax credit already earned, to their sale, on 01.04.2014. Rule 21(8) of the Rules which resonates the first proviso to Section 13 of the Act by linking the availing of input tax credit to goods sold and thereby to the reduced rate of taxation, came into effect on 21.01.2014 on which date there was no statutory provision enabling the State, in the exercise of its power of delegated legislation, to notify a rule that input tax credit would be "availed" on the sale of goods lying in stock or their manufacture etc. by reference to the reduced rate of taxation, prevalent at the time of "sale/manufacture" etc. of goods that had already earned a determinate amount of input tax credit.

24. The State may be well within its power to alter the terms & conditions of availing input tax credit by a piece of subordinate legislation but as subordinate legislation may only be notified if it is relatable to statutory power enabling the State to notify such a rule, but the absence of such a provision in the statute, empowering the State to notify such a rule, between 21.01.2014 and 01.04.2014, in our considered opinion, did not empower the State, in the exercise of its power of delegated legislation to notify Rule 21(8) of the Rules on 21.01.2014.

25. We, therefore, have no hesitation in holding that on the date of introduction of sub Rule (8) of Rule 21 of the Rules, the State did not possess any power, emanating from the Act, to confine the availing of input tax credit to the reduced rate of tax on stock in trade i.e. transactions that had concluded with the dealer already earning input tax credit. A further perusal of the amendment in the first proviso to Section 13 of the Act reveals that it is not retrospective but applies to transactions after 21.01.2014. The amendment in the rule, which came into effect prior to the amendment the Act could, therefore, not be enforced, by the respondents before 01.04.2014 to take away a vested right already determined without statutory sanction.

26. We, therefore, allow the writ petitions and hold that in the absence of any provision in the statute enabling the State of Punjab to notify Rule 21(8) of the Rules w.e.f. 21.01.2014, the said provision would come into effect from 01.04.2014. However, since the notification by which Rule 21(8) of the Rules was added to the Rules, was obviously issued in view of the fact that the respondents were simultaneously, or soon thereafter, reducing the rate of taxation on various goods and as such, the notification was intended to ensure that the public exchequer does not suffer a loss by granting input tax credit at higher rates than the tax actually deposited (after lowering the rate of taxation), we grant liberty that if the public exchequer is adversely affected on account of the fact that we have held the notification of Rule 21(8) of the Rules to be an act of excessive delegation, the respondents may roll back the lowered rates of taxation, as per law, for the period between 21.01.2014 to 31.03.2014 to the level at which it was existing prior to the notification lowering such rate.

PUNJAB & HARYANA HIGH COURT

VATAP NO. 142 OF 2014

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MAHINDRA & MAHINDRA LTD.
Vs.
STATE OF HARYANA

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

19th May, 2015

HF ▶ Assessee

APPEAL - TRIBUNAL – PRELIMINARY ISSUE UNADJUDUCATED – REVISIONAL JURISDICTION – ASSESSMENT FINALIZED FOR THE YEAR 2004-05 IN 2008– ANOTHER MATTER OF THE APPELLANT BEING DEALT BY TRIBUNAL DECIDED IN 2009 HOLDING APPELLANT'S CLAIM FOR CONCESSION AS ILLEGAL – SUBSEQUENTLY, BASED ON THIS ORDER REVISIONAL JURISDICTION SOUGHT TO BE INVOKED FOR YEAR 2004-05 – APPEAL AGAINST ORDER OF REVISIONAL AUTHORITY DISMISSED BY TRIBUNAL – ON APPEAL BEFORE HIGH COURT, HELD THAT THE FIRST ISSUE TO BE DECIDED WAS WHETHER THE TWO CASES WERE SIMILAR OR NOT SO AS TO INVOKE REVISIONAL JURISDICTION IN VIEW OF SEC 34 OF THE ACT – MATTER REMANDED TO TRIBUNAL FOR FRESH DECISION – LIBERTY TO FURTHER REMAND IT TO REVISIONAL AUTHORITY – APPEAL DISPOSED OF – *SEC 34 OF HVAT ACT, 2003*.

The assessment for the year 2004-05 was finalized in 2008. Another matter of the appellant was being dealt by the tribunal in STA No.407 of 2009-10 whereby it was decided that the appellant's claim for concessional rate of duty was illegal with respect to goods sold to Nigams as Nigams are not government departments. On the basis of this decision, Revisional Jurisdiction was sought to be invoked for the year 2004-05 by passing an order dated 27/11/2012. The tribunal dismissed the appeal against the order of the revisional authority. Allowing the appeal, the high court remanded the matter to the Tribunal to first decide the basic issue as to whether the two cases were same so as to invoke revisional jurisdiction in view of the second proviso to section 34 (1) of the Act. This issue is to be decided for passing fresh orders. The tribunal can either decide the matter itself or further remand it to revisional authority.

Present: Mr. Avneesh Jhingan, Advocate, for the appellant.

Mr. Mamta Singla Talwar, AAG, Haryana, for the respondent.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

1. This is an appeal against the order of the Haryana Value Added Tax Appellate Tribunal, Haryana (for short, the 'Tribunal') dated 31.10.2013 (Annexure A-6), dismissing the appeal filed against the order of the revisional authority, dismissing the preliminary issue raised before the Deputy Excise & Taxation Commissioner-cum-Revisional Authority, Karnal, that the revisional jurisdiction was invoked beyond the period of limitation, as prescribed under Section 34 of the Haryana Value Added Tax Act, 2003 (for short, the 'Act').

2. Several questions of law have been raised contending that they are substantial questions of law relating to the ambit of Section 34. It is not necessary to set out these questions as we find that the main issue that arises for consideration has not been dealt with by the Tribunal, at all. We are, therefore, inclined to remand the matter to the Tribunal, for a fresh decision, especially on the issue, which we will shortly indicate.

3. Section 34 of the Act reads as under:

"34. (1) The Commissioner may, on his own motion, call for the record of any case pending before, or disposed of by, any taxing authority for the purposes of satisfying himself as to the legality or to the propriety of any proceeding or of any order made therein which is prejudicial to the interests of the State and may, after giving the persons concerned a reasonable opportunity of being heard, pass such order in relation thereto as he may think fit:

Provided that no order passed by a taxing authority shall be revised on an issue which on appeal or in any other proceeding from such order is pending before, or has been settled by, an appellate authority or the High Court or the Supreme Court, as the case may be:

Provided further that no order shall be revised after the expiry of a period of three years from the date of the supply of the copy of such order to the assessee except where the order is revised as a result of retrospective change in law or on the basis of a decision of the Tribunal in a similar case or on the basis of law declared by the High Court or the Supreme Court.

(2) The State Government may, by notification in the Official Gazette, confer on any officer not below the rank of Deputy Excise and Taxation Commissioner, the power of the Commissioner under subsection (1) to be exercised subject to such exceptions, conditions and restrictions as may be specified in the notification and where an officer on whom such powers have been conferred passes an order under this section, such order shall be deemed to have been passed by the Commissioner under sub-section (1)."

4. We are concerned essentially with the second proviso to Section 34. The revisional jurisdiction was exercised on the following basis:

The Assessing Authority finalized the assessment for the relevant assessment year, namely, 2004-05, on 05.02.2008. Another matter was being dealt with by the Tribunal, namely, STA No.407 of 2009-10, in the appellant's case. It was held that the appellant's claim for concession with respect of the goods sold to the Haryana Vidyut Parsaran Nigam Ltd.(HVPNL) and Uttar Haryana Bijli Vitran Nigam Ltd.(UHBVNL), was illegal. That case was decided by an order of the Tribunal dated 11.12.2009. The Tribunal held that the Nigams are not Government departments and therefore, the appellant was not entitled to concessional rate of duty. It is based on this decision that the revisional jurisdiction was sought to be invoked in the present case, by issuing an order dated 27.11.2012.

5. The main question is as to whether the present case which involves the sale of the same goods to the Police Department, the Forest Department and other Departments and to the State Transport Corporation, is similar to the case dealt with by the order of the Tribunal dated 11.12.2009 (released on 21.12.2009). Had the present case involved the sale of goods to the said Nigams, it may have been a different matter, altogether. It was necessary for the Tribunal, however, to first decide the issue as to whether this case is similar to the other case for it is only in the event of that finding being in the affirmative that the revisional jurisdiction could have been invoked under the second proviso to Section 34. This issue, admittedly, has not been raised much less dealt with in the impugned order. We would have considered deciding this issue ourselves but for the fact that it was suggested that there may be certain other aspects regarding the constitution of these bodies that may also require consideration.

6. We would, therefore, leave it, in the first instance, for the authorities under the Act, to decide the issue.

7. The appeal is disposed of by the following order:

The impugned order dated 31.10.2013 (Annexure A-6) is set aside. The matter is remanded to the Tribunal for fresh decision, in accordance with law, including on the above issue. It would be open to the Tribunal to decide the said issue or to further remand the matter to the revisional authority.

PUNJAB & HARYANA HIGH COURT

CWP NO. 9908 OF 2015

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BRISK INFRASTRUCTURE & DEVELOPERS (P) LTD.
Vs.
STATE OF HARYANA AND OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

18th May, 2015

HF ▶ Petitioner/Assessee

CONSTITUTION OF INDIA – WORKS CONTRACT – VIRES OF EXPLANATION(i) TO SEC 2(1) (zg) OF THE HVAT ACT AND RULE 25(2) OF HVAT RULES – COVERED BY THE CASE OF CHD DEVELOPERS LTD – PETITION DISPOSED OF IN SAME TERMS.

Following the case of CHD developers Karnal, this writ petition is disposed of in same terms. It is held that the tax is to be computed on a value not exceeding the value of transfer of property in goods on and after the date of entering in to an agreement for sale. The value of immovable property and any other thing done prior to entering into agreement is to be excluded. The assessment orders are therefore liable to be set aside and where only notices have been issued , the assessment shall be framed in accordance with the aforesaid law.

Present: Mr. Sandeep Goyal, Advocate,

Mr. K.K. Gupta, Advocate, and Mr. Rishab Singla, Advocate, for the petitioner.

Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana.

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S.J. VAZIFDAR, A.C.J.

1. It is admitted that this writ petition is covered by the order and judgement of a Division Bench of this Court in a group of writ petitions with lead case i.e. CWP-5730-2014 titled as *CHD Developers Limited, Karnal* Vs *The State of Haryana and others* decided on 22.04.2015.

2. The petitioners therein had prayed for a writ of mandamus declaring Explanation (i) to Section 2(1) (zg) of the Haryana Value Added Tax Act, 2003 and Rule 25 (2) of the Haryana Value Added Tax Rules, 2003 and other related provisions in so far as they include the value of land for charging VAT on developers to be ultra vires to the Constitution of India. The Division Bench, inter alia, held as under:-

"44. In case the provisions of law are seeking to charge sales tax on any amount other than the value of goods transferred in course of execution of works contract, the provisions would be ultra vires the Constitution of India. The tax is to be computed on a value not exceeding the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. However, the 'deductive method' requires all the deductions to be made therefrom to be specifically provided for to ensure that tax is charged only on the value of transfer of property in goods on and after the date of entering into agreement for sale with the buyers. Where 'deductive method' has been prescribed under the rules for ascertaining the taxable turnover, ordinarily it should include a residuary clause in consonance with the mandate of law so as to cover all situations which can be envisaged.

45. In view of the above, essentially, the value of immovable property and any other thing done prior to the date of entering of the agreement of sale is to be excluded from the agreement value. The value of goods in a works contract in the case of a developer etc. on the basis of which VAT is levied would be the value of the goods at the time of incorporation in the works even where property in goods passes later. Further, VAT is to be directed on the value of the goods at the time of incorporation and it should not purport to tax the transfer of immovable property. Consequently, Rule 25(2) of the Rules is held to be valid by reading it down to the extent indicated hereinbefore and subject to the State Government remaining bound by its affidavit dated 24.4.2014 The State Government shall bring necessary changes in the Rules in consonance with the above observations."

3. In these circumstances, the Division Bench disposed of the writ petitions as follows:-

"53. To conclude, in some of the writ petitions challenge has been laid by the petitioners to the assessment order passed by the Assessing Authority relying upon circular issued by the Excise and Taxation Commissioner whereas in others, the order of the revisional authority on the same premises has been assailed. Still further, in certain cases, the petitioners have approached this Court at the stage of issuance of notices for framing of assessments itself. In our opinion, in all these matters, the assessment orders and revisional orders passed by the concerned authorities are liable to be set aside with liberty to the appropriate authority to pass fresh orders in the light of the legal principles enunciated hereinbefore. We order accordingly. In so far as cases where only notices have been issued, the competent authority shall be entitled to proceed further and pass order in accordance with law keeping in view the aforesaid interpretation noticed above. The writ petitions are, thus, partly allowed in the above terms."

4. In these circumstances, the present writ petition is also disposed of in the same terms.

5. There shall be no order as to costs.

PUNJAB & HARYANA HIGH COURT

CWP NO. 12141 OF 2015

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PRAHLAD METAL COMPANY
Vs.
STATE OF PUNJAB AND OTHERS

RAJESH BINDAL AND G.S. SANDHAWALIA, JJ

11th June, 2015

HF ▶ Assessee

PENALTY – CHECK POST - ATTEMPT TO EVADE TAX – RELEASE OF GOODS – GOODS OF PETITIONER DETAINED U/S 51 – BANK GUARANTEE OFFERED FOR RELEASE OF GOODS – GOODS NOT RELEASED – ON WRIT BEFORE THE HIGH COURT THE STATE AGREED TO RELEASE THE GOODS – PETITION DISPOSED OF – COST IMPOSED SINCE THERE WAS NO JUSTIFICATION FOR DETENTION OF GOODS AFTER BANK GUARANTEE WAS FURNISHED – STATE TO PAY THE COST AND RECOVER IT FROM THE GUILTY OFFICER.

The goods of the petitioner were detained by the Respondent State. The Petitioner furnished the Bank Guarantee seeking release of goods on 26.2.2015 as prescribed u/s 51 of Punjab VAT Act 2005. However, the goods were not released and petitioner approached the High Court by way of Writ Petition. The High Court held :-

The State Counsel on instructions from the department has submitted that vehicle and the goods shall be released immediately since he has no justification for detention of goods after 26.2.2015 when the petitioner had furnished the Bank Guarantee. The petition is disposed of in terms of undertaking given by the State that vehicle and goods in question shall be released to the petitioner forthwith. Moreover, since there was no justification for detention of goods from 26.2.2015 onwards after furnishing of Bank Guarantee, the petitioner shall be entitled to cost of Rs.25,000/- which would be paid by the State within a period of one month by way of Bank Draft. The State shall be at liberty to recover the same from the guilty officers.

Present: Mr. Avneesh Jhingan, Advocate, for the petitioner.

Mr. Rajesh Bhardwaj, Additional Advocate General, Punjab.

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RAJESH BINDAL, J.

1. The petitioner has filed the present petition seeking a direction to the respondents to release the goods being carried in the trucks bearing Nos. PB-23J-7141 and NL01-G-9846,

which were detained by respondent no. 2 on 12.5.2015. The petitioner claimed that the goods were purchased by him from M/s Satguru Enterprises, Mohali and were being carried to Delhi. The drivers of the vehicles were carrying requisite documents. The seller of the goods was paid part of the sale consideration through RTGS bank transaction prior to even purchase of goods. Despite this fact, the goods were not released, even though on 26.5.2015, the petitioner had furnished two bank guarantees for a total sum of ₹ 6,13,839 i.e. 30% of the value of the goods shown in the bills being ₹ 10,23,631/- and ₹ 10,22,505/-, Annexures P-1 and P-2, respectively.

2. Learned counsel for the State, on instructions from S. S. Channi, AETC, Mobile Wing, Ludhiana, submitted that the bank guarantee having been furnished, the vehicles and the goods detained shall be released immediately. He has no justification for detention of the goods at least after 26.5.2015 when the petitioner had furnished the bank guarantee.

3. After hearing learned counsel for the parties, the present petition is disposed of in terms of undertaking given by learned counsel for the State that the vehicles and goods in question shall be released to the petitioner forthwith. However, considering the fact that there is no justification available for detention of goods from 26.5.2015 onwards after the petitioner had furnished the bank guarantees to the tune of 30% of the value of the goods shown in the invoices in terms of Section 51(6) of the Punjab VAT Act 2005, the petitioner shall be entitled to costs of ₹ 25,000/-. Firstly, the cost shall be paid by the State within a period of one month by way of bank draft, however, the State shall be at liberty to recover the same from the guilty officer(s).

PUNJAB & HARYANA HIGH COURT

STA NO. 34 OF 2014

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KAPSONS ELECTRO STAMPINGS
Vs.
COMMISSIONER OF CENTRAL EXCISE & ANOTHER

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

29th May, 2015

HF ▶ Revenue

APPEAL – PRE-DEPOSIT – SERVICE TAX – RENTAL OF IMMOVABLE PROPERTY – APPELLANT ENTERED INTO A LEASE AGREEMENT FOR LEASING OUT LAND & BUILDING ALONGWITH PLANT & MACHINERY ETC. FOR A CONSOLIDATED SUM OF RS. 7,00,000/- PER MONTH – RS. 55,000/- WAS ALLEGEDLY FOR LAND & BUILDING AND BALANCE WAS FOR OTHER FACILITIES – ADJUDICATING AUTHORITY TREATED A SUM OF RS. 2.80 CRORE AS RENT AND RAISED THE DEMAND OF SERVICE TAX AMOUNTING TO RS. 31,86,820/- - APPEAL FILED BEFORE COMMISSIONER (APPEALS) WITH AN APPLICATION FOR WAIVER OF PRE-DEPOSIT – COMMISSIONER (APPEALS) ORDERED THE PAYMENT OF TAX – WAIVED OFF PENALTY AND INTEREST – ON APPEAL, TRIBUNAL MAINTAINED THE ORDER – ON FURTHER APPEAL BEFORE HIGH COURT – HELD: NO SUBSTANTIAL QUESTION OF LAW ARISES – COURT WOULD NOT INTERFERE IN THE DISCRETION EXERCISED BY THE APPELLATE AUTHORITY – COMMISSIONER (APPEALS) HAS ALREADY GRANTED WAIVER OF INTEREST AND PENALTY – APPEAL DISMISSED – TWO MONTHS TIME GRANTED TO DEPOSIT THE BALANCE AMOUNT.

The appellant had entered into a lease agreement for leasing out Plant and Machinery, Equipments, Jigs and Fixtures, Dies, Office Equipment, Furniture & Fittings to a unit @ Rs.7,00,000/- per month being the lease amount, out of which Rs.55,000/- was allegedly for Land & Buildings and the balance was for use of other facilities. The adjudicating authority treated a sum of Rs.2.80 crores as Rent and Service Tax liability was worked out at Rs.31,86,820/- by invoking the extended period of limitation along with equal amount of penalty and interest. The appellant filed an appeal before the Commissioner (Appeals) along with an application for waiver of penalty as provided u/s 35F. The Commissioner (Appeals), however, directed the appellant to pay the entire amount of Service Tax and waived off the requirement of pre-deposit of interest and penalty.

The argument that building was let out only for Rs.55,000 per month and the rest of the amount was only on account of rent for immovable Plant & Machinery which was movable and not covered under the Act, prima facie, cannot be accepted. The assessee has maintained Ledger Account and there is no break up for different Heads of Land and Buildings and Plant

& Machinery. The Lease Agreement was also not registered under the Registration Act 1908. The Commissioner (Appeals) has already granted waiver regarding deposit of interest and penalty and observed that there was no un-due hardship. The Court would not enquire in the discretion which has been exercised by the authorities under the Act in view of the facts and circumstances of the present case. Since High Court can interfere only if there is substantial question of law, the present appeal is not maintainable, as no substantial question of law arises for consideration of the High Court. The issues raised require consideration at the time of hearing of appeal.

Appeal dismissed. However, Assessee is granted time to deposit balance amount of pre deposit within two months from the date of order.

Present: Mr. Jagmohan Bansal, Advocate, for the appellant.

Mr. Sunish Bindlish, Advocate, for the respondents.

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G.S.SANDHAWALIA J.

1. The instant appeal, filed under Section 83 of the Finance Act, 1994 (for short the 'Finance Act') read with Section 35 G of the Central Excise Act, 1944 (for short, the 'Act'), is directed against the order dated 20.11.2014 (Annexure A-13), passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for short, the 'Tribunal'). Vide the said order, the Tribunal has refused to interfere in the order of the Commissioner (Appeals) dated 31.01.2013 (Annexure A-10) wherein pre-deposit on the entire amount was ordered, during the pendency of the first appeal.

2. The questions of law that arises for consideration is as under:

"a) Whether in the light of amended Section 35F order to deposit entire amount of adjudicated service tax is justified?

b) Whether order passed by the ld. Tribunal is perverse and contrary to facts and circumstances of the case?

c) Whether the impugned order is justified when the appellant has strong prima facie case on merits?"

3. The reasoning given by the Tribunal was that the rent note executed by the appellant showed that the building, plant and machinery along with other infrastructure had been rented out and therefore, fell within the renting of immoveable property and was, thus, exigible to service tax.

4. A perusal of the paperbook would show that a show cause notice dated 19.06.2009 was issued to deposit the service tax amounting to ₹10,28,160/- along with interest on account of the fact that during the audit conducted on M/s Kapsons Industries, Jalandhar, it was found that lease deed had been entered into on 01.04.1997 (extended on 29.03.2001) for leasing out plant and machinery, equipments, jigs and fixtures, dies, office equipments, furniture and fittings to the said unit ₹7,00,000/- per month being the lease amount, out of which, ₹55,000/- was allegedly for the land and building and the balance was for the use of other facilities. Accordingly, the appellant was asked to send the deposit particulars along with the documentary evidence and pay service tax upto 30.06.2009. On 10.08.2009, the appellant submitted the details of the lease/rent receipts from 01.04.2008 to 30.06.2009 and vide notice dated 30.05.2011 (Annexure A-6), it was asked to deposit the service tax of

₹46,04,320/- along with interest. The final audit report further raised various dues and violations which had been made by the appellant.

5. Accordingly, an order dated 15.12.2011 (Annexure A-9) was passed by the Adjudicating Authority, wherein a finding was recorded that a sum of ₹2,80,00,000/- had been received as rent and the service tax liability was worked out at ₹31,86,820/- as the appellant had not got himself registered nor paid service tax and there was violation of Section 68, 69, 70, 73(1) of the Finance Act read with Rule 7(4) of the Service Tax Rules, 1994. Accordingly, the extended period under Section 73(1) of the Act was invoked and it was held that it was also liable to pay interest on the evaded service tax, apart from the demand of ₹31,86,820/- along with penalty of ₹200/- per day, during which, such failure continued, apart from the penalty of ₹5000/- and an equivalent penalty also under Section 78. 6. The appellant filed an appeal before the Commissioner (Appeals) and filed an application praying for waiver of the penalty as prescribed under Section 35F of the Act. The plea taken that the service tax was not liable to be paid since the rent amount had been divided into two heads, one of land and building and the other for plant and machinery, was rejected as the same had never been disclosed during the audit. The plea that the demand was time barred was also rejected as the fact had never been disclosed to the Department on its own and was only detected by the audit team. In the absence of any undue hardship, the Commissioner (Appeals), directed the appellant to pay the entire amount of service tax confirmed against it and waived off in full the requirement of pre-deposit of interest and penalties imposed under the impugned order. The said amount was to be deposited within 15 days. The appellant, thereafter, challenged the said order by filing CWP No.4800 of 2013, which was disposed of with the observations that an appeal should be filed before the Tribunal. Resultantly, the impugned order has been passed whereby the Tribunal has declined to interfere in the discretion exercised by the Commissioner (Appeals). 7. Counsel for the appellant has vehemently submitted that the order impugned whereby there was reference to the valuation of the plant and machinery on one side and the value of the land and building on the other, has been taken on a exaggerated basis whereas the approved valuer's report only showed an amount of ₹72,26,186/-. It was, accordingly, submitted that the rent was not in ratio to the value of the assets of plant and machinery and that the Commissioner (Appeals) was not justified by denying the relief regarding the pre-deposit.

8. Counsel for the revenue, on the other hand, supported the order and submitted that the discretion exercised was not lightly to be interfered with and under the provisions of the Act, the service was taxable and only on account of the audit of M/s Kapsons Industries, the factum of the violation had been detected and in such circumstances, no question of law arises which would require consideration by this Court.

9. The unamended provisions of Section 35F of the Act provide that the Appellate Tribunal should take into account the factum of undue hardship of the appellant and may dispense with such deposit, subject to the conditions it may deem fit, to impose, so that the interest of the Revenue can be safeguarded. The said provisions read as under:

> *"SECTION 35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :*
>
> *Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied*

would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue."

10. In the present case, as noticed, the renting of immoveable property had been brought in to the service net w.e.f. 01.06.2007 vide notification dated 22.05.2007. The explanation to Section 65(90a) of the Finance Act provide that renting of immoveable property includes use of immoveable property, factories, office buildings, warehouses plus for use in the course or furtherance of business or commerce. Sub-section (105)(zzzz) also provides that taxable service means providing of any service by renting of immoveable property The argument that as per the amended lease deed dated 29.03.2011, the building was only let out for ₹55,000/- per month and the rest of the amount was only on account of the rent of the immoveable plant and machinery, which was moveable and not covered under the Act, *prima facie,* cannot be accepted. The Adjudicating Authority has noticed that a consolidated ledger account is being maintained and that there is no breakup for the different heads of land and building and the plant machinery and the agreement dated 29.03.2011 was not registered under the Registration Act, 1908. The Commissioner (Appeals) has, *prima facie,* considered the stand of the appellant and granted the benefit of waiver regarding the pre-deposit of interest and penalties imposed and noticed that there was no undue hardship.

11. The amended rent deed whereby the rent was fixed at ₹7,00,000/- per month, which was divided into two accounts, for land and building to the tune of ₹55,000/- and ₹6,45,000/- for the use and other facilities, does not show any details as to which of the plant and machinery had been leased out for the huge rental of ₹6,45,000/- per month. Relevant portion of the agreement reads as under:

"In consideration of the sum of Rs. 10.00 Lacs (Rupees Ten Lacs only) paid as interest free deposit by the Lessee to the Lessor (receipt whereof the Lessor hereby acknowledge) and in consideration of the Lease Rent hereby reserved and pursuant to the covenants agreed to between the parties and hereinafter after mentioned "The Lessor" hereby conveys, grants and dismiss by way of lease, the plant & machinery, equipments, jigs & fixtures, Dies, office equipments, furniture and fittings and other infrastructural facilities as particularly described in the schedule attached hereto together with all attachments, whatever belonging to and hereto together with all attachments, whatsoever belonging to and hereto enjoyed by the Lessor unto 'The Lease' from, the first day of April, 1997 for a period of ten years during which period 'The Lessee' shall pay the sum of Rs. 7,00,000 (Rupees Seven Lacs only) per month as divided into Rs. 55,000.00 (Rupees fifty five thousand only) per month for the use of land & building and the balance of Rs. 6,45,000.00 (Rupees six lacs forty five thousand only) per month for the use of all other facilities as rent w.e.f. 1st April, 2001 in advance on or before the 10th of the month aforementioned in each year at the office or the premises as 'The Lessor' may require or fix in this behalf from time to time."

12. Counsel for the appellant has admitted that the property is spread over one acre of land in Jalandhar and in such circumstances, the submission that it was not covered under the definition of immoveable property and does not come within the ambit of service tax, cannot be accepted. This Court would not interfere in the discretion which has been exercised by the authorities under the Act, in view of the facts and circumstances of the present case. The authorities were able to detect the amount of evasion of tax on the basis of the audit conducted on a sister concern and the extended period of limitation had been invoked. Under Section 35G of the Act, this Court would only interfere if there is a substantial question of

law involved and the appeal is only to be heard on the questions so formulated. Admittedly, the adjudicating order was passed on 15.12.2011, well before the amendment came on 06.08.2014 and even the order of the Commissioner (Appeals) was passed on 31.01.2013, well before the amendment and therefore, question No.1 does not arise in the facts of the case.

13. Keeping in view the above discussion, this Court is of the opinion that the substantial questions of law which have been raised by the appellant, do not arise for consideration of this Court in an appeal against an order of predeposit. The issues raised require consideration at the hearing of the appeal. Moreover, needless to clarify that the observations herein and in the impugned order would not affect the parties at the hearing of the appeal.

14. In such circumstances, this Court is not inclined to interfere with the discretion which has been exercised and where the benefit of pre-deposit has been restricted to a reasonable amount, in favour of the appellant. However, since an interim order had been passed in favour of the appellant on 24.12.2014 that the appellant would deposit a sum of ₹8 lacs towards service tax, which is stated to have been deposited, liberty is granted to the appellant to deposit the balance outstanding amount within a period of 2 months, from the date of this order.

15. The appeal is, accordingly, dismissed.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CEA NO 93 of 2014

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MARUTI SUZUKI INDIA LTD.
Vs.
COMMISSIONER OF CENTRAL EXCISE

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

15th May, 2015

HF ▶ Revenue

APPEAL - PRE DEPOSIT – CENTRAL EXCISE ACT – SECTION 35F – TRANSACTION VALUE – DEALERSHIP MARGINS BEING GIVEN OVER AND ABOVE THE ASSESSABLE VALUE OF TAXES DECLARED IN THE INVOICES – ADDITIONAL DEMAND OF RS.240.57 CRORES RAISED ALONG WITH PENALTY AND INTEREST – EXTENDED PERIOD OF LIMITATION ALSO INVOKED – TRIBUNAL DIRECTED TO DEPOSIT RS.150 CRORES AS CONDITION FOR HEARING OF APPEAL – ON APPEAL HIGH COURT HELD – NO SUBSTANTIAL QUESTION OF LAW ARISES – PRIMA FACIE OPINION OF THE TRIBUNAL JUSTIFIED – ASSESSEE ENTITLED TO RAISE ALL CONTENTIONS ON MERIT AT THE TIME OF REGULAR HEARING – AMOUNT ALREADY REDUCED FROM RS. 240 CRORES TO RS.150 CRORES – APPEAL DISMISSED – THREE MOTHS TIME GIVEN TO DEPOSIT THE AMOUNT.

The appellant, a Car manufacturer, had been assessed to Central Excise Duty by the Commissioner, Central Excise and additional central excise duty of Rs.240.57 crores was found payable along with equal amount of penalty and interest.

On appeal before the Tribunal along with an application for hearing of appeal without pre deposit, the appellant took a stand that there was no fraud and no willful statement and accordingly the demand was time barred. It was pleaded that the amount of dealers' margin which had been offered as a part of promotional discount was not includible in the assessable value. Accordingly prayer was made for waiver of pre-deposit as it would cause undue hardship to the appellant. The Tribunal had rejected the contentions of the assessee holding prima facie against the appellant and observed that the definition u/s 4(3)(d) of the Act would include the amount given as a promotional discount in the assessable value. The reliance placed upon decision of Hon'ble Bombay High Court in Tata Motors vs Union of India – 2012 (296) ELT 161 (Bom.) by appellants was not taken into consideration on the ground that the assessee would be provided opportunity to argue the same during a regular hearing. The contention with regard to extended period of limitation was also rejected on the ground that the holding charges being recovered by the dealers have been suppressed from the department and, therefore, the extended period of limitation has been rightly invoked. The Tribunal ordered the sum of Rs.150 crores as a condition for the hearing of appeal u/s 35Fof the Act.

On appeal before the High Court it was held, that No question of law arises in view of the prime facie conclusions arrived at by the Tribunal. The Tribunal after giving benefit of pre deposit has already reduced the amount of deposit to the tune of Rs.150 crores out of a duty of Rs.240.57 crores along with equal amount of penalty and interest. No substantial question of law arises which have been raised by the applicant and the issues raised require consideration at the hearing of the appeal as to the judgments relied upon by the appellant. The opinion formed by the Tribunal was merely a prima facie opinion which cannot be faulted.

Accordingly, the appeal was dismissed but the appellant was granted 3 months time to deposit the amount from the date of order.

Cases referred:

Union of India & others Vs. Bombay Tyres International Ltd. 1984 (17) ELT 329

Maruti Suzuki India Ltd. Vs. CCE, Delhi-III 2010 (257) ELT

Tata Motors Ltd. Vs. UOI 2012 (286) ELT 161 (Bom.)

Benara Sales Ltd. Vs. Commissioner of Central Excise 2006 (207) ELT 513

ITC Ltd. Vs. Commissioner (Appeals) Customs 2005 (184) ELT 347 (All.)

Present: Mr.V.Lakshmikumaran, Advocate,
Mr.Aman Pratap Singh, Advocate,
Mr.Amrinder Singh, Advocate,
Mr.R.K.Hasija, Advocate and
Mr.Shobit Phutela, Advocate, for the appellant.
Mr.Kamal Sehgal, Advocate, for the respondent.

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G.S.SANDHAWALIA J.

1. This judgment shall dispose of CEA Nos.93 & 94 of 2014, filed under Section 35G of the Central Excise Act, 1944 (for short, the 'Act'), filed by the manufacturer, since common questions of law and facts are involved and by a common impugned order passed by the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (for short, the 'Tribunal') dated 15.10.2014 (Annexure A-1), the lis has been decided.

2. The Tribunal, vide order dated 15.10.2014, directed the appellant manufacturer to deposit a sum of ₹150 crores, within 8 weeks and that the balance amount of duty interest and penalty shall remain stayed, subject to the deposit, while deciding the stay application of the appellant.

3. The following four questions of law have been framed by the appellant for the decision by this Court:

> *"(i) Whether in facts and circumstances of the present case, the Appellate Tribunal is correct in directing the Appellant to deposit Rs.150 crore out of Rs.240 crore (approx) demand as a precondition to hear the Appeal on merits when the entire case is covered in favour of the Appellant by rulings of the Hon'ble Supreme Court and the Bombay High Court?*

(ii) Whether in facts and circumstances of the present case the Appellate Tribunal is correct in directing the Appellant to make a pre-deposit as a pre-condition to hear the Appeal on merits when the entire case is covered by order of the Appellate Tribunal in Appellant's own case; thus, breaching the doctrine of judicial discipline and judicial propriety?

(iii) Whether in facts and circumstances of the present case the Appellate Tribunal is correct in directing the Appellant to make a pre-deposit as a pre-condition to hear the Appeal on merits, when the Hon'ble Tribunal has failed to pass an order after reserving the judgment for more than five months without considering the submissions of the Appellants and deciding the matter on facts and issues which were never part of the proposed demand in the Show Cause Notice?

(iv) Whether in facts and circumstances of the present case the Appellate Tribunal is correct in directing the Appellant to make a pre-deposit when substantial period of demand is time barred and beyond the period of limitation?

4. A perusal of the paperbook would go on to show that vide a show cause notice dated 19.06.2009 (Annexure A-7) and five other notices, the Revenue, on the basis of an audit conducted from 11th to 15th November, 2008, noticed that the appellant-manufacturer was giving dealership margins to the respective dealers for vehicles being sold by them, over and above the assessable value and taxes, as declared in the invoices. The appellants were also permitting different incentive schemes as corporate discounts, free insurance for the sale of the vehicles under the brand name 'Maruti' by way of regular advertisement. The advertisement provided the details of the offers and also gave the names and telephone numbers of the dealers through whom the schemes could be availed. After going through the advertisement and investigation done on the ground that the show cause notice was got issued on the ground that the promotional schemes should be included in the assessable value, as per the definition of transaction value, given under Section 4(3)(d) of the Act, which provided for determination of demand of customs or the central excise duty of transaction value. Investigations were made, accordingly, and correspondence *inter se* the appellants and the dealers and a conclusion was *prima facie* arrived at that the schemes were conceived and prepared by the manufacturer and the dealers were not party to the schemes and the stand taken that the schemes were launched by the dealers, was not correct. The dealers were bound to implement the schemes and the considerations pertaining to the dealers' contribution was liable to be added in the assessable value to arrive at the transaction/assessable value. Accordingly, quantifying the total discounts given by the manufacturer and the central excise duty payable on the same, the said show cause notice was issued.

5. The defence taken by the appellants was that whatever discounts were passed to the end consumers as the customers had bought the vehicles from the dealers and had got maximum savings and no loss had been incurred by the dealers. The discounts were advertised and known prior to the removal of the goods. Reliance was placed upon the judgment of the Apex Court in ***Union of India & others Vs. Bombay Tyres International Ltd. 1984 (17) ELT 329***. The demand was denied and it was pleaded that the demand duty was barred under Section 11A of the Act. The balance-sheet and profit and loss accounts of the entire period of dispute had been shown and it was submitted that there was no suppression of facts and statements and that the investigation on the extended period of limitation was perverse and contrary to the facts and time-barred.

6. The adjudicating authority, vide order dated 10.01.2013 (Annexure A-9), by taking into account the defence of the appellants, came to the conclusion that the period relates to the evaluation of vehicles from June, 2004 to March, 2012. The provisions of Section 4(3)(d)

of the Act were taken into consideration to hold that the discounts given by the dealers of the manufacturer would be includible in the assessable value of the goods. The objection raised by the appellants that the dealers were not incurring any expenditure and the discounts were being borne by them on their own accord, was taken into consideration and it was held that under the dealership agreement, they were to follow the promotional schemes as issued by the manufacturer. Accordingly, by holding that the manufacturers have legally enforceable rights upon the dealers, the amounts of discounts were held to be included in the transaction value. It was further held that the manufacturer had wilfully mis-stated that the promotional scheme had been launched and rather the promotional schemes were formulated and launched by the manufacturer and therefore, proviso under Section 11A had been rightly invoked. Resultantly, the dealers' contribution and consumers' promotion scheme provided from the dealers' margins had been included in the assessable value, which was quantified as ₹15,70,21,54,908/- and the central excise duty was quantified at ₹240,57,84,802/-. Recovery of interest were also ordered under Section 11AB and penalty to the tune of an equivalent amount of ₹240,57,84,802/- was levied, while giving the benefit upon the institutional discounts and spot discounts which were not to be included in the assessable value.

7. The appellant-manufacturer, filed an appeal before the Tribunal along with an application for waiver of the pre-deposit and taken the plea that there was no fraud and no wilful mis-statement and the demand was time-barred. Vide the impugned order, the Tribunal came to the conclusion that the only issue involved was whether the amount of dealers' margin which had been offered as part of the promotional discount, was includible in the assessable value, for the purpose of payment of central excise duty or not, in view of the definition of Section 4(3)(d) of the Act, wherein, transaction value had been defined. It was, accordingly, held that it would form part of the assessable value of such goods and would be an indirect consideration, received by the assessee in clearance of the products manufactured by him. The promotional scheme being mandatory upon the dealers, the manufacturer's contention that they were doing on their own accord, was rejected on the ground that the agreement was liable to be terminated. Reliance was placed upon the judgment of the larger Bench of the Tribunal in ***Maruti Suzuki India Ltd. Vs. CCE, Delhi-III 2010 (257) ELT*** wherein it had been held that the provision of running pre-delivery inspection and three free after sale services were also part of the price of goods. The judgment of the Bombay High Court in ***Tata Motors Ltd. Vs. UOI 2012 (286) ELT 161 (Bom.)***, was referred to but not taken into consideration on the ground that the appellant would be provided opportunity to argue on its ratio during regular hearing. Other judgments relied upon were rejected on the ground that the transaction value came into force w.e.f. 01.07.2000 and the judgments were prior to that point of time.

8. Another factor which weighed with the Tribunal was that the dealers were also charging handling charges, over and above the ex-showroom price and the manufacturer had no control over the dealers in this regard. Thus, the handling charges were being recovered by the dealers which range from ₹6000/- per vehicle and thus, had been suppressed from the Department and therefore, the extended period of limitation had rightly been invoked. The discount was being compensated from handling charges, collected by the dealers, indirectly and thus, the appellants were undervaluing the excisable goods while delivering to the dealers.

9. Counsel for the appellants has, thus, submitted that in view of the judgment of the Bombay High Court in **Tata Motors Ltd.** (supra), the circular dated 01.07.2002 had been quashed and therefore, while placing reliance upon ***Benara Sales Ltd. Vs. Commissioner of Central Excise 2006 (207) ELT 513***, argued that once a *prima facie* case was made out, it would be undue hardship to the appellant to deposit the amount and therefore, the conditions

imposed to deposit the sum of ₹150 crores, was not justified. It was further submitted that dispensation of deposit was to be allowed as there was two views possible while placing reliance upon the Division Bench judgment of the Allahabad High Court in ***ITC Ltd. Vs. Commissioner (Appeals) Customs 2005 (184) ELT 347 (All.)***.

10. Counsel for the Revenue, on the other hand, submitted that in view of the amendment made in the section, the transaction value would include the value of the concession given by the dealers and the interest of the Revenue was to be protected. In the absence of any financial hardship being faced by the appellant-company, the discretion exercised by the Tribunal is not lightly to be interfered with, in the facts and circumstances and out of the ₹240,57,84,802/- of duty along with penalty of the equivalent amount and interest etc., only a sum of ₹150 crores had been asked to be deposited.

11. The provisions of Section 35F of the Act provide that the Appellate Tribunal should take into account the factum of undue hardship of the appellant and may dispense with such deposit, subject to the conditions it may deem fit, to impose, so that the interest of the Revenue can be safeguarded. The said provisions read as under:

> *"SECTION 35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied : Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue."*

12. The facts have already been noticed in detail above. The Tribunal, *prima facie*, after taking into account the fact that in view of the provisions of Section 4(3)(d), has come to the conclusion that the transaction value means the price paid or payable for the goods once sold. The same has been held to be inclusive of the amount charged, which the buyer of the vehicle is liable to pay, in connection with the sale and whether the same is payable at the time of the sale regarding advertisement marketting and selling expenses. The factum of the issue being decided against the assessee itself by the larger Bench of the Tribunal in **Maruti Suzuki India Ltd.** (supra), is also not disputed wherein the point taken into consideration was whether the charges incurred towards pre-delivery investigation and after sales service by the dealers from the buyers of car, were to be included in the assessable value, as per the definition of transaction value, given in the Act. The same reads as under:

> *"SECTION 4. Valuation of excisable goods for purposes of charging of duty of excise. –*
>
> *(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall –*
>
> *(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;*
>
> *(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.*
>
> *xxxx xxxx xxxx*

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

13. As regards the judgment of the Apex Court in **Bombay Tyres International Ltd.** (supra), the Tribunal noticed that the amendment to Section 4 which came into force on 01.07.2000, incorporating the value of the excisable good, for the purpose of charging the duty on excise to the transaction value and as per their definition, the price actually paid would include in addition to the price charged which the buyer was liable to pay, in connection with the sale regarding the amount charged for advertising, publicity, marketing and selling.

14. A perusal of the judgment of the Bombay High Court in **Tata Motors Ltd.** (supra) would also go on to show that the issue in challenge therein was to the circulars dated 01.07.2002 and 12.12.2002, issued by the Revenue, pertaining to the cost of the pre-delivery inspection and free further sales service incurred which had been included in the assessable value. The Court came to the conclusion that the circulars issued by making reference to Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, had wrongly been invoked and linked with the expenses of publicity. Clause 7 of the circular dated 01.07.2000 was, accordingly, held to be not in conformity with the provisions of Section 4(3)(d) and accordingly, held to be illegal and void. That the pre-delivery inspection and free further sales service charges could be included in the transaction value only when they are charged by the assessee from the buyer and thus, it was held to be a question of fact. It was also noticed that the adjudication order was not under challenge and whether the adjudicating authority was justified, would be decided in appeal. In the present case, there is no circular, as such, which is subject matter of challenge and the demand has been raised on the basis of the provision itself and therefore, reference to the said judgment is without any basis.

15. Once the whole issue *prima facie* has been considered by the Tribunal and has been decided against the appellants, the Tribunal, thereafter, has given the benefit of reducing the deposit to the tune of ₹150 crores, out of the duty of ₹240,57,84,802/-, levied along with equal amount of penalty plus interest. Though the Tribunal also took into account the handling charges issue, which was not subject matter of the notice, but it has on merits also *prima facie* discussed the main issue of transaction value for the purpose of deciding the stay application and therefore, in the absence of any question of law arising, this Court would not interfere in the discretion which has been exercised, keeping in view the facts and circumstances of the present case. The authorities have came to the conclusion that the demand was within the limitation, on account of the fact that an attempt had been made earlier that the dealers, at their own level, had been trying to promote the same by way of advertisement to get out of the ambit of transaction value. However, on a closer examination by the authorities, it revealed that the said fact was not correct and rather, the company was organising the advertisements and the dealers had to comply with the said terms and conditions, in view of the mandatory provisions of the agreement.

16. Under Section 35G of the Act, this Court would only interfere if there is a substantial question of law involved and the appeal is only to be heard on the questions so

formulated. Keeping in view the above discussion, this Court is of the opinion that the substantial questions of law which have been raised by the appellant, do not arise for consideration of this Court in an appeal against an order of pre-deposit. The issues raised require consideration at the hearing of the appeal as to the judgments relied upon by the appellant. Moreover, needless to clarify that the observations herein and in the impugned order would not affect the parties at the hearing of the appeal.

17. In such circumstances, this Court is not inclined to interfere with the discretion which has been exercised and where the benefit of pre-deposit has been restricted to a reasonable amount, in favour of the appellant-manufacturer. However, since an interim order had been passed in favour of the appellant company by this Court, it is granted 3 months' time to deposit the amount, as per the direction of the Tribunal, from the date of this order. 18. The appeals are, accordingly, dismissed.

PUNJAB & HARYANA HIGH COURT

ITA NO 110 of 2015

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THE PRINCIPAL COMMISSIONER OF INCOME TAX-2
Vs.
HARISH GOYAL

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

25th May, 2015

HF ▶ Assessee - Respondent

PENALTY – INCOME TAX ACT – REBATE CLAIMED U/S 88E OF I.T. ACT – MISTAKE OF ACCOUNTANT – PENALTY LEVIED BY ASSESSING OFFICER FOR WRONG CLAIM – PENALTY SET ASIDE BY COMMISSIONER AND TRIBUNAL ON BASIS THE OF ERRONEOUS CLAIM MADE ON ACCOUNT OF RETURNS FILED ON BEHALF OF RESPONDENT BY HIS CONSULTANT – APPEAL FILED BY DEPARTMENT BEFORE HIGH COURT – APPEAL DISMISSED SEEING NO REASON TO INTERFERE WITH THE CONCURRENT FINDINGS BY THE AUTHORITIES BELOW – ASSESSEE NOT TO BE PENALIZED FOR ACCOUNTANT'S FAULT.

The returns for the Assessment Year 2007-08 were filed. Rebate u/s 88E of Income Tax Act, 1961 was claimed. Due to claim wrongly made penalty was levied by the Assessing Officer. The Commissioner set aside the penalty on appeal and the orders were further upheld by the Tribunal in favour of Assessee. The Department appealed before High Court. It was contended that the erroneous claim was made on account of the Returns filed by the Consultant on Respondent's behalf. Therefore, dismissing the appeal, it was held that there was no reason for the High Court to interfere in the concurrent findings of the authorities below that the assessee should not be penalized for his Accountant's fault.

Present: Ms. Urvashi Dhugga, Advocate, for the appellant.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

1. This is an appeal against the order of the Tribunal dated 17.10.2014 upholding the decision of the CIT (Appeals) setting aside the penalty levied by the Assessing Officer.

2. We must proceed on the basis that the respondent/assessee wrongly claimed rebate under Section 88 E of the Income Tax Act, 1961 in respect of the assessment year 2007-2008. The respondent added the income from the share trading in his other total income and claimed the benefit of rebate to the extent of the security transaction tax.

3. We see no reason to interfere with the concurrent findings of the CIT (Appeals) and the Tribunal that the erroneous claim was on account of the return filed on behalf of the

respondent by his consultant. They have decided not to visit the assessee with the drastic consequences of a penalty on account of the accountant's default. In these circumstances, no question of law arises.

4. The appeal is, therefore, dismissed.

SGA
LAW OFFICES

PUNJAB & HARYANA HIGH COURT

VATAP NO. 170 OF 2014

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RAKHI AGENCIES LTD.
Vs.
STATE OF HARYANA & ANOTHER

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

25th May, 2015

HF ▶ Assessee

REVIEW – TRIBUNAL – TAX AND PENALTY IMPOSED BY CHECKING OFFICER – APPEAL BEFORE TRIBUNAL DISMISSED – REVIEW APPLICATION ADMITTED ON THE QUESTION OF JURISDICTION - APPEAL FIXED TO BE HEARD ON MERITS –REVIEW PETITION DISMISSED BY MAJORITY SUBSEQUENTLY NOT NOTICING THE ORDER ALLOWING REVIEW – APPEAL BEFORE HIGH COURT – HELD ONCE REVIEW APPLICATION HAD BEEN ENTERTAINED ON THE POINT OF JURISDICTION, THE SAME HAD TO BE DECIDED ON MERITS – MATTER REMANDED TO TRIBUNAL FOR HEARING THE PETITION AS PER THE PREVIOUS ORDER ALLOWING THE APPLICATION FOR REVIEW – APPEAL ALLOWED.

Tax & Penalty u/s 9(2A) of CST Act read with Section 31(8) of HVAT Act was imposed on the appellant. On the dismissal of first appeal, an appeal was filed before Tribunal which was also dismissed vide order dated 6.11.2008. Against this order a review application was filed. Since the matter struck at the very root of the jurisdiction of the officer who imposed penalty, review was allowed vide order dated 9.7.2012. The appeal was fixed to be heard on merits., However, subsequently, the review petition was dismissed by majority of two members of the Tribunal without noticing the order dated 9.7.2012 on the ground that there was no mistake apparent on the face of the order dated 6.11.2008 and that the issue of jurisdiction was not raised earlier. On appeal before High Court it is held that it is obvious that the majority passed the order without noticing the order dated 9.7.2012 allowing the review petition. The Chairman (Minority Judgement) rightly observed that once the review petition had been entertained on the point of jurisdiction, the same had to be decided. The appeal is allowed and matter remanded to Tribunal to hear the petition in accordance with the order dated 9.7.2012 passed by the Tribunal.

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

Ms.Mamta Singla Talwar, AAG, Haryana, for the respondents.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

1. This is an appeal against the order of the Haryana Value Added Tax Appellate Tribunal, Haryana (for short, the 'Tribunal') dated 28.05.2013 (Annexure A-11), dismissing the appellant's review petition, erroneously, as it had earlier been allowed by the Tribunal.

2. The appeal is admitted on the following substantial question of law:

"Whether on the facts and circumstances of the case, the Ld. Tribunal was justified in dismissing the Review Application of the appellant even though vide its order dated 9.7.2012 the Review Application had already been allowed and the appeal was ordered to be heard on merits?"

3. The Assessing Authority, vide an order dated 03.10.2003 (Annexure A-6), imposed a tax and penalty under Section 9(2A) of the Central Sales Tax Act, 1956, read with Section 31(8) of the Haryana Value Added Tax, 2003. The First Appellate Authority dismissed the appeal. The appellant filed an appeal before the Tribunal, which was dismissed by an order dated 06.11.2008 (Annexure A-9). Against this order, the appellant filed the said application for review. The Tribunal, in its order dated 09.07.2012, noted that its observations in paragraph 6 of the order dated 06.11.2008 were not strictly in accordance with law; that the matter struck at the very root of the jurisdiction of the Officer who imposed the penalty and that it would, therefore, be in the interest of justice to allow the review petition. The Tribunal, accordingly, fixed the appeal for hearing on the issue discussed in the order.

4. In the circumstances, the appeal had to be heard on merits, *de novo.* For some reason, the majority of two Members of the Tribunal failed to notice the order dated 09.07.2012 (Annexure A-10). The majority order dated 28.05.2013 observed that the appellant had filed a review petition against the said order of the Tribunal dated 06.11.2008 and proceeded to dispose of the review petition, yet again. This they could obviously not have done as the review petition had already been allowed vide order dated 09.07.2012 which has attained finality. The order dated 09.07.2012 has, admittedly, not been challenged. It is obvious that the majority treated the matter as a review petition, for the order observed that there was no mistake apparent on the face of the order dated 06.11.2008, sought to be reviewed and that nothing of relevance escaped the notice of the Tribunal that passed the order dated 06.11.2008. The majority also observed that the appellant had not raised the issue of jurisdiction before the checking officer.

However, as we noted earlier, the Tribunal, vide the order dated 09.07.2012, had granted the review and had, in fact, observed that the issue was at the very root of the matter. It is obvious that the majority, passed the order without noticing the order dated 09.07.2012. The minority judgment of the Chairman dated 28.05.2013 noticed the order dated 09.07.2012. The Chairman rightly observed that once the review petition had been entertained on the point of jurisdiction, which went to the root of the case, the same had to be decided. Obviously, the Chairman also had, inadvertently, stated that the appeal is allowed. The appeal is, now, to be considered by the Tribunal.

5. The appeal is, accordingly, allowed. The question of law is answered in favour of the appellant. The impugned order and judgment dated 28.05.2013 (Annexure A-11) is quashed and set aside. The matter is remanded to the Tribunal and the petition shall be heard in accordance with the order dated 09.07.2012, passed by the Tribunal.

PUNJAB & HARYANA HIGH COURT

CWP NO. 11477 OF 2015

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RAWAT CRANE SERVICE
Vs.
STATE OF HARYANA AND OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

28th May, 2015

HF ▶ Assessee

STAY OF RECOVERY – SECURITY – PENDENCY OF APPEAL BEFORE TRIBUNAL – TRIBUNAL NOT CONSTITUTED – WRIT FILED SEEKING INTERIM RELIEF – RECOVERY PROCEEDINGS TO BE STAYED IF SECURITY FURNISHED BY PETITIONER BY THE DATE FIXED – RECOVERY PROCEEDINGS TO BE STAYED TILL THE DECISION REGARDING ADEQUACY OF SECURITY IS TAKEN AND ONE WEEK THEREAFTER IF SECURITY FOUND INADEQUATE – PETITIONER REFRAINED FROM DISPOSING OF ITS IMMOVABLE PROPERTIES OR ENCUMBERING THE SAME TILL PENDENCY OF APPEAL – SECTION 33(5) OF HVAT ACT.

An appeal had already been filed before Tribunal. Since the Tribunal had not been constituted Writ was filed seeking interim relief. The Hon'ble High Court has directed for the stay of recovery proceedings in the event of furnishing of security u/s 33(5) of the Act. The recovery proceedings shall not be initiated till the decision of the Respondents and one week thereafter in case the security is found inadequate. The petitioner is directed not to dispose of its immovable property or encumber the same till pendency of appeal. The appeal is disposed of.

Present: Mr. Rajiv Agnihotri, Advocate, for the petitioner.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

1. The petitioner has filed an appeal before the Tribunal. However, the Tribunal under the Haryana Value Added Tax Act, 2003 has not yet been constituted. The constitution of the Tribunal also depends upon certain other proceedings which have been filed unconnected to the present writ petition. In the circumstances, the appeal that had been filed by the petitioner cannot proceed at this stage. In lieu thereof, it is not possible for the petitioner to seek interim relief before the Tribunal. Considering the order passed in similar matters including an order dated 04.03.2015 in Civil Writ Petition No. 3961 of 2015 (*M/s Kohinoor Foods Ltd. v. The State of Haryana and others*), we dispose of this writ petition by the following order:-

2. In the event of the petitioner furnishing by 15.06.2015 security contemplated under Section 33(5) of the said Act, recovery proceedings be not initiated. The respondents shall consider whether the security, if offered by the petitioner, is satisfactory or not. In the event of security being offered by 15.06.2015, the recovery proceedings shall not be initiated till the decision of the respondents on the question as to whether the security is adequate or not and for a period of one week thereafter, in the event of the decision being adverse to the petitioner. However, pending the appeal the petitioner shall not dispose of its immovable properties or encumber the same in any manner whatsoever.

PUNJAB & HARYANA HIGH COURT

CWP NO. 2764 OF 2015

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BAXTER INDIA (P) LTD.
Vs.
STATE OF HARYANA AND OTHERS

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

28th May, 2015

HF ▶ Assessee

STAY OF RECOVERY – BANK GUARANTEE – PENDENCY OF APPEAL BEFORE TRIBUNAL – TRIBUNAL NOT CONSTITUTED – WRIT FILED – PETITIONER'S UNDERTAKING FOR KEEPING BANK GUARANTEE ALIVE TILL PENDENCY OF APPEAL – RESPONDENTS DIRECTED TO HEAR APPEAL ON MERIT – RESPONDENTS ENTITLED TO INVOKE BANK GUARANTEE ONLY UPON EXPIRY OF FOUR WEEKS FROM DATE OF COMMUNICATION OF ORDER OF TRIBUNAL, IF PASSED AGAINST PETITIONER – PETITIONER DIRECTED TO AMEND BANK GUARANTEE WITHIN THE TIME SPECIFIED FAILING WHICH RESPONDENTS ENTITLED TO ENCASH THEM – WRIT DISPOSED OF.

A writ was filed whereby the Petitioner had undertaken to keep the Bank Guarantee alive till pendency of appeal before Tribunal and its disposal. The Court has directed for hearing of appeal on merits. The Respondents would encash the Bank Guarantee only if an adverse order is passed against the petitioner. The petitioner is to keep the Bank Guarantee alive and if this amendment is not done within the time specified the Respondents shall be entitled to encash the Bank Guarantees. The Writ is disposed off.

Present: Mr. Avneesh Jhingan, Advocate, for the petitioner.

Ms. Mamta Singla Talwar, Assistant Advocate General, Haryana.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

1.The petitioner's appeal is pending before the Haryana Tax Tribunal. The only reason this petition has been filed is because the Haryana Tax Tribunal has not been constituted as yet. There is some difficulty in constituting the Tribunal, inter alia, on account of the pendency of certain proceedings questioning the constitution of the Tribunal. The writ petition is, therefore, disposed of by directing the appeal to be heard on merits in view of the petitioner's undertaking to keep the bank guarantees alive pending the hearing and final

disposal of the appeal and for a period of six weeks thereafter. The respondents shall be entitled to invoke the bank guarantees only upon the expiry of a period of four weeks from the date of the communication of the decision of the Tribunal, if adverse to the petitioner.

2. The amendment to the bank guarantees to keep them alive pending the hearing and final disposal of the appeal before the Tribunal shall be carried out within four weeks from today. If the amendment is not carried out within four weeks from today, the respondents shall be entitled to encash the present bank guarantees.

PUNJAB & HARYANA HIGH COURT

STA NO. 7 OF 2015

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TOPS SECURITY LTD. AND OTHERS
Vs.
COMMISSIONER, CENTRAL EXCISE AND SERVICE TAX COMMISSIONERATE

S.J.VAZIFDAR, ACTING CHIEF JUSTICE AND G.S. SANDHAWALIA J

26th May, 2015

HF ▶Assessee

APPEAL – RESTORATION – POWER OF CESTAT – PRE DEPOSIT – DEMAND RAISED – APPEAL FILED BEFORE CESTAT – ORDER PASSED FOR PRE DEPOSIT AS A CONDITION PRECEDENT FOR HEARING OF APPEAL – EXTENSION OF TIME SOUGHT TWICE FOR DEPOSITING THE AMOUNT – FAILURE TO DEPOSIT ON THE REQUISITE DATE I.E. 20.4.2013 – APPLICATION FOR FURTHER EXTENSION OF TIME FILED ON 22.4.2013 – APPEAL DISMISSED ON 23.4.2013 FOR NON COMPLIANCE WITHOUT DECIDING LAST APPLICATION FOR EXTENSION – FINALLY AMOUNT DEPOSITED ON 27.4.2013 – APPLICATION FOR RESTORATION OF APPEAL DISMISSED – APPEAL BEFORE HIGH COURT – CONTENTION RAISED BY DEPARTMENT THAT CESTAT HAS NO POWER TO RESTORE APPEAL – ALLOWING APPEAL, HELD, CESTAT HAS POWER TO RESTORE THE APPEAL AND TO GRANT EXTENSION OF TIME FOR PRE DEPOSIT – APPEAL RESTORED TO THE FILE OF CESTAT TO BE HEARD ON MERITS – SEC. 86(6A) OF FINANCE ACT, RULE 41 OF CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL (PROCEDURES) RULES – 1982.

A demand was raised by the Commissioner against which an appeal had been filed before the CESTAT. The Appellant was directed to deposit a sum as a condition precedent for hearing of appeal. An extension of time was sought twice for pre deposit. On the date of 20.4.2013, again the appellant failed to deposit the amount. On 22.4.2013 once again an application for extension of time for depositing the amount was filed. On the same day before deciding the application, the appeal was dismissed for non compliance. On 27.4.2013 the amount was finally deposited and an application for restoration of appeal was filed which was dismissed. On appeal before High Court it was contended by the department that the CESTAT has no power to restore appeal or grant extension of time. Allowing the appeal, it is held that CESTAT has the power to restore the appeal or extend the time for pre deposit in view of Sec.86 of Finance Act and Rule 41 of Customs, Excise & Service Tax Appellate Tribunal. The appeal is restored before CESTAT to be heard on merits.

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

Mr. Kamal Sehgal, Advocate, for the respondents.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

C.M. No. 10874-CII of 2015

Application for placing on record Annexure A-13 is allowed, subject to all just exceptions.

Annexure A-13 is taken on record.

STA No. 7 of 2015

1.This is an appeal against the order of the CESTAT dismissing the appellants' application for restoration of their appeals and dismissing the applications of the appellants for extension of time to deposit the amounts as a condition precedent to the maintainability of the appeal.

2. The appeal is admitted on the following substantial questions of law:-

"i) Whether in the facts and circumstances of the case, rejection of the application for restoration of the appeal by the Learned Tribunal was justified in law?

ii) Whether in the facts and circumstances of the case, the delay of 4 days to deposit the amount of pre-deposit owing the financial hardship faced by Appellant was justified in law and condonable?"

3. The appellants had filed an appeal before the CESTAT against an order of the Commissioner raising a demand of about `58 lacs. The merits of the demand are not relevant for the purpose of this judgment. By an order dated 25.09.2012, the appellant no. 1 was directed to deposit the balance of the service tax within 8 weeks. Appellants no. 2 and 3 are the Directors of the company. They were directed to deposit an amount of `5,00,000/- each within 8 weeks. The deposit of the aforesaid amounts was a condition precedent to the maintainability of the appeals.

4. By an order dated 29.01.2013, the time to deposit the amount was extended by a period of 8 weeks. By yet another order dated 15.04.2013, the time to deposit the amounts was extended upto 20.04.2013. On 22.04.2013, the appellant filed an application for a further extension. The appellants had failed to deposit the aforesaid amounts.

5. On 22.04.2013, the appeal itself was dismissed for noncompliance of the aforesaid orders requiring the appellants to deposit the said amounts. At that stage, the last application for extension filed on 22.04.2013 had not been decided. As we mentioned earlier, the last date for depositing the amounts was 20.04.2013.

6. On 27.04.2013, the appellants deposited the entire amounts. Accordingly, they made an application for restoration of the appeal which had been dismissed in default on 20.04.2013.

7. There was, therefore, a delay of only 7 days in complying with the orders requiring the appellants to deposit the amounts. The application for extension of time filed on 22.04.2013 and the application for restoration were, however, dismissed by the order of the Tribunal dated 26.09.2013 impugned in this appeal.

8. We do not see any reason to deny the appellants an extension of a mere 7 days. It would be grossly inequitable and unfair to deny the appellants an opportunity of having their case heard on merits on account of their having delayed in complying with the order by just 7 days. The application for extension dated 22.04.2013 was pending when the appeal was dismissed on 23.04.2013 for non-compliance with the said orders. They could not have deposited the amounts on that date without a formal order. Had the order been passed on the date of the application itself, there would be a delay of only 2 days.

9. The contention that the CESTAT does not have power or jurisdiction to grant an extension of time or to restore the appeal is not well founded. Section 86(6A) of The Finance Act, 1994 reads thus:-

"86. Appeals to Appellate Tribunal

xxx xxx xxx

[(6A) Every application made before the Appellate Tribunal,-

(a) in an appeal for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application; shall be accompanied by a fee of five

hundred rupees:"

10. Sub section (6A) of Section 86 of the Finance Act presupposes the maintainability of an application for restoration of an appeal or an application. Thus, even assuming that there is no separate provision relating to or permitting applications for restoration, it would make no difference. The CESTAT would always have the power to restore an appeal which has been dismissed for any reason including for non-compliance of a deposit order.

11. Rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 which makes this clearer, reads as under:-

*"**41. Orders and directions in certain cases.***

The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice ." (emphasis applied.)

12. The concluding words "to secure the ends of justice" are wide enough to cover cases such as these viz. to grant an extension of time to deposit an amount or to restore appeals dismissed on account of the failure to comply with the orders of pre-deposit.

13. The appeal is, therefore, allowed. The questions of law are answered in favour of the appellants and against the respondents. The appeal shall stand restored to the file of the CESTAT and shall be heard on merits.

PUNJAB VAT TRIBUNAL

APPEAL NO. 507 OF 2014

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REZONDI RETAIL (INDIA)
Vs.
STATE OF PUNJAB

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

9TH April, 2015

HF ▶ Revenue

PENALTY – CHECK POST – ATTEMPT TO EVADE TAX – REMAND – GOODS IN TRANSIT INTERCEPTED – DETENTION ON GROUNDS OF LACK OF E-ICC FORM TO PROVE ALLEGED EXPORT – PENALTY IMPOSED BY AETC UNDER SECTION 51 OF THE ACT – APPEAL BEFORE DETC – IRREGULARITIES POINTED OUT IN AETC'S ORDER AND REQUIREMENT OF CONSIDERATION REGARDING ALLEGED EXPORT OBSERVED – APPEAL BEFORE TRIBUNAL AGAINST ORDER OF REMAND ON THE BASIS THAT THE IMPUGNED ORDER INDICATED ACCEPTANCE BY DETC REGARDING EXPORT – ARGUMENT NOT ACCEPTED BY TRIBUNAL DUE TO RELEVANT SENTENCE WRITTEN IN THE IMPUGNED ORDER BEING UNCLEAR – ORDER UPHELD – AETC TO PASS A SPEAKING ORDER AND CONSIDER WHETHER CASE SHOULD FALL WITHIN PURVIEW OF SECTION 51 – CASUAL APPROACH ON PART OF AETC OBSERVED ETC DIRECTED TO PROBE INTO THE MATTER - APPEAL DISMISSED – SECTION 51(7)(C) OF PVAT ACT.

The hosiery goods in transit were intercepted by the Mobile Wing. The goods were detained as they were not accompanied by proper documents as required under Section 51(2) and (4) of the Act. No e-ICC form was accompanied to prove that the goods were meant for export or inter state sale. Penalty under Section 51(7)(c) was imposed by AETC. An appeal was filed before 1st Appellate Authority which remanded the order back to AETC to pass a speaking order. It has been mentioned in the order of the 1st Appellate Authority in a vague language that 'the fact that comes to consideration that the goods have been exported'. An appeal before Tribunal was filed against the remand order on the basis that the sentence mentioned in the impugned order indicated acceptance on part of DETC regarding goods being meant for export. Dismissing the appeal, it has been held that the language of DETC was not clear but it reflects that the question of export was meant for consideration. The remand order is upheld and AETC is directed to hear the matter on merits and pass a speaking order after considering whether the case falls within the ambit of Section 51. The Tribunal has observed that the DETC found many mistakes in the order passed by AETC Mobile Wing showing her casual approach by passing and signing the order. This is not expected from a quasi judicial authority. Copy of the judgment is sent to the Excise & Taxation Commissioner to probe and proceed accordingly.

Present: Mr. K.L. Goyal, Sr. Advocate alongwith Mr. Rohit Gupta, Advocate counsel for the appellant.

Mrs. Sudeepti Sharma, Deputy Advocate General for the State.

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

1. The Assistant Excise and Taxation officer vide order dated 13.3.2014 had imposed a penalty of Rs. 8,97,372/- under Section 51(7) (c) of the Punjab Value Added Tax Act,2005, but on appeal the Deputy Excise and Taxation(Commissioner (A), Ludhiana Division, Ludhiana vide order dated 27.10.2014 remitted the case back to the Assistant Excise and Taxation Commissioner, Mobile Wing, Ludhiana to reconsider, all the facts and circumstances as submitted by the Counsel for the parties and pass a fresh order.

2. The briefs facts of the case are that during the course of checking on 4.2.2014, Shri Navjeet Singh, Excise and Taxation Officer, Mobile Wing, Ludhiana intercepted a vehicle No. PB-12J-1578 carrying hosiery goods. On examination of the documents by the Detaining Officer, it was found that the goods were not accompanying proper documents as required U/s 51 (2) & (4) of the Punjab Value Added Act, 2005 read with Rule 64 (b) of the Punjab Value Added Tax Rules. On a query by the Designated Officer, the driver replied that no "e-icc form" which could disclose that the goods are being taken for export or inter State 'sale was accompanying the goods. As such the goods were detained and the case was referred to the Assistant Excise and Taxation Commissioner, Mobile Wing, Ludhiana who imposed a penalty of Rs.8,97,372/- U/s 51 (7) (c) of the Punjab Value Added Tax Act, 2005.

3. On Appeal, the Deputy Excise and Taxation Commissioner finding no fault with the order dated 13.3.2014 observed as under:-

> *"I have heard both the sides and gone through the facts of the case and also read over the order of the AETC (MW), Ludhiana. The documents submitted by the counsel have been examined at length and placed on the tile. From the examination of the documents submitted by the counsel, the fact comes to consideration that the goods have been exported. I have also examined the file of the department at length from which it has been noticed that order has been passed in a hurry mind which shows that even order sheet written by the AETC have not been signed on some dates and judgment was reserved on 10.3.2014 which has been released on 12.3.2014 whereas shown in order, it has been announced on 13.3.2014 which is different date and in file, original order has been written with the own hands of the A Assistant Excise and Taxation Commissioner (Mobile Wing) in which she has imposed a penalty of Rs.10,95,435/- where as the penalty order which has been served to the appellant is for Rs.8,97,372/- only which clearly shows that the Assistant Excise and Taxation Commissioner, Mobile Wing, Ludhiana has not applied fully her mind before passing/ signing the order. Although she tried to cover up the mistake by passing the rectified order dated 16.10.2014 which itself is not a self speaking order and she has rectified only one mistake whereas there are so many mistakes in her previous order, so she should pass the self-speaking order. In view of the facts explained above and in the light of the judgment cited by the A counsel and clarification given by the worthy ETC Punjab, the case is remanded back to the AETC (MW), Ludhiana to pass the fresh order in the case on merits keeping in view all the facts and the documents submitted by the counsel and citation given by the counsel within two months after giving the reasonable opportunity of being heard."*

Against this order, the appellant has again knocked the door of this court by way of second appeal.

4. I have heard the counsel for the parties and perused the record of the case. The counsel for the appellant has submitted that the Deputy Excise and Taxation Commissioner (A) has accepted that the goods were being exported, but this contention does not weigh with me. On scrutiny of the order, I do not find any such observation having been made by the Deputy Excise and Taxation Commission in this regard. The impugned order just indicates that the Deputy Excise and Taxation Commissioner has recorded that it was a matter of consideration if the goods are meant for export. As a matter of fact, the language of the relevant sentence is not clear, but it conveys the only meaning that matter requires consideration. Actually, in the absence of 'e-Trip/e-ICC' it was difficult to make out whether the goods were for export. The appellant has also admitted that "e-ICC" form was not generated. In any case, it is still to be decided by the Deputy Excise and Taxation Commissioner, whether the goods are meant for export. The remaining part of the order has not been challenged by the counsel for the appellant.

5. In these circumstances, I am of the view that the order passed by the Deputy Excise and Taxation Commissioner is correct. The Assistant Excise and Taxation Commissioner, Mobile Wing, Ludhiana while passing the order would examine as to "whether the case falls within the purview of Section 51 (6) (b) of the Act as to attract the penalty U/s 51 (7) (c) of the Act?" The Assistant Excise and Taxation Commissioner would also examine all the arguments raised by the appellant as well as the State before passing the speaking order.

6. Before parting with the order, it may be observed that the Deputy Excise and Taxation Commissioner has found the following mistakes in the order dated 13 3.2014 passed by the Assistant Excise and Taxation Commissioner, Mobile Wing, Ludhiana:-

(1) The order sheet written by the Assistant Excise and Taxation Commissioner, Mobile Wing, Ludhiana has not been signed on some dates. A

(2) The judgment was reserved on 10.3.2014 and was released on 12.3.2014 whereas the record shows that the judgment –was announced on 13.3.2014

(3) There are different dates and on the original order are different dates.

(4) In the original order written by the Assistant Excise and Taxation Commissioner, Mobile Wing, Ludhiana in which she imposed a penalty of Rs.10,95,435/- whereas the penalty order is to the tune of Rs.8,97,372/- which was served upon the appellant.

(5) The order of rectification dated 16.10.2014 is also not a self speaking order and she has rectified only one mistake whereas the order is replete with many mistakes, so she did not pass a speaking order regarding the aforesaid irregularities.

(6) All this shows that the officer was very casual in her approach while passing and signing the order. This much can't be expected from a quasi judicial authority.

The copy of the judgment is sent to the Excise and Taxation Commissioner, Punjab for a probe and to proceed accordingly.

Pronounced in the open court.

PUNJAB VAT TRIBUNAL

APPEAL NO. 704 OF 2013

C.L. JAIN WOOLLEN MILLS PVT. LTD
Vs.
STATE OF PUNJAB

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

11th April, 2015

HF ▶ Assessee- appellant

PRE- DEPOSIT – APPEAL - ENTERTAINMENT OF – DISMISSAL OF APPEAL BY FIRST APPELLATE AUTHORITY FOR NON COMPLIANCE OF SEC 62(5) – TAX OUGHT TO HAVE BEEN DEPOSITED AS PER AMENDED SEC 62(5) IN VIEW OF ORDINANCE ISSUED IN 2011 AS ALLEGED BY DEPARTMENT – APPEAL FILED BEFORE TRIBUNAL - PLEA REGARDING THERE BEING NO AWARENESS OF THE CONTENTS OF ORDINANCE IT BEING PASSED ON THE SAME DATE AS FILING OF FIRST APPEAL ACCEPTED BY COURT – HELD, AMENDED PROVISION NOT TO APPLY IN PRESENT CASE – TAX TO BE DEPOSITED AS PER JUDGEMENT PASSED IN EARLIER CASE – CASE REMITTED BACK TO DETC TO ENTERTAIN APPEAL PROVIDED TAX DEPOSITED AS PER THE CONDITION MENTIONED – SEC 62(5) OF PVAT ACT

The appeal before first appellate authority was dismissed for non compliance of sec 62(5) of PVAT Act. An appeal was filed before Tribunal contending that the appeal before DETC was filed on the same day as ordinance regarding the amendment of sec 62 was issued which could not have been known on the day of filing itself. The appeal was accepted holding that the amended provision would not apply in this case. The appellant should deposit tax as per the judgement passed in the case of Ahluwalia Contracts. The case is remitted back to the DETC to entertain the appeal on merits in the event of tax being deposited as per the aforesaid judgement.

Case followed:

Ahluwalia Contracts v/s The state of Punjab (37 PHT 53) *(P&H)*

Editorial Note: This is for the information of our readers that as per judgement passed in the case of Ahluwalia Contracts , it is held that if the petitioner has paid more than 25% of the Tax, Interest and Penalty, the view taken by the appellate authority that 25% should be worked out on the additional demand, cannot be accepted.

Ordinance reproduced:

(2011) 40 PHT 2 (JS)

GOVERNMENT OF PUNJAB

DEPARTMENT OF LEGAL AND LEGISLATIVE AFFAIRS

Notification No. 33-Leg/2011 *dated17.8.2011*

Amendments in section 62 of PVAT Act – Punjab VAT 4th Amendment Ordinance, 2011

The following Ordinance of the Governor of Punjab promulgated under clause (1) of article 213 of the Constitution of India on the 16th August, 2011 is hereby published for general information:

The Punjab Value Added Tax (Fourth Amendment) Ordinance, 2011

(Punjab Ordinance No. 10 of 2011)

An

Ordinance

Amendment in section 62 of Punjab Act 8 of 2005 – *In the principal Act, in section 62, in sub-section (5) for the words "total amount of tax", the words "total amount of additional demand created" shall be substituted.*

Present: Mr. K.L. Goyal, Sr. Advocate alongwith

Mr. Rohit Gupta, Advocate counsel for the appellant.

Mrs. Sudeepti Sharma, Deputy Advocate General for the State.

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

1. This is an appeal against the order dated 25.09.2013 passed by the Deputy Excise and taxation Commissioner (A) Ludhiana Division, Ludhiana dismissing the appeal of the appellant on the ground of non-compliance of section 62(5) of the Punjab Value Added Tax Act, 2005.

2. Arguments heard. The appeal was preferred before the Deputy Excise and Taxation Commissioner on 17.8.2011 i.e. on the day the ordinance regarding amendment of section 62(5) of the Act, 2005 was issued. Therefore, the appellant was not supposed to know about the ordinance and the contents of the amendment on the day he filed the appeal. Consequently, the amended provision u/s 62(5) of the Act would not apply in this case. Therefore, he is required to deposit the tax in accordance with the judgment delivered in case of Ahluwalia contracts vs The State of Punjab 37 PHT 53.

3. Accordingly, this appeal is accepted and the case is remitted back to the Deputy Excise and Taxation Commissioner to examine whether the tax has been deposited in accordance with the aforesaid judgment. If, it has been so done then Deputy Excise and taxation Commissioner would entertain and hear the appeal on merits. The parties are directed to appear before the DETC on 13.7.2015.

4. Pronounced in the open Court.

PUNJAB VAT TRIBUNAL

APPEAL NO. 689 OF 2014

R.S. INTERNATIONAL
Vs.
STATE OF PUNJAB

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

11th April, 2015

HF ▶ Assessee- appellant

APPEAL – ENTERTAINMENT OF – PREDEPOSIT – INPUT TAX CREDIT – PROOF OF ADJUSTED AMOUNT - APPEAL FILED BEFORE FIRST APPELLATE AUTHORITY – PROOF OF REVERSAL OF ITC AVAILABLE TO APPELLANT IN LIEU OF PAYMENT TOWARDS 25% OF ADDITIONAL DEMAND NOT SUBMITTED IN TIME – DISMISSAL OF APPEAL FOR NON COMPLIANCE OF SEC 62(5) OF THE ACT – APPEAL FILED BEFORE TRIBUNAL – APPELLANT READY TO PRODUCE REQUISITE DOCUMENTS AS PROOF OF THE AMOUNT ADJUSTED TOWARDS PAYMENT OF PREDEPOSIT– APPEAL ACCEPTED – DETC DIRECTED TO VERIFY DOCUMENTS PRODUCED AND HEAR APPEAL ON MERITS AFTER BALANCE, IF ANY, PAID BY APPELLANT – SEC 62(5) OF THE PVAT ACT, 2005

An appeal was filed before the First Appellate Authority which was dismissed for non – compliance of sec 62(5) of the Act. An appeal was filed before Tribunal alleging that since there was ITC amount available to the appellant, he had reversed that amount towards payment of 25% of the penalty amount in the return for the second quarter 2012-13. He had requested time of one hour to give proof that he has reversed ITC. But the appeal was dismissed by the Ld. DETC as he could not appear within the time taken. Now the appellant was ready to give the proof of the requisite documents before Tribunal which could not be earlier produced. The appeal is allowed with a direction to the Ld.DETC to hear the appeal on merits after verifying the documents so produced on record and deciding the entitlement of the appellant to have refund and adjusting the amount towards payment of additional demand of 25%. The balance, if any, would have to be paid by the appellant for hearing of appeal. The appeal is allowed.

Present: Mr. K.L. Goyal, Sr. Advocate alongwith
Mr. Rohit Gupta, Advocate counsel for the appellant.
Mrs. Sudeepti Sharma, Deputy Advocate General for the State.

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

1. This is an appeal against the order dated 12.7.2013 passed by the DETC(A), Patiala Division Patiala dismissing the appeal of the appellant for non-deposit of 25% of the additional demand.

2. The counsel for the appellant has placed on record cash security receipt of Rs. 40,518 on account of advance penalty and has submitted that the penalty order was later on set-aside. It is also submitted that the appellant besides this refund of Rs. 40,518/-, he has been awarded reversal of Rs. 11,100/-. The amount of these items would be suffice to meet with the requirement of section 62(5) of the Act. He has further undertaken to deposit the balance, if any, towards 25% of the additional demand, if the aforesaid amounts are adjusted. In the aforesaid circumstances, he appellant has requested for entertaining his appeal and decide the same on merits.

3.I have gone through the order passed by the first appellate authority which reveals that similar argument was raised before him. The relevant part of the order under appeal reads as under:-

> *"Shri Sushil Jindal, Advocate/Counsel for the appellant and Shri L.M. Sharma, ETI, ICC, Shambu (Import) have appeared from the department with record file on 12.7.2013. The ld. Counsel stated that the ITC claim equal to 25% of penalty amount has been pending in district office. So he has requested to hear the appeal on merits. He argued that he has utilized balance of his ITC for the payment of the 25% of the penalty amount. He has reversed this amount in the return for the second quarter 2012-13. He has requested for the time of one hour to give the proof that he has reversed ITC to the tune of 25% of the penalty in his VAT-XX as no VAXX or any proof has been produced so far.*
>
> *On 12.7.2013 (afternoon) Shri L.M. Sharma, ETI has appeared from the Department alongwith the file and no body appeared from the appellant deposit being called thrice at different intervals from 4 to 5 p.m. I am left with no alternative then to presume that 25% of additional demand has not been got deposited and appeal is liable for rejection. So the appeal is dismissed"*

4.The counsel for the appellant has further submitted that since due to paueity of time, he could not produce the documents before the DETC, therefore, his appeal was dismissed, but now he is in possession of all the required documents and he is ready to produce the same having heard the rival contentions, I am of the view that it would be expendient in the interest of justice to provide an opportunity to the appellant of being heard on merits. The appeal could not be turned down nearly heard on ground that he could not produce the proof of deposit/adjustment of 25% to be deposited against the additional demand particularly when he has now produced the with regard to adjustment of the amount against the 25% of the additional demand. Therefore, it would be appropriate to provide him to satisfy him about the compliance of section 62(5) of the Act, 2005. Counsel has further undertaken that if after adjustment in the aforesaid manner, any balance out of aforesaid 25% of the additional demand is found due, then the appellant would deposit the same before the DETC.

5. Resultantly, this appeal is accepted, impugned order is set-aside and the DETC is directed to take the documents on record and verify regarding the entitlement of the appellant to have refund and then adjust the same against the additional demand of 25%. If any balance still remains after the aforesaid adjustments, then the appellant would deposit the same and after making the satisfaction about the same with regard to deposit of 25% of additional demand in the aforesaid manner, he would entertain and hear the appeal on merits.

6. The appellant is directed to appear before the DETC on 30.6.2015.

PUNJAB VAT TRIBUNAL

APPEAL NO. 629 OF 2013

BHASIN INDUSTRIES
Vs.
STATE OF PUNJAB

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

6TH APRIL, 2015

HF ▶ Appellant –dealer

ENTRIES IN SCHEDULE – SILVER/ GOLD MEDALS – SILVER AND GOLD MEDALS TO FALL UNDER RESIDUAL ENTRY AS PER CLARIFICATION - APPEAL CONTENDING SUCH ITEMS TO FALL UNDER SCHEDULE C UNDER ORNAMENTS TAXABLE AT A LOWER RATE – HELD BY TRIBUNAL THAT GOLD AND SILVER MEDALS ARE SAME IN THEIR END USE I.E. ADORNING, MODE OF MANUFACTURE AND PROPERTIES AS GOLD AND SILVER ORNAMENTS – OBSERVED IT AS BEING AGAINST PRINCIPLES OF SPECIFICATIONS TO DENY PARENTAGE TO THE ITEM IN QUESTION BY ASSIGNING IT AS RESIDUARY ITEM - BENEFIT OF AMBIGUITY TO GO IN FAVOUR OF ASSESSEE IN CASE ITEM FALLING SIMULTANEOUSLY UNDER TWO ENTRIES – BEING PRODUCTS OF THE SAME PROPERTY MEDALS OF GOLD AND SILVER CAN'T BE TAKEN AWAY FROM SCHEDULE C OF THE ACT – CLARIFICATION U/S 85 QUASHED – *SCHEDULE C, ENTRY 2 OF PVAT ACT*

An appeal was filed before the Tribunal against the order of the Commissioner holding that the gold and silver medals are taxable @ 13% and are not covered under Schedule C of the Act. It was contended that they should be classified as ornaments under Schedule C Entry 2.

Allowing the appeal, it is held that the medals of gold and silver have to pass through the same process of manufacturing /moulding finishing before putting for sale. Their use is also the same as ornaments i.e. used for adorning or events. It is observed that when a particular article can be classified under a specific item in Tariff schedule, it would be against the principles of the specification to deny its parentage and consign its residuary item of the schedule. In any case of ambiguity, the benefit should go the assessee. Also, the medals and ornaments of gold and silver are products of the same property and cannot be taken away from Schedule C of the Act. The view taken by the Excise and Taxation Commissioner is quashed. However, surcharge is leviable as per the notifications issued.

Case referred:

-M/s Bharat Forge & Press Industries p Ltd. V Collector of Central Excise, Baroda Gujrat (1990) 1 SCC 532

-Dunlop India ltd. And Madras Rubber factory Ltd. V Union of India and others 1983 (13) (E.L.T) 1566 (SC)

-Commissioner of Central Excise, Calcutta V Calcutta Springs Ltd. 2008 (229) ELT 161 (SC)

Present: Mr. K.L. Goyal, Sr. Advocate alongwith Mr. Rohit Gupta, Advocate counsel for the appellant.

Mr. S.S. Brar, Additional Advocate General for the State.

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

This appeal has arisen out of the order dated 2.9.2013 passed by the Excise and Taxation Commissioner, Punjab, vide which the Commissioner while deciding the case under Section 85 Punjab Value Added Tax Act, 2005 observed as under:-

(i) Silver/Gold medals are not covered under any of the entries of Schedule 'C' appended to the Punjab Value Added Tax Act, 2005.

(ii) Silver/Gold medals are taxable at the rate of 13% plus surcharge as applicable.

The precise question which arise determination before me is "whether the silver/gold medals are covered under any of the entries in Schedule 'C' appended to the Punjab VAT Act, 2005? If so what rate of tax is to be charged over them?" To decide this question will have to go back to Schedule 'C':-

'SCHEDULE-C

(See Section 8)

LIST OF GOODS TAXABLE @ 1 PERCENT

Serial No.	Name of Commodity
1.	Bullions
2.	Gold, Silver and Platinum Ornaments
3.	Noble metals and ornaments
4.	Precious Stones
5.	Pulses
6.	Unbranded besan

Schedule 'C' covers the gold and silver including its ornaments irrespective of the ratio of gold added to them. The arguments raised by the Counsel for the appellant before me is that the silver/gold medals are nothing, but are the preparations of these metals like a silver/gold ornaments as mentioned Entry 2 of Schedule 'C'. As per note 9 of chapter 71 of Central Excise Tariff Act, 1985, expression "articles of jewellery" means:

(a) Any small objects of personal adornrnent (for example rings, bracelets, necklaces, brooches, ear rings, watch chains, fobs, pendants, tie-pins, cuff-links, dress studs, religious or other medals and insignia.

(b) ****

This definition includes watch chains, dress studs, medals and insignia. The Counsel has also referred me to the Dictionary meaning of the medal. As per Oxford's Dictionary Medal means:-

"A piece of metal, usually in the form of a disc. Struck or cast with an inscription or device to commemorate an events etc. Or awarded as a distinction for proficiency etc."

And the said dictionary interprets jewellery as under:-

"Jewels or other ornament objects especially for personal adornment."

As per Wikipedia, the free Encyclopedia an ornament is something used for decoration. Ornament may also refer to:

- Ornament (art), a purely decorative element in architecture and the decorative arts
- Christmas ornament, a decoration used to festoon a Christmas tree
- Hood ornament, a decoration on the hood of an automobile
- Garden ornament, a decoration in a grassy area
- Peak ornament, a decoration under the peak of the eaves of a gabled building.
- Ornamental plant, a decorative plant
- Ornament (music_, a flourish that serves to decorate music
- Biological ornament, a biological structure that appears to serve only a decorative purpose.
- Bronze and brass ornamental work
- Ornaments Rubric, a prayer of the Church of England
- Ornament (football), the football team from Hong Kong.

For ornamentation of the human body see:-

- Human physical appearance
- Fashion
- Jewellery
- Tattoo

As per Wikipedia, the free Encyclopedia 'medal' has been defined as under:-

> "A medal, or mediallion, is strictly speaking, a small, flat and round (or at times, ovoid) piece of metal that has been sculpted, molded, cast, struck, stamped, or some way marked with an insignia, portrait, or other artistic rendering. A medal may be awarded to a person or organization as a form of recognition for sporting, military, scientific, academic, or various other achievements. Military awards and decorations are more precise terms for certain types of State decoration. Medals may also be created for sale to commemorate particular individuals or events, or as works of artistic expression in their own right. In the past, medals Commissioned for an individual, typically with his portrait, were often used as a form of diplomatic or personal gift, with no sense of being an award for the conduct of the recipient."

The counsel has thus urged that on combined reading of the dictionary meanings as well as while reading these words in the light of taxation statues. The medal could be said to be a specific ornament, conferred upon a persons in recognition to his distinguished work which may adorn his status. Since it is a space of the gold or silver ornaments and is in no way superior to the ornaments in quality or category therefore the medal must fall in entry 2 Schedule 'C' of the Act 2005. The counsel has also urged that the residuary section regarding

classification cannot be used so easily as to take each and every item which is not mentioned in the schedules appended to the Act and only those goods which cannot be classified on assessment and analysis, could be taken to the residuary items. It has also been observed in case M/s Bharat Forge and Press Industries (P) Ltd. versus Collector of Central Excise, Baroda, Gujarat (1990) 1 SCC 532 as under:-

> 4. The question before us is whether the department is right in claiming that the items in question are dutiable under tariff entry 68. Thus, as mentioned already, is the residuary entry and only such goods as cannot be brought under the various specific entries in the tariff should be attempted to be brought under the residuary entry. In other words, unless the department can establish that the goods in question can be no conceivable process of reasoning be brought under any of the tariff item, resort can not be had to the residuary item. We do not think this has been done. Looking at tariff Item 26-AA(iv), it encompasses all sorts of pipes and tubes. It is also clear that it is of no consequence whether the pipes and tubes are manufactured by rolling, forging, spinning, casting, drawing, annealing, welding or extruding. It is true that initially pies and tubes may be obtained from sheets, billets or bars by various processes, but the process of manufacture of pipes and tubes does not end there. In order to achieve fully the purpose for which the pipes and tubes are manufactured, it is necessary to manufacture smaller pieces of pipes and tubes and also to manufacture them in such a shape that they may be able to conduct liquids and gases, passing them through and across angles, turnings, corners and curves or regulating their flow in the manner required. Smaller pieces of pipes and tubes differently shaped are manufactured for this purpose. They are merely intended as accessories or supplements to the large pipes and tubes. They are pipes and tubes made out of pipes and tubes. There is no change in their basic physical properties and there is no change in their end use. There is no reason why these smaller articles cannot also be described as pipes and tubes."
>
> It is also observed that when a particular articles can be classified under a specific item in Tariff Schedule. It would be against the principles of the specification to deny its parentage and consign its residuary item of the schedule. Similar observations were made in Dunlop India and others 1983 (13) (E.L.T.) 1566 (SC). Wherein their Lordships observed as under:-
>
> > **Classification of goods - Article classifiable under specific item can not be classified under residuary item.**
> >
> > **"**When an article is by all standards classifiable under a specific item in the Tariff Schedule it would be against the very principle of classification to deny it parentage consign its residuary item, (Para 37)"

There is no denying a fact that gold/silver ornaments are a source of decoration. Similarly, medals as created from gold or silver are to commemorate particular individuals or events. Gold or silver ornaments or medals, before they are produced, will have to pass the same process of manufacture/moulding finishing and polishing before they are put to sale. Sometimes, the golden coins are often set as pieces of jewellery or the medals. Variety of medals is also produced commercially for the commemorating or adoring or events. However, the gold/silver medals whatever the case may be made of gold, silver Guilt, bronze or lead do not loose their parentage if the gold/silver ornaments can be classified as items of schedule 'C' appended to the Act, then why medals of the same or inferior metals can be an exception to it so as to fetch higher rate of tax. Had any difference been made between gold/silver medals with the other ornaments then things would have been different. A man made confusion has invited the authorities to classify these items differently particularly when there is no basic

change in their properties, thee is no change in their end use; there is no difference with regard of mode and method of manufacture. In any case the law has gone to the extent that when there is confusion with regard to the classification of goods then the same has to be decided in favour of assessee as the benefit of ambiguity should be resolved in favour of subject. A similar view was taken in case of Commissioner of Central Excise, Calcutta vs Calcutta Springs Ltd., 2008 (229) ELT 161 (SC), wherein the Apex Court observed as under:-

> "Lastly, in the present case, the Commissioner has himself stated that on the interpretation of two entries, that it is quite possible that the liner in the question is capable of falling simultaneously under both the entries quoted above. If that be the case, then, in a classification dispute the benefit should go to the assessee."

While examining the case from another angle, the Medals being also the pieces of decoration are conferred upon a person or organization for their distinguished services whereas the ornaments are used to decorate an individual to raise his/their status or pedestal. As such ornaments being used for a better purpose could be taxed at a higher rate but not the medals. However, both being the product of some property can't be taken way from Schedule 'C' of the Punjab VAT Act.

It would also be worth which to mention here that the appellant had also got a clarification by way of an application on 17th April, 2012 from the Excise and Taxation Commissioner, Punjab regarding the classification of medals for the purpose of tax and in response to the said application, vide memo No. VAT-3-2012/2229, dated 8.4.2012. the Deputy Excise and Taxation Commissioner on behalf of the Commissioner had opined that the rate of tax on silver is 1% and surcharge would be 10%. This can also be given weight at the time of deciding this appeal.

In the aforesaid facts and circumstances, the Tribunal is of the view that the medals made of silver/gold cannot be taken away from Schedule 'C' of the Act and the view taken by the Excise and Taxation Commissioner, Punjab is bound to be quashed. As regards the surcharge that would also be applicable as per the Rules, Notifications issued by the State Government in this regard from time to time.

Pronounced in the open court.

PUNJAB VAT TRIBUNAL

APPEAL NO. 17

PRABHAT YARN TRADERS
Vs.
STATE OF PUNJAB

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

8TH APRIL, 2015

HF ▶ Appellant

APPEAL – ENTERTAINMENT OF – PRE DEPOSIT – ADJUSTMENT OF INPUT TAX CREDIT – DEMAND RAISED ON ASSESSMENT – APPEAL BEFORE TRIBUNAL REQUESTING ADJUSTMENT OF ITC TOWARDS AMOUNT DUE AS PRE DEPOSIT FOR ENTERTAINMENT OF APPEAL – APPEAL ACCEPTED – DESIGNATED OFFICER TO DETERMINE THE ITC AVAILABLE, IF ANY, WITHIN 2 MONTHS AND ADJUST THE SAME AGAINST 25% OF ADDITIONAL DEMAND RAISED – APPELLANT DIRECTED TO PAY THE BALANCE DUE , IF ANY – ORDERS OF ASSESSING AUTHORITY TO PREVAIL IN CASE OF NON-PAYMENT / NON ADJUSTMENT – SEC 62(5) OF PVAT ACT

The appellant filed an appeal before the Tribunal requesting that while determining Input tax Credit, if found available and due, may be adjusted towards 25% of the additional demand raised as a condition for entertainment of appeal. The Tribunal accepted the appeal directing the designated officer to find out if any ITC is available for the assessment year 2012-13 within two months and adjust the same towards the amount due as pre deposit for entertainment of appeal. The appellant is directed to pay the balance if due. On failure of payment the orders of appellate authority would remain intact.

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

The said case was put up before the Chairman, VAT Tribunal Punjab on 30.03.2015 for consideration and Chairman, VAT Tribunal Punjab passed the following orders:-

The Counsel for the appellant has requested that while determining the ITC, if available is found due in favour of the appellant, that may be adjusted against the additional demand of 25% and the appellant is ready to make the payment of the balance of 25% of the additional demand. If it is so found. In these circumstances, E.T.O.-cum-Designated Officer, Ludhiana is directed to determine the ITC while deciding the assessment or the year 2012-13 within two months and if any ITC is found available to the appellant, the same may be adjusted against the 25% of the additional demand. The appellant is also directed to deposit the balance out of 25% of the additional demand, if something is found due.

Accordingly, this appeal is accepted. The appellant is directed to pay the 25% in the aforesaid terms. If the payment is made/adjusted, the appeal would be entertained, otherwise, the orders passed by the appellate authority would remain intact.

Disposed off accordingly.

PUNJAB VAT TRIBUNAL

APPEAL NO. 77 OF 2014

HM STEELS LTD

Vs.

STATE OF PUNJAB

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

30TH March, 2015

HF ▶ Appellant

INPUT TAX CREDIT – BROUGHT FORWARD - ASSESSMENT YEAR 2009-10 – TAX LIABILITY DISCHARGED BY ADJUSTING ITC BROUGHT FORWARD – SUBSEQUENT DEMAND RAISED FOR THE SAME YEAR – DENIAL OF ITC BROUGHT FORWARD FROM PREVIOUS YEAR(2008-09) ALLEGING CLOSURE OF BUSINESS PREMISES OF APPELLANT PREVENTING VERIFICATION BY DEPARTMENT – APPEAL – HELD, NO ASSESSMENT BEING FRAMED FOR THE YEAR 2008-09 INDICATED ACCEPTANCE ON PART OF DEPARTMENT WITH RESPECT TO ITC BROUGHT FORWARD- CONTENTION REGARDING ABSENCE OF VERIFICATION DUE TO CLOSURE OF BUSINESS PREMISES FOUND WITHOUT SUBSTANCE – ENOUGH EVIDENCE PRODUCED TO SHOW BUSINESS NOT CLOSED – EXCESS ITC AVAILABLE DURING 2008-09 TO BE CARRIED FORWARD AND ADJUSTED AGAINST SUBSEQUENT LIABILITY, IF ANY – APPEAL ALLOWED.

The appellant had filed his returns for the year 2009-10 and discharged the tax liability after the adjustment of ITC brought forward from previous years. Subsequently a demand was raised under the PVAT Act and the CST act. The order revealed that the ITC brought forward from previous years had been rejected in the absence of proper verification. Aggrieved by the order of the appellate authority, an appeal was filed before the Tribunal. It is held that since no assessment for the previous year 2008-09 was framed, it is presumed that the excess ITC was accepted by the respondents. Therefore, the said amount should have been adjusted towards the tax liability of the year in question. The argument that no verification could be done due to the business premises being closed is without substance. The assessee was served with the assessment orders on the said address. A copy of rent deed was enclosed as proof. Entry tax had been paid during 2008-09. It could not be said that the assessee had closed the business, Accepting the appeal, the court has ordered to adjust the excess ITC available during 2008-09 to be carried forward and adjust it towards subsequent liability , if any.

Present: Mr. K.L. Goyal, Sr. Advocate alongwith Mr. Rohit Gupta, Advocate counsel for the appellant.

Mrs Sudeepti Sharma, Deputy Advocate General for the State

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

1. This is an appeal against the order dated 10.1.2014 passed by the Deputy Excise and Taxation Commissioner (Appeals), Ludhiana Division, Ludhiana, dismissing the appeal of the appellant against the order dated 20.5.2013 passed by the Excise and Taxation Officer-cum-Designated Officer, Fatehgarh Sahib creating a demand of Rs. 15,40,964/-.

2. The appellant is a dealer duly registered under the provisions of Punjab Value Added Tax Act, 2005 as well as Central Sales Tax Act, 1956 having TIN No. 03111144156. He has been engaged in the trading of iron and steel having its offices at Harbanspura, G.T. Road, Sirhind and at Amlho Road, Mandi Gobindgarh with its Corporate Office at Chandigarh. The appellant filed its return for the year 2009-10, quarterly returns in VAT-15 and Annual Return in VAT-20 as per provisions of the Punjab Value Added Tax Act, 2005. The tax liability was discharged after the adjustment of ITC brought forward from the previous years which was amounting to Rs. 36,08,559/-. Accordingly to the appellant there was no additional liability to be discharged. However, it has been further alleged that on 20.5.2013 notice was received by the appellant, whereby a demand for Rs. 15,40,964/- under the Punjab VAT Act and Rs. 28,19,008/- under the Central Sales Tax Act was created ex-parte. The order revealed that the Assessing Authority had rejected the ITC brought forwarded from previous years in the absence of proper verification resulting into huge demand with which the appellant is burdened.

3. Arguments heard. The appellant is an old assessee of the respondents. He had also filed its returns for the year 2008-09 in which the excess ITC amounting to Rs. 36,08,559/- was carried forward and the same was not adjusted towards the tax liability for the year 2009-10. However, the Excise and Taxation Officer-cum-Designated Officer without even verifying the same rejected the ITC. No assessment for the year 2008-09 was framed therefore it would be presumed that the excess ITC was accepted by the respondent. Therefore, the said amount should have been adjusted towards the tax liability for the assessment year 2009-10, but it was not so done. The argument, that verification could not be affected as the business premises at the address of Village Harbanspura, G.T. Road, Sirhind, District Fatehgarh Sahib were found closed, is without any substance. It may be observed that the assessee was served with the assessment order for the current years on the said address. The assessee, vide letter dated 28.08.2008, had also duly intimated the respondent about his another place of business. He also enclosed the copy of rent deed. The assessee had also paid entry tax amounting to Rs. 4,70,55,571/- during 2008-09 and claimed for ITC on purchase sin Punjab on merely Rs. 4,96,993/-. In such circumstances, how it could be said that the assessee had closed the business. Thus, it would be held that the arguments raised by the State Counsel have no meaning and the arguments raised by the appellant have merit.

5. Resultantly, this appeal is accepted and the impugned order is set-aside. The excess ITC available to the appellant during the year 2008-09 be carried forward and adjusted against the subsequent liability if any.

6. Announced in open Court in the presence of the counsel for the parties.

PUNJAB VAT TRIBUNAL

APPEAL NO. 612 OF 2013

R.L. INDUSTRIES
Vs.
STATE OF PUNJAB

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

23rd February, 2015

HF ▶ Appellant – dealer

PENALTY – ATTEMPT TO EVADE TAX – CHECK POST -/ROADSIDE CHECKING – GOODS IN TRANSIT INTERCEPTED – INVOICE BEING COMPUTERIZED AND SERIAL NUMBER WAS SMALL - EVASION SUSPECTED – PENALTY IMPOSED – APPEAL BEFORE TRIBUNAL – HELD THAT REASONABLE TIME TO BE GRANTED TO APPELLANT – GENUINENESS OF TRANSACTION NOT VERIFIED FROM BOOKS OF ACCOUNTS AND ARGUMENTS NOT CONSIDERED – NON SPEAKING ORDER PASSED BY LD. OFFICER SET ASIDE – APPEAL ACCEPTED WITH A DIRECTION TO THE OFFICER TO PASS SPEAKING ORDER AFTER HEARING BOTH PARTIES – *SEC 51(7)(b) OF THE PUNJAB VAT ACT, 2005*

The goods in transit were intercepted. Documents were produced by the driver. Goods were detained u/s 51(6)(a) of the Act. The AETC mentioned that the invoice being computerized and serial number in small was suspected of being deleted after the consignment reaches the destination. The CPU was examined. The administrative password was not provided thereby raising suspicion. Penalty was imposed u/s 51 of the Act. On appeal before Tribunal, it is held that the notice doesn't bear the date it was actually issued. Reasonable time is to be granted through notice to explain the circumstances. The AETC imposed penalty without calling for record and without considering arguments. Genuineness of transaction was not verified from books of accounts. Thus he passed a non speaking order. The matter is remitted to the Ld. AETC to decide afresh after hearing both parties and pass a speaking order.

Present: Mr. K.L. Goyal, Sr. Advocate along
with Mr. Rohit Gupta, Advocate counsel for the appellant.
Mrs. Sudeepti Sharma, Deputy Advocate General for the State.

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

1. This appeal is directed against the order dated 17-7-2013 passed by the Deputy Excise & Taxation Commissioner (A) Patiala Division, Patiala dismissing the appeal against

the order, dated 21-3-2011 passed by Assistant Excise & Taxation Commissioner. Mobile Wing, Patiala imposing a penalty of Rs. 1,79,593-00 under section 51(7)(b) of the Punjab Value Added Tax Act. Brief facts of the case are that on 8-3-2011 when driver with a vehicle No. PB-23-H-7294 loaded with Scaffolding Vertical & Ladger ERW Pipes was intercepted by the Excise and Taxation officer, Mobile Wing, Patiala, the driver produced the Invoice No. 21, dated 8-3-2011 in favour of M/s Steel Emporium, A-243, Road No. 6, Jaipur along with GR and Form VAT-47 issued by the purchasing dealer of Rajasthan. The goods were detained for further verification and notice under section 51(6)(a) of the Act was issued. Thereafter, the case was forwarded to Assistant Excise & Taxation Commissioner, Mobile Wing, Patiala, who also issued notice for 21-3-2011. The Assistant Excise & Taxation Commissioner on 21-3-2011 has mentioned in the order that invoice being computerised and serial number in small was suspected of being deleted after the consignment reaches the destination. It was also observed that CPU, as produced, was examined whether it allows deletion or not. The dealer has provided the user password but the Administrative Password was not provided/produced which created suspicion. The fact of deletion could not determined in the absence of Administrative Pass word. Having violated sections and rules by the appellant, a penalty of Rs. 1,79,593 was imposed under section 51(7)(b) of the Act of 2005. The appellant preferred the appeal against the order, dated 21-3-2011 which was dismissed.

2. It is also noticed that the Excise & Taxation Officer recorded in the notice dated 8-3-2011 that the actual value of the goods required proof, the bill and billety are to be compared with account books, serial number was very small. Therefore, it was to be checked from the CPU. Thereafter on 10-3-2011, the case was forwarded to Assistant Excise & Taxation Commissioner. Mobile Wing, Patiala who issued undated notice for 21-3-11 and on the same day he while observing that the bill and GR are not genuine, imposed a penalty of Rs. 1,79,593/- under section 51(7)(b) of the Act.

3. Arguments heard. Record produced.

4. After receipt of the case by the the Excise & Taxation Officer on 10-3-2011, the notice was issued by the Assistant Excise & Taxation Commissioner-cum-Dy. Director (Investigation) for 21-3-2011. Having examined the notice, it reveals that the same does not bear the date it was actually issued. The ends of justice require that a reasonable time be granted to the appellant through the notice to explain the circumstances appearing against him. In the present case, issued was issued for 21-3-2011 and on the same day, without calling for any further record, penalty was imposed. The appellant when appeared before the Assistant Excise & Taxation Commissioner on 21-3-2011 had also filed written arguments but none of the arguments was considered by the appellant. Though the Excise & Taxation officer had required the verification of the account books but Assistant Excise & Taxation Commissioner did not proceed to verify about the genuineness of the transaction from the account books. Having examined the impugned order the same is very in cryptic in nature. The same being non speaking and without application of mind is liable to be set aside. As such Assistant Excise & Taxation Commissioner required to pass a speaking order after considering the relevant contentions.

5. Resultantly, this appeal is accepted. Impugned order is set aside and Assistant Excise & Taxation Officer, Mobile Wing, Patiala is directed to pass a speaking order after hearing both the parties. Parties are directed to appear before Assistant Excise and Taxation Commissioner, Mobile Wing, Patiala on 6-4-2015.

Pronounced in the open court.

SGA
LAW OFFICES

PUNJAB VAT TRIBUNAL

VATAP No. 502 of 2013

NEELAM STEELS
Vs.
STATE OF PUNJAB

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

12th February, 2015

HF ▶ Assessee

NON SPEAKING ORDER- APPELLATE AUTHORITY – CONTENTION RAISED BY APPELLANT THAT REASSESSMENT ORDER PASSED BEYOND LIMITATION AND WITHOUT JURISDICTION BY OFFICER - DISMISSAL OF APPEAL – REASONS FOR ITS CONCLUSION NOT MENTIONED- CONTENTIONS NOT RECORDED – APPEAL ACCEPTED BY TRIBUNAL REMITTING THE CASE BACK TO DETC FOR PASSING A SPEAKING ORDER.

It was contended by the appellant that the reassessment order passed by the Excise and Taxation officer was beyond limitation period as the reassessment was to be framed within a period of five years. But it was framed much later. Also, it was passed without jurisdiction as she had no power to frame it u/s 11 of the Act. The First Appellate Authority has given no reasons for ignoring the plea of the appellant nor has it recorded his contentions raised. No reason while passing its judgement is mentioned. It is held by the Tribunal that a non speaking order has been passed by the Appellate Authority. Matter has been remitted to Ld.DETC to pass a speaking order.

Present: Mr. K.L. Goyal, Sr. Advocate along with

Mr. Rohit Gupta, Advocate counsel for the appellant.

Mrs. Sudeepti Sharma, Deputy Advocate General for the State.

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

1. This order of mine shall dispose of two connected Appeal Nos. 502 and 503 of 2013 against the order, dated 27-2-2013 passed by Deputy Excise & Taxation Commissioner (A) Ludhiana Division, Ludhiana whereby he dismissed the appeal against the orders, dated 28-3-2008 passed by the Appellant Authority Ludhiana-3.

2. While dealing with the case under section 20 of the Punjab General Sales Tax Act, 1948 against the re-assessment order for the assessment year 2002-03 imposed a penalty of Rs. 5,000/- under Punjab General Sales Tax Act 1948 and Rs. 4,57,137/- and also Rs. 9,14,275/- respectively under Central Sales Tax Act, 1956.

3. The counsel for the appellant has argued that the order passed by the Excise and taxation Officer is beyond jurisdiction as show was appointed as Designated Officer under the Punjab Value Added Tax Act, 2005 only and has no power to frame reassessment u/s 11(A) of the repealed act. The order is totally illegal and not sustainable. The appellant authority has not gone through the arguments and did not mention the same in the order and the reason to ignore the said arguments are also not mentioned, the onus of which was upon the assessing authority. No penalty u/s 23 of the Punjab General Sales Tax Act can legally be imposed by simply reopening the case after such a long time.

4. The counsel for the appellant has further urged that the case does not involved the application of mind. The appellant authority did not examine and discuss the reasons for framing. The reassessment of the assessment year 2002-03 after such a long time i.e. on 28-3-2008. The order is non speaking.

5. As regards the question of reassessment of the assessment for the year 2002-03, it could be reassessed within 5 years from 30-5-2003. The proceedings for the reassessment were initiated on 31-3-2006. Therefore assessment cannot be said to be time bound. As regards the other arguments raised by the appellant, the appellant authority has not assigned any reason for ignoring the same. The relevant order passed by the Deputy Excise & Taxation Commissioner reads as under:-

> *"I have heard the arguments of both the sides and gone through the facts available on the file in a careful manner. Accordingly, the arguments put forth by the counsel have no force. So in view of the facts of the case and in the interest of natural justice both the appeals are dismissed and order of Excise & Taxation Officer is sustained."*

6. The basic spirit behind the passing of the judgment is to apprise a party of the decision of the officer and the reasons for his decision. The officer while passing the judgement must record the contentions as raised by the counsel for the appellant and reasons for his agreement or dis-agreement with them while recording his conclusions. The Appellant Authority has failed in performing its obligations while passing the impugned order. The order being non speaking needs to be set-aside.

7. Resultantly, this appeal is accepted and the case is remitted back to the Deputy Excise and Taxation Officer(A) Ludhiana Division, Ludhiana for passing a speaking order. After discussing the arguments put forth by the appellant, the parties are directed to appear before Deputy Excise and Taxation Commissioner, Ludhiana on 16-3-2015. Copy of the order be placed in the connected Appeal No. 503 of 2013.

SGA
LAW OFFICES

NOTIFICATION

NOTIFICATION LEVYING ENTRY TAX ON SUGAR

PART III

GOVERNMENT OF PUNJAB

DEPARTMENT OF INDUSTRIES AND COMMERCE

NOTIFICATION

The 1st June, 2015

No. S.O. 21/P.O. 1/2015/S.4/2015. – In exercise of the powers conferred by sub-section (1) of section 4 of the Punjab Development of Trade, Commerce and Industries Ordinance, 2015 (Punjab Ordinance No. 1 of 2015) , and all other powers enabling him in this behalf, the Governor of Punjab is pleased to levy tax at the rate of eleven percent (11%) on the entry of sugar, specified in the Schedule, for consumption, use or sale into the State of Punjab.

ANIRUDH TEWARI, IAS

Principal Secretary,

Department of Industries and Commerce.

NOTIFICATION

PUNJAB VALUE ADDED TAX (INCENTIVES FOR EXPANSION PROJECTS) RULES, 2015.

PART III
GOVERNMENT OF PUNJAB
DEPARTMENT OF EXCISE AND TAXATION
(EXCISE AND TAXATION-II BRANCH)

NOTIFICATION
The 6th April, 2015

No. G.S.R. 19/P.A.8/2005/Ss.8-E and 70/2015.— In exercise of the powers conferred by section 70 read with section 8-E of the Punjab Value Added Tax Act, 2005 (Punjab Act No. 8 of 2005), and all other powers enabling him in this behalf, the Governor of Punjab is pleased to make the following rules, to carry out the purpose of the said Act, namely :—

RULES

1. Short title and Commencement.—

(1) These rules may be called the Punjab Value Added Tax (Incentives for expansion projects) Rules, 2015.

(2) They shall come into force on and with effect from the date of their publication in the Official Gazette.

2. Definitions.— In these rules, unless the context otherwise requires,—

(a) 'Acts' means the Punjab Value Added Tax Act, 2005 and the Central Sales Tax Act, 1956;

(b) 'Agro Industrial and Food Processing Industries' means units which add value to agricultural produce, their intermediates and residues, and edible animal products by processing or by improving storability or by providing the link from farm to the market or part thereof Agro Industry also includes hi-tech agriculture, fish processing, honey processing, cold chain infrastructure, steel silos and warehouses for food grains;

(c) 'agriculture produce' means produce of agriculture, horticulture, agro forestry, floriculture and bio-mass/agro produce;

(d) 'competent authority' means the Chief Executive Officer of the Punjab Bureau of Investment Promotion;

(e) 'eligible area' means an area eligible for incentives as specified in the Fiscal Incentives for Industrial Promotion, 2013;

(f) 'Eligibility Certificate' means a Certificate granted by the competent authority;

(g) 'Eligible period' means the maximum period during which an eligible unit can exhaust the incentive limit granted and it shall commence with effect from the date of approval of the unit;

(h) 'Eligible unit' in relation to an expansion project means a unit in an eligible area satisfying the following conditions :

(1) There shall be a minimum 50 per cent. increase in the Fixed Capital Investment (original value without depreciation) for all projects with original investment of Rs 100 crore or less subject to the condition that the minimum increase in the Fixed Capital Investment would be Rs 1 Cr.

(2) For projects with original investment above Rs. 100 crore, the minimum increase in Fixed Capital Investment shall be 25 per cent. subject to a minimum limit of Rs 50 crore; and

(3) Such expansion shall have to be carried out after the cut off date of 01.04.2013 meaning thereby that the unit shall make the requisite Investments only after 01.04.2013 as expansion of the existing project;

(i) 'Existing unit' means any other unit which is not availing incentive under the Industrial Policy of 2013;

(j) 'Fixed Capital Investment (FCI)' shall include the investment of building (excluding land), plant and machinery and equipment in relation to an industrial unit, including miscellaneous assets, technical know-how and other cost components associated with the industrial activity as appraised and firmed up by Banks or Financial Institutions;

(k) 'Form' means a Form appended to these rules;

(l) 'Government' means the Government in the Department of Excise and Taxation;

(m) 'Incentive limit' means the maximum cumulative quantum of tax incentive granted, which can be availed by an eligible unit during an eligible period;

(n) 'Information technology' means information technology and telecommunication;

(o) 'Information Technology Industry' means information technology, hardware and software industries;

(p) `Integrated Steel Plant' shall mean a steel plant in which final end product is to be sold in retail sale such as sponge iron, billets, balooms, slabs etc. and is manufactured starting from iron ore or scrap and all the processes concerning such manufacturing are performed in the plant itself;

(q) 'Integrated Textile Unit' means one that consists of composite process including spinning, weaving or knitting, processing and manufacturing of end products like fabrics, garments, towels, etc.;

(r) Interdepartmental Committee' means committee constituted, as such, by the Government, which shall comprise representatives from the Department of Finance, Department of Industries and Department of Excise and Taxation;

(s) 'Manufacturing' means a process by which the material is transformed into a different and distinct product with the minimum value addition of 25 per cent. in the value of the raw material, but does not include the process of treating, repairing, reshaping, reconditioning, assembling, electroplating, polishing, blending, cutting, dyeing, heat treatment, wire drawing and conversion of penultimate product into final product for the purpose of availing incentives;

(t) 'Negative List' means the list of units and goods specified in Annexure-A

(u) Prescribed authority' means an Assistant Excise and Taxation Commissioner, incharge of the district;

(v) 'tax' means tax under the Acts, excluding surcharge under the Punjab Value Added Act, 2005;

(w) 'tax incentive' means the amount of tax collected and retained by the eligible unit but the retention of tax shall be restricted to that part of net tax liability accrued under the Acts (after adjusting it against input tax credit if any available), in case of the unit availing incentive scheme, which is adjustable against the incentive limit granted under the Industrial Policy of 2013. The net tax liability on account of surcharge accrued under the Punjab Value Added Act, 2005 shall not form the part of tax incentives;
(x) 'Zone I area' means an eligible area notified as such by the Industrial Policy of 2013; and

(y) 'Zone II area' means an eligible area notified as such by the Industrial Policy of 2013.

3. **Conditions for eligibility and entitlement.—** These incentives shall be admissible to an 'Eligible unit' in relation to an expansion project subject to the following conditions :—

(1) These incentives shall not be available to the goods specified in the Negative List given at Annexure 'A'.

(2) These incentives shall be admissible to an expansion project, which falls in an eligible area and in respect of which an Eligibility Certificate has been granted by the competent authority.

(3) The maximum time period and maximum cumulative amount of incentive available for different kinds of industries and with different amounts of investment shall be as per the restrictions and tables referred to in the Rule 4.

(4) If any false declaration is given for the purpose of availing incentives or if any incentives are availed for which the unit was not eligible, the amount of incentives are liable to be recovered from the date of availment of such incentives along with interest compounded annually @ 18 per cent. per annum.

(5) Government of India is in the process of introducing a uniform Goods and Services Tax (GST) regime throughout the country. In this event the benefits related to CST/VAT incentives granted or being availed would be suitably modified by the State Government in conformity with the Goods and Services Tax regime.

4. Quantum of Entitlement.—

(1) The tax incentives from the liability to pay tax under the Acts with regard to group of industries situated in different zones shall be available subject to the maximum benefit as per table given below.

TABLE
Incentives for New large manufacturing Sector units.

Eligible Area		Fixed Capital Investmen from Rs. 25 Crs. to Rs 100 Cr.	Fixed Capital Investmen from Rs. 100 Cr. to Rs 50(Cr.	Fixed Capita Investment above Rs 500 Cr.
Zone I	Quantum of incentive available	30% VAT + 37.5% CST	35% VAT + 37.5% CST	40% VAT+ 37.5% CST
	Maximum cumulative quantum of incentive	30% of Fixed Capita Investment.	35% of Fixed Capita Investment	40% of Fixed Capita Investment
Zone II	Quantum of incentive available	15% of VAT+ 25% CST	17.5% VAT+ 25% CST	20% VAT+ 25% CST
	Maximum cumulative quantum of incentive	15% of Fixed Capita Investment	17.5% of Fixed Capita Investment	20% of Fixed Capita Investment
Eligibility from date of application in years.		10	11	13

(i) Incentives for manufacturing sector units with Fixed Capital Investment from Rs. 10 Cr. to 25 Cr.

Eligible Area	Fixed Capital Investment from Rs. 10 Cr to Rs. 25 Cr.	Maximum cumulative quantum o incentive	Eligibility from date o application in years.
Zone I	25% VAT + 37.5% CST	25% of Fixed Capital Investment	8
Zone II	12.5% VAT+25% CST	12.5% of Fixed Capital Investmen	8

(ii) Incentives for manufacturing sector units with Fixed Capital Investment from Rs. 1.0 Cr. to 10 Cr.

Eligible Area	Fixed Capital Investmen from Rs. 1.0 Cr to Rs. 10 Cr.	Maximum cumulative quantum o incentive	Eligibility from date o application in years.
Within approved Industria Focal Points, Industria Estates and Industrial Parks	25% VAT+ 37.5% CST	25% of Fixed Capital Investment	7

(iv) Incentives for Integrated Textile Units.

Eligible Area			Fixed Capital Investmen from Rs. 150 Cr. to Rs 500 Cr.	Fixed Capita Investment above Rs 500 Cr.
Textile Zone i.e.				
(a)	Districts of Mansa, Bathinda Muktsar, Fazilka, Ferozepur Faridkot, Moga, Barnala, Sangrur Patiala, Amritsar and Tarn Taran	Quantum of incentive available	40% VAT+ 40% CST	45% VAT+ 40% CST
(b)	All approved Industrial Parks Industrial Focal Points and Industria Estates in all districts of the State	Maximum cumulative quantum of incentive	40% of Fixed Capita Investment	45% of Fixed Capita Investment
Eligibility from date of application in year			11	13

(v) Incentives for Agro and Foods Processing Industry.			
Fixed Capital Investment	Fixed Capital Investment (Rs. 1 Cr. to <Rs 25 Cr.)	Fixed Capital Investmen (Rs. 25 Cr. to < Rs. 100 Cr.)	Fixed Capita Investment (Rs. 100 Cr. and above)
Incentive	40% VAT+ 37.5 CST	42.5% VAT+ 40% CST	45% VAT+ 42.5% CST
Maximum cumulative quantum of incentive	40% of Fixed Capital Investment	42.5% of Fixed Capita Investment	45% of Fixed Capita Investment
Eligibility from date o application in year	10	10	12

(vi) Incentive for Electronic Hardware and Information Technology Industry.		
Sector	Software Sector	Hardware sector
Investment	Fixed Capital Investment (Rs. 1 Cr. and above)	Fixed Capital Investment (Rs. 5 Cr. and above
Area	Mohali and Amritsar only	Whole of State of Punjab
Incentive	40% VAT + 40% CST	40% VAT + 40% CST
Maximum cumulative quantum of incentive	40% of Fixed Capital Investment	40% of Fixed Capital Investment
Eligible from date o application in years	10	10

[Editor's Note :— After (ii) point, there is no (iii) point in the original notification.]

(2) The expansion project in an eligible area shall be entitled to the incentives under sub-rule (1) on the incremental production only and a separate account of incremental production resulting from such expansion shall mandatorily be maintained.

EXPLANATION: 'Incremental Production' in relation to an expansion project shall mean production over and above either the installed capacity or actual production before such expansion, whichever is more."

Illustration :

1. *If the date of commencement of incentive for the eligible unit is 01.04.2014 and the unit before expansion is having an average quarterly production of 100,000/- units of the product over the last 2 years and the installed quarterly capacity is 90,000/- units of the product. If such a unit, after expansion, produces 1,20,000/- units per quarter, then the incremental production in the quarter will be taken as 20,000/- units of the product.*

2. *If the date of commencement of incentive for the eligible unit is 01.04.2014 and the unit before expansion is having an quarterly production of 100,000/- units of the product over the last 2 years and the installed quarterly capacity is 1,10,000/- units of the product. If such a unit, after expansion, produces 1,20,000/- units per quarter, then the incremental production in the quarter will be taken as 10,000/- units of the product.*

(3) The quantum of incentives availed by an expansion project during a period shall be calculated at the prevalent rates of tax payable under the Acts on the taxable turnover in respect of the incremental production of the concerned expansion project subject to sub-rule (1).

5. Mode of availing tax incentives.— (1) An eligible unit shall make an application to the competent authority for the grant of Eligibility Certificate for availing tax incentives. On receipt of the application, the competent authority shall refer the matter to the Interdepartmental Committee for the purpose of determination of Fixed Capital Investment.

(2) The Interdepartmental Committee shall determine the actual Fixed Capital Investment after taking into account the project appraisal report of the Bank or Financial Institution, certificate of Chartered Accountant, invoices of the purchases of capital goods and the industry norms regarding Capital Investment etc.

(3) Since the total Fiscal incentives cannot be more than 100 per cent. of the Fixed Capital Investment, therefore, the eligible unit shall inform the competent authority about the quantum of tax incentives it wants to claim, subject to the aforesaid cap of total Fiscal incentives.

(4) Keeping in view the provisions of rule 4 and sub-rules (2) and (3) of this rule, the competent authority shall quantify tax incentives and issue an Eligibility Certificate to the eligible unit.

6. Conditions regarding availability of input tax credit to a person purchasing goods from a unit availing incentive scheme,—

(a) The unit availing incentives shall issue a VAT invoice/ Retail invoice, as the case may be, as is issued by a unit which is not availing incentive scheme. The provisions regarding availability of input tax credit as applicable to person purchasing goods from a unit which is not availing incentive scheme shall apply mutatis mutandis to a person purchasing goods from a unit availing incentive scheme :

Provided that if the goods sold by a unit availing incentive scheme on VAT invoice are subsequently sold or used in manufacturing, processing or packing of goods for sale, by a taxable person in the course of inter-state trade or commerce or in the course of export outside India, that taxable person shall be entitled to claim input tax credit only to the extent of tax actually deposited by the unit availing the incentives, in the State Treasury.

(b) Minimum period required for availing benefit of incentives,—

(i) if the unit availing the benefit of incentives dis-continues its business before the expiry of the incentive period or before the exhaustion of the incentive limit granted, it shall be liable to deposit the entire amount of incentives availed into the Government Treasury along with interest compounded annually @ 18 per cent. per annum; and

(ii) the unit availing incentive shall be required to continue its operations till it pays into the Treasury, a cumulative tax amount equal to at least 50 per cent. of the amount of incentives availed. If any unit closes its business before the happening of such an event, it shall be liable to deposit the differential amount of incentive availed and the cumulative amount of tax paid into the Government treasury alongwith interest compounded annually @ 18 per cent. per annum.

7. Withdrawal of Incentives.— The entire tax incentives granted in respect of an eligible unit, including the availed amount shall be liable to be withdrawn by the Commissioner, if it is found that.—

(i) the Eligibility Certificate has been obtained by fraud, deceit, misrepresentation, mis-statement or concealment of any material fact; or

(ii) the unit availing incentives has indulged in any type of malpractice like bogus billing, bogus claim of input tax credit; or

(iii) the unit has concealed any particulars from any return furnished by him; or

(iv) the unit has deliberately furnished incorrect particulars therein; or

(v) the unit has concealed any transactions of sale or purchase from his account books; or

(vi) the unit has not maintained intelligible accounts, which prevent the Commissioner or the designated officer to assess the tax due from him; or

(vii) the unit has availed input tax credit to which he is not entitled to; or

(viii) the unit has claimed refund which was not due to him; or

(ix) the unit has claimed credit in respect of tax, which was not actually paid,

(x) the unit has not maintained true separate account of incremental production resulting from such expansion.

In addition, the Commissioner may direct that the person who has been found to be indulging in any of the above irregularities or malpractices, shall pay by way of penalty, a sum equal to twice the amount of incentive availed by him. The provisions of section 56 of the Punjab Value Added Tax Act, 2005, shall also be applicable to such person. However, no order shall be passed by the Commissioner without affording opportunity of being heard.

8. Filing of returns.— (1) The unit holding Eligibility Certificate shall continue to file the returns in the manner as provided under the Acts and the rules made there under.

(2) Notwithstanding anything contained in these rules, the unit holding Eligibility Certificate, shall attach an attested copy of the Eligibility Certificate and Treasury Receipts as proof of payment of amount of tax, which is outside the incentive scheme, alongwith the return. Such a unit shall continue to do so till the incentive is fully availed of or the period of incentive under these rules, expires, whichever is earlier.

9. Assessment of tax.—(1) The assessment of an eligible unit in respect of which an Eligibility Certificate has been granted shall be made in accordance with the provisions of the Acts and the rules made thereunder, but it shall preferably be made within a period of one year from the date of filing of the annual statement or due to be filed, whichever is earlier. The additional demand so determined, if any, shall be paid into the Government Treasury as per the provisions of the Acts and the rules made thereunder.

(2) If an order of withdrawal of the incentives is passed before the Eligibility Certificate is due for expiry, the entire amount of tax incentive availed by the unit shall become payable immediately in lump-sum and the provisions relating to recovery of tax, interest and penalty, if any, under the Acts, shall be applicable in such cases. The provisions of section 35 of the Punjab Value Added Tax Act, 2005 shall also apply mutatis mutandis regarding recovery of tax, interest and penalty due under these rules concerning first charge of State on the property of the unit availing incentive.

10. Registers to be maintained by the Prescribed authority.— The prescribed authority shall maintain a register in respect of units availing incentive and entries regarding the grant of Eligibility Certificate shall be made in the register so maintained.

11. Settlement of disputes.— If any dispute arises regarding eligibility of the unit or the quantum of incentives to be granted, the matter shall be referred to the Financial Commissioner (Taxation), whose decision shall be final and binding on the unit.

Annexure-A
[See rule 2(t)]
Negative List

1. Distilleries, Breweries, Bottling Plants and Canning Plants
2. Manufacturing of Tobacco products, cigar/Cigarettes and Gutka.
3. Traditional Brick/Tile Kilns except ceramic tile manufactured from basic stage.
4. Manufacturing of Cement
5. Vanaspati Ghee Mills
6. Rice Shellers (With Fixed Capital Investment of less than Rs. 10 Crore)
7. Refining of petroleum products.
8. Iron and Steel Industry except Integrated Steel Plants having Fixed Capital Investment of more than Rs. 100 Crore

D.P. REDDY,
Financial Commissioner Taxation and
Secretary to Government of Punjab,
Department of Excise and Taxation.

SGA
LAW OFFICES

NOTIFICATION

ORDINANCE REGARDING ENTRY TAX ON SPECIFIED GOODS

PART II

GOVERNMENT OF PUNJAB

DEPARTMENT OF LEGAL AND LEGISLATIVE AFFAIRS, PUNJAB

NOTIFICATION

The 6th May, 2015

No. 1-Leg./2015.-The following Ordinance of the Governor of Punjab promulgated under clause (1) of article 213 of the Constitution of India on the 5th Day of May, 2015, is hereby published for general information:-

THE PUNJAB DEVELOPMENT OF TRADE, COMMERCE AND

INDUSTRIES ORDINANCE, 2015

(Punjab Ordinance No. 1 of 2015)

AN

ORDINANCE

to provide for the non discriminatory and compensatory levy of tax on the entry of specified goods into the local area for development of trade, commerce and industries and the matters connected therewith or incidental thereto.

Promulgated by the Governor of Punjab in the Sixty-sixth Year of the Republic of India.

Whereas the Legislative Assembly of the State of Punjab is not in session and the Governor is satisfied that circumstances exist, which render it necessary for him to take immediate action;

Now, therefore, in exercise of the powers conferred by clause (1) of article 213 of the Constitution of India, the Governor of Punjab is pleased to promulgate the following Ordinance, namely:

Short title and commencement.

1. (1)This Ordinance may be called the Punjab Development of Trade, Commerce and Industries Ordinance, 2015.

(2) It shall come into force on and with effect from the date of its publication in the Official Gazette.

Definitions

2. (1) In this Ordinance, unless the context otherwise requires,-Definitions.

(a) "Appellate Authority" means an Appellate Authority appointed under section 3 of the Punjab Value Added Tax Act, 2005;

(b) "Board" means the Punjab Development of Trade, Commerce and Industries Board;

(c) "Business" includes,

(i) any trade, commerce or manufacture or any venture or concern whether or not such trade, commerce, manufacture, venture or concern is carried on with a motive to make profit and whether or not any profit accrues therefrom;

(ii) any transaction in connection with or incidental or ancillary to such trade, commerce, manufacture, venture or concern; and

(iii) e-commerce transactions including direct buying and selling through electronic marketplaces and online shopping websites;

(d) "dealer" includes occasional dealer or any person, who in the course of business, whether on his own account or on account of his principal or any other person, brings or causes to be brought into a local area, goods specified in the Schedule or takes delivery or is entitled to take delivery of goods specified in the Schedule on its entry into the local area;

(e) "entry of goods", with all its grammatical or cognate expressions, means, entry of goods into the State of Punjab from any place outside the State and through any mode of transport;

(f) "information collection centre" means the information collection centre or check post including temporary check post or both, as the case may be, established under section 51 of the Punjab Value Added Tax Act, 2005;

(g) "local area" means an area within the territorial boundaries of the State of Punjab;

(h) "occasional dealer" means a person who, in the course of occasional transactions of the business, whether on his own or on account of his principal or any other person, brings or causes to be brought into a local area, goods specified in the Schedule or takes delivery or is entitled to take delivery of goods specified in the Schedule on its entry into the local area;

(i) "person" includes any company or association or body of individuals whether incorporated or not, and also Hindu Undivided Family, a firm, a society, a trust, a club, an individual, a local authority, State Government, the Central Government or any Union Territory or any other judicial body and also includes any person, who acts as a carrier of goods or the logistics partner, who on his own account or on account of seller or on account of any other person brings or causes to be brought or causes the entry of goods into the local area, to be delivered to any person for consumption, use or sale;

(j) "prescribed" means prescribed by rules made under this Ordinance;

(k) "Schedule" means a Schedule appended to this Ordinance;

(l) "Scheduled goods" means any goods mentioned in the Schedule;

(m) "State" means the State of Punjab;

(n) "State Government" means the Government of the State of Punjab;

(o) "tax" means tax leviable under this Ordinance;

(p) "Tribunal" means the Tribunal constituted under section 4 of the Punjab Value Added Tax Act, 2005; and

(q) "value of goods" means the value of any goods as ascertained from purchase invoice or bill and includes value of packing material, packing and forwarding charges, insurance charges, amounts representing excise duty, countervailing duty, custom duty and other such duties, amount of any fee or tax charged, transport charges, freight charges and any other charges relating to purchase and transportation of such goods into the local area in which goods are being brought or received for consumption, use or sale therein:

Provided that where the goods ordered through e-commerce websites have been brought into the State by the seller or the logistic partner or carrier of goods, the value of goods shall be the value on original purchase invoice including value of packing material, packing and forwarding charges, amount of any fee or tax charged, transport charges, freight charges and any other charges relating to purchase and transportation of such goods into the local area.

Authorities for carrying out the purposes of this Ordinance,

3. The Commissioner, the Tribunal, the Chairman of the Tribunal, the Members of the Tribunal, the Appellate Authority, the Additional Commissioner, the Joint Commissioner, the Deputy Commissioner, the Assistant Commissioners and the Officers appointed under the Punjab Value Added Tax Act, 2005 shall be the authorities for carrying out for the purposes of this Ordinance.

Levy of tax.

4. (1) For the purpose of development of trade, commerce and industry in the State, there shall be levied and collected a tax on entry of goods specified in the Schedule into a local area for consumption, use or sale therein, from any place outside that local area, at such rate as specified by the State Government by notification from time to time. Different rates may be specified in respect of different goods or different classes of goods not exceeding twenty per cent:

Provided that the State Government may by notification amend the Schedule:

Provided further that the State Government may by notification exempt any class of persons or any transactions from payment of tax subject to such conditions, as may be notified:

Provided further that the goods being brought into the local area for further transfer outside the local area through consignment sale or branch transfer shall not be subject to this tax.

(2) The tax levied under sub-section (1), shall be payable by any person, who brings or causes to be brought into the local area, such goods, whether on his account or on the account of his principal or takes delivery or is entitled to take delivery of such goods on its entry into a local area:

Provided that tax levied under sub-section (1), shall be payable by the seller or the logistics partner or the carrier of goods, who brings or causes to be brought or causes the entry of goods into any local area, for delivery of such goods to any person for consumption, use or sale therein, on entry of such goods into the local area.

Registration.

5. Every person registered under the Punjab Value Added Tax Act, 2005 shall be deemed to be registered under this Ordinance. The logistic partner or the carrier of goods, who brings or causes to be brought or causes the entry of goods into any local area for any person, not registered under the Punjab Value Added Tax Act, 2005, for the value more than rupees five lacs, shall be liable for registration under this Ordinance, in the manner as may be prescribed.

Returns.

6. (1) The returns filed by a person registered under the Punjab Value Added Tax Act, 2005 shall be treated as returns filed under this Ordinance.

(2) Any person who is liable to be registered under this Ordinance, but is not registered under the Punjab Value Added Tax Act, 2005 shall file returns under this Ordinance, as may be prescribed.

(3) A person who is registered under the Punjab Value Added Tax Act, 2005 shall declare the tax due under this Ordinance with his VAT returns and pay the same along with his returns.

(4) Notwithstanding anything contained in this section, the Commissioner or the designated officer, as the case may be, may by notice, direct a person other than a taxable person or a registered person to file returns at such intervals and in such form and containing such information, as may be required.

Administration and collection of Tax.

7. Subject to the provisions of this Ordinance and the Rules made thereunder, the authorities appointed under this Ordinance, shall be empowered on behalf of the Board to assess, revise, rectify, collect and enforce the payment of tax including interest and penalty, if any, payable by the person under the Ordinance, as if such tax, interest or penalty, if any, payable by the person, is a tax, interest or penalty payable under the Punjab Value Added Tax Act, 2005. For this purpose, the aforesaid authorities may exercise all or any of the powers, exercisable by them under the Punjab Value Added Tax Act, 2005 and the Rules framed thereunder and the provisions of the Punjab Value Added Tax Act, 2005 relating to returns, assessment, provisional assessment, revision, rectification, review, payment of tax in advance, registration of transfer of any business, imposition of tax liability, carrying on business on the transfer of successor to such business, transfer of any liability of any firm or Hindu Undivided Family to pay tax in the event of dissolution of such firm or partition of family, information collection centre, recovery of tax from third parties, detention of goods, appeals, review references, refunds, rebates, charging or payment of interest, compounding of offences and treatment of documents furnished as confidential, seeking information from any person shall apply accordingly.

Manner of payment of tax.

8 (1) In case entry into the local area is made through road, by a registered person, the tax shall be paid by such person along with returns.

(2) In case entry into the local area is made through road, by a unregistered person, he shall have the option to pay tax under this Ordinance either at the information collection center at the time of entry of goods into the local area or at the Office of the Assistant Excise and Taxation Commissioner of the concerned district in the manner, as may be prescribed.

(3) In case entry into the local area is made through Railway Stations, tax under this Ordinance shall be paid by the person at the information collection center located at Railway

Stations or at the Office of the Assistant Excise and Taxation Commissioner of the concerned district in the manner, as may be prescribed.

(4) For any other kind of entry of goods into the local area by any other mode of transport, the tax shall be paid in the Office of the Assistant Excise and Taxation Commissioner of the concerned district in the manner, as may be prescribed.

Constitution of the Board.

9. The Board shall consist of the following, namely:-

(i)	the Chief Minister of Punjab;	: Chairman
(ii)	the Minister of Industries and Commerce, Punjab;	:Vice-Chairman
(iii)	the Minister of Excise and Taxation, Punjab;	: Member
(iv)	the Minister of Finance, Punjab;	: Member
(v)	the Minister of Local Government, Punjab;	: Member
(vi)	the Chief Secretary, Punjab;	: Member
(vii)	the Principal Secretary Industries and Commerce, Punjab;	: Member
(viii)	the Principal Secretary Finance, Punjab; and	: Member
(ix)	the Director Industries and Commerce, Punjab. Secretary: Member	

Functions of the Board.

10. The functions of the Board shall be such, as may be prescribed.

Utilization of the proceeds of the tax.

11. (1) The proceeds of the tax levied under this Ordinance shall be utilized proceeds of the exclusively for the development or facilitating trade, commerce and industry tax. in the State and for other welfare measures for the general public in the local area, which shall include the following:

(a) developing industrial estates, focal points and industrial clusters being developed by the State Government, providing financial aids, grants, incentives and subsidies to financial, industrial and commercial units;
(b) creating infrastructure for supply of electricity and water to specified trades, marketing and other commercial complexes;
(c) creating, development and maintenance of other infrastructure for the furtherance of specified trades;
(d) providing financial aids, grants and subsidies for creating, developing and maintaining pollution free environment in the local area;
(e) providing finance, aids, grants and subsidies to the local bodies and government agencies for the purposes specified in clauses (a), (b), (c) and (d);
(f) providing amenities to the public in the local area;
(g) implementing the social welfare schemes for public in the local area; and
(h) any other purpose connected with the development of trade, commerce and industry or for facilities relating thereto which the State Government may specify by notification.

(2) The proceeds of the levy under this Ordinance shall be transferred to the Consolidated Fund of the State and shall be utilized exclusively for the development of trade, commerce and industries of specified trade in the State.

12. The State Government, after giving fifteen days notice of its intention Power to amend so to do, may, by like notification add to or omit goods and alter the rate of tax the Schedule. specified in the Schedule and thereupon, the Schedule shall be deemed to have been amended accordingly:

Provided that if, the State Government is satisfied that circumstances exist, which render it necessary to take immediate action, it may, for reasons to be recorded in writing, dispense with the condition of previous notice.

13 (1) The State Government may, by notification in the Official Gazette, Power of the make rules for carrying out the purposes of this Ordinance. State Government to make rules.

(2) In particular and without prejudice to the generality of the foregoing powers, the State Government may make such rules, as may provide for any other matter which has to be or may be prescribed.

(3) Every rule made under this Ordinance shall be laid, as soon as may be, after it is made, before the House of the State Legislature, while it is in session, for a total period of fourteen days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session in which it is so laid or the successive sessions as aforesaid, the House agrees in making any modification in the rules, or the House agrees, that the rules should not be made, the rules shall thereafter have effect only in such modified form or be of no effect, as the case may be. However, any such modification or annulment shall be without prejudice to the validity of anything previously done or omitted to be done under that rule.

Bar of jurisdiction.

14. No civil court shall have jurisdiction to entertain or decide any action relating to matters arising under this Ordinance.

PROF. KAPTAN SINGH SOLANKI,

GOVERNOR OF PUNJAB.

H.P.S. MAHAL,

Secretary to Government of Punjab,

Department of Legal and Legislative Affairs.

SGA
LAW OFFICES

NOTIFICATION

NOTIFICATION REGARDING LEVY OF ADDITIONAL FEE ON PETROL

PART III

GOVERNMENT OF PUNJAB

DEPARTMENT OF FINANCE

(FINANCE EXPENDITURE IV BRANCH)

NOTIFICATION

The 21st May, 2015

No. S.O. 19/P.A. 8/2002/S.25/2015.- In exercise of the powers conferred by sub-section (1) of section 25 of the Punjab infrastructure (Development and Regulation) Act, 2002 (Punjab Act No. 8 of 2002), and all other powers enabling him in this behalf, the Governor of Punjab is pleased to make the following amendment in the Government of Punjab, Department of Finance, Notification No. 7/1/11/2011-5FEIV/6349, dated the 11th July, 2002, namely:-

AMENDMENT

In the said notification, for the words, figure and signs "That every dealer shall be liable to pay a fee at the rate of rupee one per litre on petrol and at the rate of rupee one for every hundred rupees on all agricultural produces as defined in the Punjab Agricultural Produce Markets Act, 1961 except;'', the words, figure and signs "That every dealer shall be liable to pay a fee at the rate of rupees two per litre on the sale of petrol, at the rate of rupee one per litre on the sale of diesel and at the rate of rupee one for every hundred rupees on all agricultural produces as defined in the Punjab Agricultural Produce Markets Act, 1961 except;'' shall be substituted.

VINI MAHAJAN,
Principal Secretary to Government of Punjab
Department of Finance.

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NOTIFICATION

DRAFT NOTIFICATION CHANDIGARH ADMINISTRATION

CHANDIGARH ADMINISTRATION

EXCISE & TAXATION DEPARTMENT

DRAFT NOTIFICATION

8th May, 2015

No. E&T-ETO (Ref.)-2015/1185. The following draft of the amendment which the Administrator, Union Territory, Chandigarh, in exercise of the powers conferred by sub-section (3) of the Section 8 of the Punjab Value Added Tax Act, 2005 (Punjab Act No. 8 of 2005), as extended to the Union Territory, Chandigarh and all other powers enabling him in this behalf, proposal to revise Schedule 'E' appended to the said Act is hereby published for the information of persons likely to be affected thereby.

Notice is hereby given that the said draft amendment will be taken into consideration by the Chandigarh Administration on or after the expiry of 15 days from the date of its publication in the official gazette together with objections or suggestions, if any, which may be received by the Excise and Taxation Commissioner, Union Territory, Chandigarh from any person with respect to the draft amendment before the expiry of the period so specified:-

DRAFT AMENDMENT

In the said Schedule 'E', at Serial No. 8 and the entries relating thereto, the following rate of tax shall be added, namely;

'8. Diesel 12.225%"

Sarvjit Singh, IAS,
Secretary Excise & Taxation,
Chandigarh Administration.

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NOTIFICATION

NOTIFICATION REGARDING AMENDMENT OF RULE 47

PART III
GOVERNMENT OF PUNJAB
DEPARTMENT OF EXCISE AND TAXATION
(EXCISE AND TAXATION-II BRANCH)

NOTIFICATION

The 15th April, 2015

No. G.S.R. 26/P.A.8/2005/S.70/Amd.(55)/2015.-In exercise of powers conferred by sub section (1) of section 70 of Punjab Value Added Tax Act, 2005 (Punjab Act No. 8 of 2005), and all other powers enabling him in this behalf, the Governor of Punjab is pleased to make the following rules further to amend the Punjab Value Added Tax Rules, 2005, namely:-

RULES

1. (1) These Rules may be called the Punjab Value Added Tax (Amendment) Rules, 2015.

(2) They shall come into force on and with effect from the date of their publication in the Official Gazetee.

2. In the Punjab Value Added Tax Rules, 2005, for rule 47, the following rule shall be substituted, namely:-

"47. Manner of assessment.-(1) The Commissioner, shall formulate the criteria for making of assessment or provisional assessment, as the case may be, of a person or class of persons, with the approval of the Government from time to time, as it considers expedient.

(2) No Designated officer shall take up any case falling under sub-section (2) of section 29 or otherwise for making of assessment or provisional assessment, as the case may be, without the prior approval of the Commissioner.

(3) The cases to be taken up for assessment or provisional assessment, as the case may be, during a financial year, shall be displayed on the website of the Department.

(4) A notice to the person concerned shall be issued, for assessment or provisional assessment, as the case may be, clearly stating the grounds for the proposed assessment, period for which such assessment is to be made, record to be produced by him, date, time and place, for conduct of such assessment:

Provided that the period of notice, shall not be less than ten working days in any case, for production of relevant record so specified in the said notice.

(5) A person, upon whom a notice has been served under sub-rule (4), shall produce all relevant documents, on the specified date and time, alongwith his objections in writing if any, alongwith sufficient evidence in support thereof."

D.P. REDDY
Financial Commissioner Taxation and
Secretary to Government of Punjab,
Department of Excise and Taxation.

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NOTIFICATION

PUNJAB GOVT. NOTIFICATION – INSTITUTION TAX

PART III

GOVERNMENT OF PUNJAB

DEPARTMENT OF HOUSING AND URBAN DEVELOPEMENT

(Housing-II Branch)

NOTIFICATION

The 20th February, 2015

No. S.O.7/P.A.9/2011/S.3/2015. – In partial modification of Notification of the Government of Punjab, Department of Housing and Urban Development, issued *vide* No. S.O. 14/P.A.9/2011/S.3/2013, dated the 28th February, 2013 and in pursuance of the provisions of sub-section (1) of section 3 of the Punjab (Institutions and other Buildings) Tax Act, 2011 (Punjab Act No. 9 of 2011) and all other powers enabling him in this behalf, the Governor of Punjab is pleased to levy tax per square feet per annum on Institutions and Buildings, to be calculated on the basis of multiple factors given in the below mentioned tables:-

A. Location of the Building and its proximity to the nearby urban area(s).

TABLE

Sr.No.	ZONE	Rate of Tax Square Feet
1	Outside M.C. Limits of Ludhiana upto 15 Kms	Rs. 1.25
2	Outside M.C. Limits of Jalandhar upto 10 Kms	Rs. 1.25
3	Outside M.C. Limits of Amritsar, Patiala, Khanna, Rajpura, Mandi Gobindgarh, Sirhind and Phagwara upto 7 Kms.	Rs.1.25
4	Outside M.C. Limits of Bathinda, Moga, Batala, Pathankot Barnala, Malerkotla, Morinda, Hoshiarpur upto 5 Kms	Rs.1.00
5	Outside M.C. Limits of Sangur, Sunam, Nabha, Faridkot Kotkapura, Ferozepur, Malout, Abohar, Sri Muktsar Sahib Kapurthala, Saheed Bhagat Singh Nagar, Roopnagar, Tarn Taran Gurdaspur, Samana, Jagroan, Mansa, Lalru and Kurali upto 3 Kms.	Rs. 1.00
6	Outside M.C. Limits of NH-1 upto 500 metres on both sides Outside any potential zone all other NH (Except NH-1) SH/Scheduled Roads upto 1 Kms both sides of any potential zone	Rs. 1.25
7	Master Plan area of SAS Nagar, Mullanpur, Zirakpur, (Outside M.C. Limits)	Rs. 1.25
8	Master Plan Area of Kharar, Dera Bassi, Banur, (Outside M.C	Rs. 1.25

	Limits)	
9	Rest of Punjab (Outside M.C. Limits)	

Note: **I.** In case an Institution or a building falls in more than one zone (over lapping zones) in that case, an average of rate of two zones shall be levied.

II. In case site falls in two or more zones, then proportionate charges as applicable in each zone shall be levied.

III. In case an institution or a building is constructed during the mid of a financial year, the tax shall be charged on prorate basis.

IV. For the current Financial year (2014-2015), calculation shall be done on prorate basis.

Annual Institutional Tax (Rs.) – Covered Area (in sq.ft.) x Rate prescribed in Table number 1 x Factors as mentioned below:-

The above charges shall be enhanced/decreased based on following factors:-

B. Usage Factors:

Sr. No.	Nature of its use	Multiplication factor
1	Commercial	1.25
2	Institutional including Hotel, Marriage Palaces, Hospitals	1.0
3	Industrial and other purposes	0.75

C Land Value Factor:

Sr. No.	Collector rate per acre	Multiplication factor
1	> 1 Crore	1.00
2	50 Lacs to 1 crore	0.90
3	< 50 Lacs	0.75

D Type of building and cost of construction of Building Factor:

Sr. No.	Type of the building	Multiplication factor
1	Building with RCC Roof	1.0
2	Building with non-RCC Roof	0.75

E Rental Value Factor:

Sr. No.	Occupation/user of the Building	Multiplication factor
1	Own (Self)	0.75
2	Rented	1.0

Illustrative example for clarification purpose: The details of the building having an area of 1,00,000 sq. ft. Is as under:

Sr.	Criteria	Details of building	Rate of tax/ multiplication factor

1	Cover Area	1,00,000 sq. Ft.	
2.	Location of the building and its proximity to nearby urban area	Location outside M.C. Limits of Ludhiana upto 15 Km	1.25 per sq. Ft.
3.	Usage factor	Hospital	1.0
4.	Land Value Factor	Collector Rate	1.0
		Rs. 1.5 cores/acre	
5.	Type of building and cost of construction	Building with RCC roof	1.0
6.	Rental Value Factor	Own (self)	0.75
	Annual Tax		100000x1.25x1.0x1.0x 1.0x1.0x0.75= Rs. 93,750/-

VISWAJEET KHANNA,
Principal Secretary to Government of Punjab,
Department of Housing and Urban Development.

NOTIFICATION

CHANDIGARH ADMINISTRATION – RATE NOTIFICATION

CHANDIGARH ADMINISTRATION
EXCISE & TAXATION DEPARTMENT
NOTIFICATION
The 17th April, 2015

No. E&T-ETO (Ref.)- 2015/991 With reference to the Chandigarh Administration. Excise & Taxation Department's Notification bearing No. E&T/ETO(Ref.)-2015/860 dated 31st March, 2015 and in exercise of the powers conferred by sub-section (3) of the Section 8 of the Punjab Value Added Tax Act, 2005 (Punjab Act No. 8 of 2005), as extended to the Union Territory, Chandigarh and all other powers enabling him in this behalf, the Administrator, Union Territory, Chandigarh, hereby makes the following amendments in Schedule 'A', Schedule 'B', Schedule 'C', Schedule 'C-1', Schedule 'E' and Schedule 'F' appended to the said Act w.e.f. 18th April, 2015 namely:-

AMENDMENT

1. In the said Schedule 'B', in Serial No. 60 and entries relating thereto, item namely "Cell Phone" shall be omitted;
2. In the said Schedule 'C-1', item namely "Pulses", thereto shall be omitted;
3. In the said Schedule 'F', the items namely, "batteries" and "Timber" shall be omitted;
4. In the said Schedule 'A', after Serial No. 65 and the entries relating thereto, the following Serial number and item shall be added, namely;
5. In the said Schedule 'B', after Serial No. 156 and the entries relating thereto, the following serial Number and item shall be added, namely;
   "157. Timber"
6. In the said Schedule 'C', after Serial No. 4 and the entries relating thereto, the following Serial number and item shall be added namely;
   "5. Pulses"
7. In the said Schedule 'E', after Serial No. 8 and the entries relating thereto, the following Serial numbers, items and rate of taxes shall be added, namely;
   "9. Batteries - 14.30%''
   "10. Mobiles - 9.35''

Sd/-
Sarvjit Singh, IAS,
Secretary Excise & Taxation,
Chandigarh Administration

PUBLIC NOTICE

EXTENTION OF DATE OF FILING OF VAT-15 OF Q4 OF 2014-15

GOVERNMENT OF PUNJAB

DEPARTMENT OF EXCISE & TAXATION

PUBLIC NOTICE

KIND ATTENTION: DEALERS/CHARTERED ACCOUNTANTS/LAWYERS/OTHER STAKEHOLDERS

This is to inform all the concerned that the last date of e-filing of VAT-15 for the 4th Quarter of 2014-15 has been extended till 4th May, 2015.

Dated: 29th April, 2015

Excise & Taxation Commissioner, Punjab

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PUBLIC NOTICE

THE CONSTITUTION (ONE HUNDRED AND TWENTY-SECOND AMENDMENT BILL, 2014

A

BILL

further to amend the Constitution of India.

BE it enacted by Parliament in the Sixty-fifth Year of the Republic of India as follows:—

1. *Short title and commencement.*

(1) *This Act may be called the Constitution (One Hundred and Twenty-second Amendment) Act, 2014.*

(2) *It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the commencement of that provision.*

2. *Insertion of new article 246A*

After article 246 of the Constitution, the following article shall be inserted, namely:—

Special provision with respect to goods and services tax

"246A. (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5), of article 279A, take effect from the date recommended by the Goods and Services Tax Council.''.

3. *Amendment of article 248.*

In article 248 of the Constitution, in clause (1), for the word "Parliament", the words, figures and letter "Subject to article 246A, Parliament" shall be substituted.

4. *Amendment of article 249*

In article 249 of the Constitution, in clause (1), after the words "with respect to", the words, figures and letter"goods and services tax provided under article 246A or" shall be inserted.

5. ***Amendment of article 250.***

In article 250 of the Constitution, in clause (1), after the words "with respect to", the words, figures and letter "goods and services tax provided under article 246A or" shall be inserted.

6. ***Amendment of article 268.***

In article 268 of the Constitution, in clause (1), the words "and such duties of excise on medicinal and toilet preparations" shall be omitted.

7. ***Omission of article 268A.***

Article 268A of the Constitution, as inserted by section 2 of the Constitution (Eighty-eighth Amendment) Act, 2003 shall be omitted.

8. ***Amendment of article 269.***

In article 269 of the Constitution, in clause (1), after the words "consignment of goods", the words, figures and letter "except as provided in article 269A" shall be inserted.

9. ***Insertion of new article 269A***

After article 269 of the Constitution, the following article shall be inserted, namely:—

Levy and collection of goods and services tax in course of interState trade or commerce.

''269A. (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.''.

10. ***Amendment of article 270.***

In article 270 of the Contitution,—

(i) in clause (1), for the words, figures and letter "articles 268, 268A and article 269", the words, figures and letter "articles 268, 269 and article 269A" shall be substituted;

(ii) after clause (1), the following clause shall be inserted, namely:—

''(1A) The goods and services tax levied and collected by the Government of India, except the tax apportioned with the States under clause (1) of article 269A, shall also be distributed between the Union and the States in the manner provided in clause (2).''.

11. ***Amendment of article 271***

In article 271 of the Constitution, after the words ‘‘in those articles’’, the words, figures and letter ‘‘except the goods and services tax under article 246A,’’ shall be inserted.

12. After article 279 of the Constitution, the following article shall be inserted, namely:—

‘‘279A. (1) ***The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and Twenty-second Amendment) Act, 2014, by order, constitute a Council to be called the Goods and Services Tax Council.***

(2) ***The Goods and Services Tax Council shall consist of the following members, namely:—***

(a) ***the Union Finance Minister..... Chairperson;***

(b) ***the Union Minister of State in charge of Revenue or Finance..... Member;***

(c) ***the Minister in charge of Finance or Taxation or any other Minister nominated by each State Government.....Members.***

(3) ***The Members of the Goods and Services Tax Council referred to in sub-clause (c) of clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.***

(4) ***The Goods and Services Tax Council shall make recommendations to the Union and the States on—***

(a) ***the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;***

(b) ***the goods and services that may be subjected to, or exempted from the goods and services tax;***

(c) ***model Goods and Services Tax Laws, principles of levy, apportionment of Integrated Goods and Services Tax and the principles that govern the place of supply;***

(d) ***the threshold limit of turnover below which goods and services may be exempted from goods and services tax;***

(e) ***the rates including floor rates with bands of goods and services tax;***

(f) ***any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;***

(g) ***special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and***

(h) ***any other matter relating to the goods and services tax, as the Council may decide.***

(5) ***The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.***

(6) ***While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of goods and services tax and for the development of a harmonised national market for goods and services.***

(7) ***One half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.***

(8) ***The Goods and Services Tax Council shall determine the procedure in the performance of its functions. Insertion of new article 279A. Goods and Services Tax Council.***

(9) ***Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:—***

(a) ***the vote of the Central Government shall have a weightage of onethird of the total votes cast, and***

(b) ***the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.***

(10) ***No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of—***

(a) ***any vacancy in, or any defect in, the constitution of the Council; or***

(b) ***any defect in the appointment of a person as a member of the Council; or***

(c) ***any procedural irregularity of the Council not affecting the merits of the case.***

(11) ***The Goods and Services Tax Council may decide about the modalities to resolve disputes arising out of its recommendation.".***

13. ***Amendment of article 286.***

In article 286 of the Constitution,—

(i) in clause (1),—

(A) for the words "the sale or purchase of goods where such sale or purchase takes place", the words "the supply of goods or of services or both, where such supply takes place" shall be substituted;

(B) in sub-clause (b), for the word "goods", at both the places where it occurs the words "goods or services or both" shall be substituted;

(ii) in clause (2), for the words "sale or purchase of goods takes place", the words "supply of goods or of services or both" shall be substituted;

(iii) clause (3) shall be omitted.

14. ***Amendment of article 366***

In article 366 of the Constitution,—

(i) after clause (12), the following clause shall be inserted, namely:—

'(12A) "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption;';

(ii) after clause (26), the following clauses shall be inserted, namely:—

'(26A) "Services" means anything other than goods;

(26B) "State" with reference to articles 246A, 268, 269, 269A and article 279A includes a Union territory with Legislature;'.

15. ***Amendment of article 368***

In article 368 of the Constitution, in clause (2), in the proviso, in clause (a), for the words and figures "article 162 or article 241", the words, figures and letter "article 162, article 241 or article 279A" shall be substituted.

16. ***Amendment of Sixth Schedule***

In the Sixth Schedule to the Constitution, in paragraph 8, in sub-paragraph (3),—

(i) in clause (c), the word "and" occurring at the end shall be omitted;

(ii) in clause (d), the word "and" shall be inserted at the end;

(iii) after clause (d), the following clause shall be inserted, namely:—

"(e) taxes on entertainment and amusements.".

17. ***Amendment of Seventh Schedule.***

In the Seventh Schedule to the Constitution,—

(a) in List I — Union List,—

(i) for entry 84, the following entry shall be substituted, namely:—

"84. Duties of excise on the following goods manufactured or produced in India, namely:—

(a) petroleum crude;

(b) high speed diesel;

(c) motor spirit (commonly known as petrol);

(d) natural gas;

(e) aviation turbine fuel; and

(f) tobacco and tobacco products.";

(ii) entries 92 and 92C shall be omitted;

(b) in List II — State List,—

(i) entry 52 shall be omitted;

(ii) for entry 54, the following entry shall be substituted, namely:—

"54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods.";

(iii) entry 55 shall be omitted;

(iv) for entry 62, the following entry shall be substituted, namely:—

"62. Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or a Municipality or a Regional Council or a District Council.".

18. *Arrangement for assignment of additional tax on supply of goods to States for two years or such other period recommended by the Council.*

(1) An additional tax on supply of goods, not exceeding one per cent. in the course of inter-State trade or commerce shall, notwithstanding anything contained in clause (1) of article 269A, be levied and collected by the Government of India for a period of two years or such other period as the Goods and Services Tax Council may recommend, and such tax shall be assigned to the States in the manner provided in clause (2).

(2) The net proceeds of additional tax on supply of goods in any financial year, except the proceeds attributable to the Union territories, shall not form part of the Consolidated Fund of India and be deemed to have been assigned to the States from where the supply originates.

(3) The Government of India may, where it considers necessary in the public interest, exempt such goods from the levy of tax under clause (1).

(4) Parliament may, by law, formulate the principles for determining the place of origin from where supply of goods take place in the course of inter-State trade or commerce.

19. *Compensation to States for loss of revenue on account of introduction of goods and services tax*

Parliament may, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for such period which may extend to five years.

20. *Transitional provisions*

Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be inforce until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier.

21. *Power of President to remove difficulties*

(1) If any difficulty arises in giving effect to the provisions of the Constitution as amended by this Act (including any difficulty in relation to the transition from the provisions of the Constitution as they stood immediately before the date of assent of the President to this Act to the provisions of the Constitution as amended by this Act), the President may, by order, make such provisions, including any adaptation or modification of any provision of the Constitution as amended by this Act or law, as appear to the President to be necessary or expedient for the purpose of removing the difficulty:

Provided that no such order shall be made after the expiry of three years from the date of such assent.

(2) Every order made under sub-section (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

STATEMENT OF OBJECTS AND REASONS

The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.

2. The proposed Bill, which seeks further to amend the Constitution, inter alia, provides for—

(a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services;

(b) subsuming of State Value Added Tax/Sales Tax, Entertainment Tax (other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry tax, Purchase Tax, Luxury tax, Taxes on lottery, betting and gambling; and State cesses and surcharges in so far as they relate to supply of goods and services;

(c) dispensing with the concept of 'declared goods of special importance' under the Constitution;

(d) levy of Integrated Goods and Services Tax on inter-State transactions of goods and services;

(e) levy of an additional tax on supply of goods, not exceeding one per cent. in the course of inter-State trade or commerce to be collected by the Government of India for a period of two years, and assigned to the States from where the supply originates;

(f) conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and services tax;

(g) coverage of all goods and services, except alcoholic liquor for human consumption, for the levy of goods and services tax. In case of petroleum and petroleum products, it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.

(h) compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period which may extend to five years;

(i) creation of Goods and Services Tax Council to examine issues relating to goods and services tax and make recommendations to the Union and the States on parameters like rates, exemption list and threshold limits. The Council shall function under the Chairmanship of the Union Finance Minister and will have the Union Minister of State in charge of Revenue or Finance as member, along with the Minister in-charge of Finance or Taxation or any other Minister nominated by each State Government. It is further provided that every decision of the Council shall be taken by a majority of 7 8 not less than three-fourths of the weighted votes of the members present and voting in accordance with the following principles:—

(A) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and

(B) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast in that meeting.

Illustration:

In terms of clause (9) of the proposed article 279A, the "weighted votes of the members present and voting" in favour of a proposal in the Goods and Services Tax Council shall be determined as under:—

WT = WC+WS Where,

WT = WC + WS =(WST/SP) × SF

Wherein—

WT = Total weighted votes of all members in favour of a proposal.

WC = Weighted vote of the Union = i.e., 33.33% if the Union is in favour of the proposal and be taken as "0" if, Union is not in favour of a proposal.

WS = Weighted votes of the States in favour of a proposal.

SP = Number of States present and voting.

WST = Weighted votes of all States present and voting i.e., i.e., 66.67%

SF = Number of States voting in favour of a proposal.

(j) Clause 20 of the proposed Bill makes transitional provisions to take care of any inconsistency which may arise with respect to any law relating to tax on goods or services or on both in force in any State on the commencement of the provisions of the Constitution as amended by this Act within a period of one year.

3. the Bill seeks to achieve the above objects.

ARUN JAITLEY

NEW DELHI;

The 18th December, 2014

———————

PRESIDENT'S RECOMMENDATION UNDER ARTICLE 117 OF THE CONSTITUTION OF INDIA

[Copy of letter No. S-31011/07/2014-SO(ST), dated the 18th December, 2014 from Shri Arun Jaitley, Minister of Finance to the Secretary-General, Lok Sabha.]

The President, having been informed of the subject matter of the proposed Bill, recommends under clauses (1) and (3) of article 117, read with clause (1) of article 274, of the Constitution of India, the introduction of the Constitution (One Hundred and Twenty-second Amendment) Bill, 2014 in Lok Sabha and also the consideration of the Bill.

FINANCIAL MEMORANDUM

Clause 12 of the Bill seeks to insert a new article 279A in the Constitution relating to Constitution of Goods and Services Tax Council. The Council shall function under the Chairmanship of the Union Finance Minister and will have the Union Minister of State incharge of Revenue or Finance as member, along with the Minister in-charge of Finance or Taxation or any other Minister nominated by each State Government.

2. The creation of Goods and Services Tax Council will involve expenditure on office expenses, salaries and allowances of the officers and staff. The objective that the introduction of goods and services tax will make the Indian trade and industry more competitive, domestically as well as internationally and contribute significantly to the growth of the economy, such additional expenditure on the Council will not be significant.

3. At this stage, it will be difficult to make an estimate of the expenditure, both recurring and non-recurring on account of the Constitution of the Council.

4. Further, it is provided for compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for such period which may extend to five years. The exact compensation can be worked out only when the provisions of the Bill are implemented.

MEMORANDUM REGARDING DELEGATED LEGISLATION

Clause 12 of the Bill seeks to insert a new article 279A relating to the constitution of a Council to be called the Goods and Services Tax Council. Clause (1) of the proposed new article 279A provides that the President, shall within sixty days from the date of the commencement of the Constitution (One Hundred and Twenty-second Amendment) Act, 2014, by order, constitute a Council to be called the Goods and Services Tax Council. Clause (8) of the said article provides that the Council shall determine the procedure in the performance of its functions.

2. The procedures, as may be laid down by the Goods and Services Tax Council in the performance of its functions, are matters of procedure and details. The delegation of legislative power is, therefore, of a normal character.

ANNEXURE

EXTRACTS FROM THE CONSTITUTION OF INDIA

* * * * *

248. ***Residuary powers of legislation***

(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

* * * * *

249. ***Power of Parliament to legislate with respect to a matter in the State List in the national interest.***

(1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

* * * * *

250. ***Power of Parliament to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation***

(1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

* * * * *

Distribution of Revenues between the Union and the States

268. ***Duties levied by the Union but collected and appropriated by the States***

(1) Such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied by the Government of India but shall be collected—

(a) in the case where such duties are leviable within any Union territory, by the Government of India, and

(b) in other cases, by the States within which such duties are respectively leviable.

* * * * *

268A. ***Service tax levied by Union and collected and appropriated by the Union and the States***.

(1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States, in the manner provided in clause (2).

(2) The proceeds in any financial year of any such tax levied in accordance with the provisions of clause (1) shall be—

(a) collected by the Government of India and the States;

(b) appropriated by the Government of India and the States,

in accordance with such principles of collection and appropriation as may be formulated by Parliament by law.

269. ***Taxes levied and collected by the Union but assigned to the States***

(1) Taxes on the sale or purchase of goods and taxes on the consignment of goods shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).

Explanation.—For the purposes of this clause,—

(a) the expression "taxes on the sale or purchase of goods" shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce;

(b) the expression "taxes on the consignment of goods" shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

* * * * *

270. ***Taxes levied and distributed between the Union and the States***

(1) All taxes and duties referred to in the Union List, except the duties and taxes referred to in articles 268, 268A and 269, respectively, surcharge on taxes and duties referred to in article 271 and any cess levied for specific purposes under any law made by Parliament shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided in clause (2).

* * * * *

271. ***Surcharge on certain duties and taxes for purposes of the Union***

Notwithstanding anything in articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

* * * * *

286. ***Restrictions as to imposition of tax on the sale or purchase of goods***

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,—

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29A) of article 366,

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

* * * * *

PART XX

AMENDMENT OF THE CONSTITUTION

368. ***Power of Parliament to amend the Constitution and procedure therefore***

(1) * * * * *

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162 or article 241, or Taxes levied and distributed between the Union and the States. Surcharge on certain duties and taxes for purposes of the Union. Restrictions as to imposition of tax on the sale or purchase of goods. Power of Parliament to amend the Constitution and procedure therefore. 13

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than onehalf of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

* * * * *

SIXTH SCHEDULE

[Articles 244(2) and 275(1)]

Provisions as to the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram

* * * * *

8. *Powers to assess* and collect land revenue and to impose taxes.

(1) * * * * *

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say—

* * * * *

(c) taxes on the entry of goods into a market for sale therein, and tolls on passengers and goods carried in ferries; and

(d) taxes for the maintenance of schools, dispensaries or roads.

* * * * *

SEVENTH SCHEDULE

(Article 246)

List I- Union List

* * * * *

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

* * * * *

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

* * * * *

92C. Taxes on services.

List II-State List

* * * * *

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

* * * * *

Powers to assess and collect land revenue and to impose taxes.

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.

55. Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television.

* * * * *

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

* * * * *

LOK SABHA

A

BILL

further to amend the Constitution of India.

(Shri Arun Jaitley, Minister of Finance)

GMGIPMRND—3824LS—18.12.2014

LOK SABHA

CORRIGENDA

to

THE CONSTITUTION (ONE HUNDRED AND TWENTY-SECOND AMENDMENT) BILL, 2014

[To be/As introduced in Lok Sabha]

1. Page 2, line 32,

for "Contitution,–"

read "Constitution,–"

2. Page 4, line 16,

for "of its recommendation."."

read "of its recommendations."."

3. Page 5, in the marginal citation against clause 18,

for "by the Council."

read "by Council."

4. Page 8, omit line 11.

NEW DELHI;

December 19, 2014

Agrahayana 28, 1936 (Saka)