SGA
LAW OFFICES

**Issue 10**
**16 May 2016**

***"Everyone wants to live at expense of the state.***
***They forget that the state wants to live at the expense of everyone"***

—Frederic Bastiat

# NOMINAL INDEX



# NOTIFICATION

## PUNJAB



## HARYANA



# NEWS OF YOUR INTEREST



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# News From Court Rooms

**UTTARAKHAND HC:** It was held that in hiring, the control is kept by the owner of vehicle as the vehicle is given with the driver. In renting the control of vehicle is transferred though temporarily, to the hirer The hirer is endowed with the freedom to take vehicle, where ever he wishes. Hence, hiring is not renting and on that activity Service Tax is not payable - reiterated in *CCE vs RS Travels(2015) CCE vs. Sachin Malhotra (2014),*

**CESTAT, HYDERABAD:** Service Tax : Merely because amount of tax paid is shown as expenditure, it cannot be concluded that incidence of duty was passed onto buyers; hence, doctrine of unjust enrichment would not apply to deny refunds merely because tax amount was written off in Profit & Loss Account. *(Balaji Pressure Vessels P ltd. – January 29, 2016).*

**CESTAT, HYDERABAD:** Service Tax: Merely because amount of tax paid is shown as expenditure, it cannot be concluded that incidence of duty was passed onto buyers; hence, doctrine of unjust enrichment would not apply to deny refunds merely because tax amount was written off in Profit & Loss Account. *(Balaji Pressure Vessels P ltd. – January 29, 2016).*

**GUJARAT HC:** Gujarat VAT : Where assessee was engaged in manufacture of cement and it claimed input tax credit on purchases of pet coke used as raw material in manufacture of cement, since pet coke was not used as fuel but was used as raw material, amount of tax credit in respect of pet coke was not required to be reduced by four per cent as contemplated under section 11(3)(b)(iii). Revenue's appeal dismissed. *(Balram Cement Ltd. – March 8, 2016).*

Central Excise : If service tax has been wrongly paid on activity amounting to manufacture, then, while determining demand of central excise duty, service tax already paid may be adjusted and only net amount would be demanded. *(Hyva India P Ltd. – February 17, 2016)*

**MADRAS HC:** CST: Where assessee was registered with Development Commissioner, Madras Export Processing Zone as EOU to manufacture and export of pharmaceutical preparations and during year 2012 it purchased goods from another EOU after payment of central sales tax, in view of paragraph 6.11 of Foreign Trade Policy 2009-14, it was entitled to refund of tax paid on purchases made from another EOU. *(Hospira Health Care India (P.) Ltd. – March 30,2016).*

**GUJARAT HC:** Sales Tax : When the goods are being transported through Gujarat without transit pass of Gujarat the authority may seize the goods after detaining the vehicle and such goods may be kept by the authority at any place where it is permissible but the vehicle is required to be released thereafter. *(Tirupati Enterprises – April 22, 2016).*

**BOMBAY HC:** Central Excise : Before initiating garnishee proceedings for recovery of dues of assessee from assessee's debtor under Section 11(2) of the Central Excise Act, 1944, revenue must first of all adjudicate what sums are due to Government. *(Sikkim Ferroys Alloys Ltd. – March 14, 2016).*

**BOMBAY HC:** Customs : Where Adjudicating Authority passed assessment order nearly 16 months after date of personal hearing, since there was no reason for hopelessly delayed order, impugned order was liable to be set aside. *(Excel Production Audio Visuals (P.) Ltd - DECEMBER 21, 2015)*

**GUJARAT HC :** Central Excise : in view of revision in Indo-Nepal Treaty, Notifications issued under Rules 18 and 19 of the Central Excise Rules, 2002 were amended to treat export to Nepal at par with other exports from 1-3-2012 and would not form part of turnover limit of Rs. 400 lakhs or Rs. 150 lakhs for SSI-exemption purposes accordingly, words 'and Nepal' in Explanation (G) to SSI Notification No. 8/2003-CE to treat exports to Nepal as clearance for home consumption, were struck down. *(Ketan Pottery Works – February 4,2016).*

## ENTRYTAX: THE MUCH AWAITED HEARING BY SUPREME COURT

On July 18 this year, a 9-judge Bench of the Supreme Court of India will begin hearing a batch of cases pertaining to entry taxes imposed by various States. These cases have huge tax implications for many states.

Chief Justice TS Thakur made this announcement on 12th May, 2016 while hearing appeals filed by different companies against entry taxes imposed by States.

"These matters have lingered. The time has come we must discuss (this issue)…There is no way we can escape this", he said.

The cases Chief Justice Thakur was referring to were actually referred to a 9-judge Bench way back in 2010 by a Constitution Bench led by Justice SH Kapadia. However, this reference has remained unheard till date!!

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# SUBJECT INDEX


**Issue 10**
**16 May 2016**

# SUPREME COURT OF INDIA

**CIVIL APPEAL NO. 2562 OF 2008**

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**COMMISSIONER OF CENTRAL EXCISE, RAIGAD**
**Vs**
**ISPAT METALLICS INDUSTRIES LTD & ORS.**

**A.K. SIKRI AND ROHINTON FALI NARIMAN, JJ.**

6th May, 2016

**HF ▶ Assessee**

*Raw material procured jointly by two sister concerns under tripartite agreement and transferred from one to another would not amount to sale and assessable value of such transfer of material not to include additional expenses received by one from another.*

**ASSESSABLE VALUE OF GOODS - EXCISE DUTY – TRANSFER OF RAW MATERIAL/GOODS - WHETHER ADDITIONAL EXPENSES TO BE INCLUDED IN ASSESSABLE VALUE – RAW MATERIAL PROCURED FOR MANUFACTURING BY FIRM A – CENVAT CREDIT AVAILED – RAW MATERIAL TRANSFERRED TO FIRM B (SISTER CONCERN) LOCATED ADJACENTLY THROUGH CONVEYOR – CENVAT CREDIT REVERSED EQUAL TO THE AMOUNT SHOWN IN INVOICE ISSUED BY SUPPLIER – DEBIT NOTES RAISED ON FIRM B FOR RECOVERING EXPENSES INCURRED LIKE BANK COMMISSION, INTEREST - TRANSFER ALLEGED TO BE A SALE BY REVENUE AND AMOUNTS RECOVERED IN FORM OF DEBIT NOTES INCLUDED IN ASSESSABLE VALUE OF GOODS – APPEAL BEFORE TRIBUNAL – RAW MATERIAL JOINTLY PROCURED BY SISTER CONCERNS FROM SUPPLIER AS PER TRIPARTITE AGREEMENT – IMPUGNED ORDER REVERSED BY TRIBUNAL HOLDING SUCH TRANSFER COULD NOT BE TERMED AS SALE AS PER CIRCULAR DATED 1/7/2002 AND ASSESSABLE VALUE NOT TO INCLUDE ADDITIONAL CONSIDERATION IN SUCH CASE – APPEAL BEFORE SUPREME COURT – FINDING OF TRIBUNAL BASED ON FACTS – TRANSFER OF RAW MATERIAL FROM ONE SISTER CONCERN TO OTHER IS ONLY A TRANSFER OF GOODS AND NOT SALE – ASSESSABLE VALUE CALCULATED ON BASIS OF VALUE SHOWN IN INVOICE ON WHICH CENVAT CREDIT IS TAKEN BY ASSESSEE IS JUSTIFIED – POST MANUFACTURING EXPENSES CANNOT BE LOADED ON TO THE AMOUNT EQUAL TO THE DUTY OF EXCISE LEVIABLE ON SUCH GOODS – APPEALS DISMISSED-** *RULE 57AB(1C) OF CENTRAL EXCISE RULES,1944 AND RULE 3(4) OF CENVAT CREDIT RULES, 2001, S. 4(1)(A) OF CENTRAL EXCISE ACT, 1944*

***Facts***

*In the present case, firm A is engaged in the manufacture of coils, sheets etc., which are cleared on payment of Excise and credit on Inputs is availed. Adjacent to it, is firm B, its sister concern, which also uses the same raw material as firm A. The raw material was purchased by*

*firm A and was transferred through a conveyor to firm B's premises under cover of an Invoice after reversing the Cenvat Credit availed on the inputs that were transferred. In addition to such invoices, firm A raised Debit Notes on firm B for recovering actual expenditure incurred by it, such as Bank Commission, interest etc. It was alleged as per Rule 57AB(1C) of Central Excise Rules 1944 and Rule 3(4) of Cenvat Credit Rules 2001 that the raw material was actually sold by firm A to firm B and that the amounts recovered by firm A in the form of Debit Notes were includible in the assessable value of such inputs that were cleared. Also the reversal of credit equal to the amount paid to the supplier as done by firm A was not in compliance with law. However, the Tribunal reversed the order of Commissioner holding that the goods were not a sale but only a transfer of raw materials that had been jointly procured by the two sister companies as per the tripartite agreement. Also, a Circular dated 01.07.2002 was applied, by which ,where no sale is involved by one sister to another, the value shown in the invoice on which Cenvat Credit was taken by assessee would be the value for the purpose of Rule 57AB and Rule 3(4). It was further held that the additional consideration could not be added neither post-manufacturing expenses could be added to the Duty leviable on such goods. The invoice value of the supplier alone would be taken into account. Aggrieved by the order, an appeal is filed by the Department before Supreme Court.*

***Held:***

*The contention that the raw materials were only transferred and not sold, has not been dislodged by the Department. The Circular in question makes a distinction between inputs on which credit has been taken which are removed on sale, and those which are removed on transfer. Where the goods are transferred to a sister unit, it is reasonable to adopt the value shown in the invoice on which Cenvat Credit was taken by assessee i.e. the invoice of the supplier of the raw material to the assessee. In the present case, as it is only a transfer and not sale of raw material, no infirmity is found with the decision of Tribunal. As determined by Tribunal that adding post-manufacturing expenses to the Duty of Excise would mean something more, the Supreme has held that the decision of Tribunal is based on finding of fact and it is justified in its finding that the present case is a case of transfer. Thus, the appeals are dismissed.*

**Present:** For Appellant(s): Mr. K. Radhakrishnan, Sr. Advocate
Mr. B. Krishna Prasad, Advocate

For Respondent(s): Mr. V. Lakshmikumaran, Advocate
Mr. M. P. Devanath, Advocate
Mr. Hemant Bajaj, Advocate
Mr. Aditya Bhattacharya, Advocate
Mr. Anandh K., Advocate
Ms. L. Charanaya, Advocate

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**R.F. NARIMAN, J.**

**1.** Two appeals have been filed from a common decision of CESTAT dated 11.10.2005, whereby the Tribunal has upset the order of the Commissioner, confirming various duty demands, penalty and interest.

**2.** The brief facts necessary in order to appreciate the controversy at hand, taken from C.A. No.2562 of 2008, are as follows.

**3.** M/s. Ispat Industries Limited (hereinafter referred to as the "IIL") is engaged in the manufacture of HR coils, sheets, plates, etc., which are cleared on payment of duty of excise. In the manufacture of such goods, it avails credit on inputs such as iron ore pellets. Adjacent to its

plant, another group company, namely, M/s. Ispat Metallics Industries Ltd. (hereinafter referred to as the "IMIL") also has a factory in which pig iron and molten metal are manufactured. The principal raw material for manufacture for both these companies is iron ore pellets. The said pellets were purchased from Mandovi Pellets and Essar Steel Limited. These were carried to the factory of IIL. Credit was availed by IIL of the duty paid on the entire quantity so procured. As and when required by the sister company IMIL, pellets were transferred through a conveyor from IIL's plant to IMIL's premises under cover of an invoice and on reversing an amount equal to the Cenvat credit availed on inputs that were so transferred. In addition to such invoices, IIL also raised debit notes on IMIL for recovering actual expenditure incurred by it in relation to the procuring of such iron ore pellets, such as bank commission, interest, etc.

**4.** The aforesaid two companies were issued show cause notices dated 29.9.2003 and 14.10.2003 respectively. It was alleged that iron ore pellets were sold by IIL to IMIL and that the amounts recovered by IIL in the form of debit notes towards bank charges, interest, etc. were includible in the assessable value of such inputs that were cleared. The notice alleged that the reversal of credit equal to the amount paid to the supplier which was being followed by IIL was not in compliance with law.

**5.** The learned Commissioner upheld the show cause notices stating that the transaction between IIL and IMIL was one of sale and not transfer. Since the goods were reassessed to duty in terms of Rule 57AB(1C) of the Central Excise Rules, 1944 and Rule 3(4) of the Cenvat Credit Rules, 2001, the assessable value in terms of Section 4(1)(a) of the Central Excise Act i.e., the transaction value at the time of clearance plus any additional consideration paid by the buyer at a later stage is to be added and, therefore, the amounts mentioned in the debit note from IIL to IMIL were also includible in the assessable duty valuation as additional consideration. The extended period for limitation was also found to be available on the facts of the present case.

**6.** The Tribunal reversed the aforesaid decision on the ground that the transfer of iron ore pellets by IIL to IMIL was not a sale of goods but was transfer of raw materials, jointly procured, under a joint procurement policy which was followed by the two sister companies and this becomes clear on a reading of the tripartite agreement between the supplier of the pellets, IIL, and IMIL. This being so, the Tribunal applied a circular dated 1.7.2002 by which, where no sale is involved but only a transfer by one sister unit to another, the value shown in the invoice on the basis of which Cenvat credit was taken by the assessee would be the value for the purpose of Rule 57AB and Rule 3(4). It was further held that additional consideration could not be added inasmuch as the amount spoken of in the Rule 57AB and Rule 3(4) is an amount equal to the duty of excise which is leviable on such goods. Post manufacturing expenses cannot possibly amount to a duty of excise leviable on such goods and therefore all amounts paid under the debit notes between IIL and IMIL could not be added to the value of those goods. Further, the invoice value of the supplier alone was to be taken into account and, consequently, the judgment of the learned Commissioner was set aside, not only on merits, but also on limitation, following the judgments of the Tribunal itself and of this Court.

**7.** Shri Radhakrishnan has read to us in detail the show cause notices and the Commissioner's judgment dated 24.12.2004, which is strongly relied upon by him in support of his case. It is his case that a proper reading of the relevant rules would make it clear that what has to be seen is transaction value under Section 4(1)(a) of the Central Excise Act and not invoice value of the supplier of the iron ore pellets. This being so, according to him, the learned Commissioner is right in his reasoning and the Tribunal's judgment should be reversed.

**8.** Shri V. Lakshmikumaran, the learned counsel, on the other hand supported the decision of the Tribunal and argued that on a reading of the Rules the rate applicable to such goods would be as on the date of removal but value would necessarily be that determined for

such goods under Section 4 or 4A of the Central Excise Act which would be the invoice value of the iron ore pellets cleared by the supplier of those pellets. He relied strongly on the circular dated 1.7.2002, which was also relied upon by the Tribunal, and further went on to argue that there was no suppression of facts in this case and, hence, the extended period of limitation could not possibly have been applied to the facts of this case.

**9.** Having heard the learned counsel for the parties, it is important to first set out the relevant rules. Rule 57AB(1C) of the Central Excise Rules, 1944 and Rule 3(4) of the Cenvat Credit Rules, 2001 as they read at the relevant time, read as follows:-

> *"57(1C) When inputs or capital goods, on which credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under Section 4 of the said Central Excise Act, and such removal shall be made under the cover of an invoice referred to in rule 52A."*
>
> *Rule 3(4) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the duty of excise which is leviable on such goods at the rate applicable to such goods on the date of such removal and on the value determined for such goods under Section 4 or Section 4A of the Act, as the case may be, and such removal shall be made under the cover of an invoice referred to in rule 7."*

**10.** The Tribunal being the last forum of appreciation of facts has held that transfer of iron ore pellets by IIL to IMIL was not a sale of goods but was only a transfer of raw materials procured under the Tripartite Agreement between the two of them and the supplier of the said pellets. This is a pure finding of fact and Shri Radhakrishnan has not been able to dislodge this finding of fact. This being the case, the application of the circular of 1.7.2002 becomes important. Paragraph 14 of the said circular reads as under:-

| | | |
|---|---|---|
| 14. | How will valuation be done when inputs or capital goods, on which CENVAT credit has been taken are removed as such from the factory, under the erstwhile sub rule (1C) of rule 57AB of the Central Excise Rules, 1944, or under rule 3(4) of the Cenvat Credit Rules, 2001 or 2002 ? | Where inputs or capital goods, on which credit has been taken, are removed as such on sale, there should be no problem in ascertaining the transaction value by application of sec.4(1)(a) or the Valuation Rules. [Provided tariff values have not been fixed for the inputs or they are not assessed under Section 4A on the basis of MRP]<br><br>There may be cases where the inputs or capital goods are removed as such to a sister unit of the assessee or to another factory of the same company and where no sale is involved. It may be noticed that sub rule (1C) of Rule 57AB of the erstwhile Central Excise Rules, 1944 and Rule 3(4) of the Cenvat Credit Rules 2001 (now 2002, talk of determination of value for |

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|---|---|---|
| | | "such goods" and not the "said goods". Thus, if the assessee partly sells the inputs to independent buyers and partly transfers to its sister units, the transaction value of "such goods" would be available in the form of the transaction value of inputs sold to an unrelated buyer (if the sale price to the unrelated buyer varies over a period of time, the value nearest to the time of removal should be adopted).<br><br>Problems will, however, arise where the assessee does not sell the inputs/ capital goods to any independent buyer and the only removal of such input/ capital goods, outside the factory, is in the nature of transfer to a sister unit. In such a case proviso to rule 9 will apply and provisions of rule 8 of the valuation rules would have to be invoked. However, this would require determination of the 'cost of production or manufacture', which would not be possible since the said inputs/ capital goods have been received by the assessee from outside and have not been produced or manufactured in his factory. Recourse will, therefore, have to be taken to the residuary rule 11 of the valuation rules and the value determined using reasonable means consistent with the principles and general provisions of the valuation rules and sub-section (1) of sec. 4 of the Act. In that case it would be reasonable to adopt the value shown in the invoice on the basis of which CENVAT credit was taken by the assessee in the first place. In respect of capital goods adequate depreciation may be given as per the rates fixed in letter F No. 495/16/93-Cus.VI dated 26 5 93 issued on the Customs side. |

**11.** A reading of this circular makes it clear that a distinction is made between inputs on which credit has been taken which are removed on sale, and those which are removed on transfer. If removed on sale, "transaction value" on the application of Section 4(1)(a) of the valuation rules is to be looked at. However, where the goods are entirely transferred to a sister unit, it is reasonable to adopt the value shown in the invoice on the basis of which Cenvat Credit was taken by the assessee i.e. the invoice of the supplier of the pellets to the assessee.

**12.** As it is clear that the present is a case of transfer and not sale of pellets, no infirmity can be found with the Tribunal's judgment, which only follows the circular dated 1.7.2001. In addition, the Tribunal was also correct in holding that post manufacturing expenses cannot be loaded on to the amount equal to the duty of excise leviable on such goods as this amount would, then, cease to be an amount equal to the duty of excise but would be something more. On both these counts therefore, we find that the Tribunal is justified in its finding on law, which is based on its finding of fact that the present is a case of transfer and not sale. This being the case, it is unnecessary to consider any of the other submissions made by the learned counsel including the point of limitation. The appeals are, accordingly, dismissed.

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# SUPREME COURT OF INDIA

**CIVIL APPEAL NO. 5899 OF 2006**

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**ASIAN PAINTS (INDIA) LTD.**
**Vs**
**STATE OF KARNATAKA & ORS.**

**A.K. SIKRI AND ROHINTON FALI NARIMAN, JJ.**

14th March, 2016

**HF ▶ Assessee**

*A registered dealer is permitted to collect Entry Tax from its customers which is not included in its turnover.*

**TURNOVER – ENTRY TAX – COLLECTION OF TAX - WHETHER ENTRY TAX COLLECTED BY REGISTERED DEALER FORMS PART OF TURNOVER – ENTRY TAX COLLECTED BY REGISTERED DEALER – AMOUNT COLLECTED AS ENTRY TAX INCLUDED IN TURNOVER BY ASSESSING OFFICER FOR PURPOSE OF LEVY OF SALES TAX – DISMISSAL OF APPEAL BY HIGH COURT HOLDING THAT REGISTERED DEALER NOT AUTHORIZED TO COLLECT ENTRY TAX - APPEAL BEFORE SUPREME COURT – HELD: S. 3-A OF ENTRY TAX ACT AUTHORIZES A REGISTERED DEALER TO COLLECT ENTRY TAX WHICH SHALL NOT FORM PART OF HIS TURNOVER AND ONLY LIMITS THE RATE AT WHICH IT CAN BE COLLECTED – BAR TO COLLECT TAX IS ONLY ON UNREGISTERED DEALER UNDER THE RELEVANT SECTION – APPEAL ALLOWED - *S . 3-A OF KERELA ENTRY TAX ACT, 1957***

***Facts***

*The appellant is engaged in manufacturing and sale of paints and is registered under the Sales Tax Act. The appellant had claimed that entry tax amounts collected separately from its customers in sale bills and paid to government will not form part of turnover so as to be subjected to levy of sales tax under the Act. However, the department treated entry tax collected as part of turnover and on that sales tax was levied. This view was upheld by High court. Thus, an appeal is filed before Supreme Court.*

***Held:***

*After perusal of S. 3-A of the Entry Tax Act, it is clear that High Court has taken an erroneous view regarding the said section that it does not authorize the registered dealers to collect entry tax. The embargo is only on unregistered dealers meaning thereby that registered dealers are authorized to collect entry tax. Sub section 1 of the said section bars the registered dealers to collect tax at a rate exceeding the specified rates. Hence, a registered dealer can collect entry tax which shall not form part of his turnover. The appeal is allowed..*

***Case referred:***

- *Anand Swarup Mahesh Kumar v. Commissioner of Sales Tax [1980 (4) SCC 451]*

***Case followed:***

- *R.S. Joshi etc. v. Ajit Mills Ltd. and Another etc [1977 (4) SCC 98]*

**Present:** For Appellant(s): Ms. Chinmayee Chandra, Advocate
Mrs. Nandini Gore, Advocate

For Respondent(s): Mr. K. N. Bhat, Sr. Advocate
Mr. V. N. Raghupathy, Advocate
Mr. Parikshit P. Angadi, Advocate

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**A.K. SIKRI, J.**

**1.** The appellant herein is engaged in the business of manufacture and sale of paints and is registered as a dealer under the provisions of Karnataka Sales Tax Act, 1957 (hereinafter referred to as 'KST Act'). It has been paying entry tax under the provisions of Karnataka Tax on Entry of Goods Act, 1979 (hereinafter referred to as 'KTEG Act') as well. In relation to the sales tax assessment under the provisions of KST Act for the periods 1992-1993 and 1993-1994, the appellant had claimed that entry tax amounts collected separately from the customers in the sale bills and paid to the Government will not form part of turnover so as to be subjected to levy of sales tax under the KST Act.

**2.** This contention of the appellant was not accepted and the entry tax so collected by the appellant from the customers was treated as part of turnover and, on that, sales tax was also levied by the Assessing Officer. This view taken by the Assessing Officer was upheld by the High Court as well in the impugned judgment.

**3.** For proper understanding of the matter, we reproduce the provisions of Section 3A of the KTEG Act which reads as under:

> *"Section 3-A. Collection of tax by registered dealer –*
>
> *(1) A person who is not a registered dealer shall not collect any amount by way of tax or purporting to be by way of tax under this Act, nor shall a registered dealer collect any amount by way of tax or purporting to be by way of tax at a rate or rates exceeding the rate or rates specified in a notification issued under Section 3.*
>
> *(2) No dealer shall collect any amount by way of tax or purporting to be by way of tax in respect of the entry of any goods on which no tax is payable by him under the provisions of this Act."*

**4.** It cannot be disputed that when a registered dealer is authorised to collect any amount by way of tax, that tax shall not form part of turnover. It has been so decided by this Court in ***M/s. Anand Swarup Mahesh Kumar v. Commissioner of Sales Tax*** [1980(4) SCC 451], as is clear from the following discussion contained in the said judgment:

> *"13. The argument urged on behalf of the appellant is that when a dealer who in this case happens to be a commission agent is permitted by law to collect the market fee which he is liable to pay to the market committee from the purchaser, such market fee cannot form part of the consideration for sale and, therefore, cannot be included in the turnover of purchases for purposes of levy of tax under the Act. But on behalf of the State Government, it is urged that all sums paid by a purchaser to a seller or to a commission agent for the purchase of the goods including any tax or fee payable by him form the consideration for the purchase and, therefore, are liable to be included in the turnover of purchases. Reliance is*

*placed by the State Government on* ***M/s. George Oakes (P) Ltd. v. State of Madras*** *in which this Court while interpreting a similar provision in the Madras General Sales Tax Act, 1939 observed that the expression 'turnover' meant the aggregate amount for which goods were bought or sold whether for cash or deferred payment or other valuable consideration and when a sale attracted purchase tax and the tax was passed on to the consumer what the buyer had to pay for the goods included the tax as well and the aggregate amount so paid would fall within the definition of turnover. In the above case, the court was construing the meaning of the expression 'turnover' appearing in a statute in which there was no provision authorising the seller to recover the sales tax payable by him from the purchaser although the price of the goods realized by him included the sales tax payable by him and thus he had passed on his liability to the purchaser. The next decision on which reliance was placed by the* ***State Government is Delhi Cloth and General Mills Co. Ltd. v. Commissioner of Sales Tax, Indore****. In that case this Court held that the expression 'sale price' as defined in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958 included the sales tax collected by a dealer from his purchaser as there was no provision in that statute imposing any liability on the purchaser to pay the tax imposed by it on the dealer and there was no law empowering the dealer to collect the tax from his buyer. In both the decisions referred to above, this Court relied upon* ***Paprika Ltd. v. Board of Trade and Love v. Norman Wright (Builders) Ltd.*** *in which it had been laid down that the price payable by a purchaser under a contract of goods for the purpose of certain penal provisions was the price fixed by the contract and a seller who wished to recover the amount of the purchase tax should, except where an adjustment was authorised by statute, include that amount in the price so fixed. From the observations made in the decisions referred to above, it follows that where a dealer is authorised by law to pass on any tax payable by him on the transaction of sale to the purchaser, such tax does not form part of the consideration for purposes of levy of tax on sales or purchases but where there is no statutory provision authorising the dealer to pass on the tax to the purchaser, such tax does form part of the consideration when he includes it in the price and realizes the same from the purchaser. The essential factor which distinguishes the former class of cases from the latter class in the existence of a statutory provision authorising a dealer to recover the tax payable on the transaction of sale from the purchaser. It is on account of the above distinction that this Court held in* ***Joint Commercial Officer, Division II, Madras-2 v. Spencer & Co.*** *that the sales tax which a seller of foreign liquor was liable to pay under Section 21A of the Madras Prohibition Act, 1937 did not form part of the turnover on which sales tax could be levied under the Madras General Sales Tax Act, 1959 because the seller was entitled to recover the sales tax payable by him from the purchaser. The relevant part of Section 21-A of the Madras Prohibition Act, 1937 referred to above read thus:*

> *21-A. Every person or institution which sells foreign liquor - shall collect from the purchaser and pay over to the government at such intervals and in such manner as may be prescribed, a sales tax calculated at the rate of eight annas in the rupee, or at such other rate as may be notified by the government from time to time, on the price of the liquor so sold."*

**5.** The High Court has, in the impugned judgment, in fact accepted the aforesaid principle. However, on the construction of Section 3A of the KTEG Act, it has taken a view

that since this section is couched in a negative term, it does not authorise the registered dealer to collect the entry tax. This construction is clearly erroneous as the embargo is put only on such dealers which are not registered dealers, meaning thereby, those who are registered dealers are authorised to collect the entry tax. That becomes further clear from the latter portion of sub-Section (1) of Section 3A which permits the registered dealers to collect the tax but bars them from collecting the tax exceeding the rates or rates specified in a notification issued under Section 3 of the Act. In fact, we are not even required to go into this discussion in greater detail as a Seven Bench Judgment of this Court in ***R.S. Joshi etc. v. Ajit Mills Ltd. and Another etc.*** [1977 (4) SCC 98] has interpreted an identically worded provision in the manner we have suggested above. We reproduce the relevant portion of the said judgment hereinbelow:

> *"Even here we may read S. 46(1) and (2):*
>
> > *"46(1) No person shall collect any sum by way of tax in respect of sale of any goods on which by virtue of Section 5 no tax is payable.*
> >
> > *(2) No person, who is not a Registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale of any goods any sum by way of tax from any other person and no Registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act……."*
>
> *Although there is no specific provision enabling the dealer to pass on the tax to the customer, there is a necessary implication in Section 46 authorising such recovery, it being optional for him to do so or not. The primary liability to pay the tax is on the dealer but it is a well-established trade practice which has received express or implied legislative cognisance, that the dealer is not prohibited from passing on the tax to the other party to the sale. Such a usage is implicit in S. 46 of the Act although what is explicit in the provision is that nothing shall be collected by way of tax in respect of sale of any goods exempted under S.5 and no registered dealer shall exact by way of tax any sum exceeding what is payable under the Act. Of course, one who is not a registered dealer, cannot collect any sum by way of tax from any other person. In short, there is a triple taboo writ into S.46. This prohibitory project is made operational, as stated earlier, by two other provisions, one sounding in criminal and the other in departmental proceedings."*

**6.** In view of the aforesaid position in law, when it is found that the appellant is a registered dealer, it would entail him to collect the entry tax and such an entry tax cannot be treated as forming part of the turnover. We, thus, allow this appeal and set aside the impugned judgment.

**7.** No orders as to costs.

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# SUPREME COURT OF INDIA

**CIVIL APPEAL NO. 4760 OF 2006**

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**RAVI PRAKASH REFINERIES (P) LTD**
**Vs**
**STATE OF KARNATAKA**

**DIPAK MISRA AND SHIVA KIRTI SINGH, JJ.**

3rd May, 2016

**HF ▶ Partly in favour of revenue and partly assessee**

*Assessment cannot be reopened after passing of final assessment order merely on basis of change of opinion.*

*De-oiled cake and oil cake are two distinct commodities for purpose of availing benefit of reduced rate of tax.*

**ENTRIES IN SCHEDULE - DE OILED CAKE / OIL CAKE – RATE OF TAX – WHETHER DE OILED CAKE IS DISTINCT FROM OIL CAKE FOR PURPOSE OF CLAIMING BENEFIT OF TAX – DE OILED CAKE SOLD IN COURSE OF INTERSTATE SALE – C FORMS PROCURED FROM DEALERS PRODUCED BEFORE ASSESSING AUTHORITY – CONSEQUENTLY, BENEFIT OF NOTIFICATION DATED 31/5/2002 GRANTED THEREBY ACCEPTING LOWER RATE OF TAX@ 2% PAYABLE ON THIS ITEM –ASSESSMENT REOPENED LEVYING TAX AT HIGHER RATE @4% CONTENDING BENEFIT OUGHT TO BE GRANTED ON OIL CAKE AS PER NOTIFICATION AND NOT ON DE -OILED CAKE – APPEAL BEFORE HIGH COURT DISMISSED ON GROUND THAT THE TWO COMMODITIES ARE DIFFERENT AND BENEFIT TO BE ALLOWED ON OIL CAKE AS PER SAID NOTIFICATION – ORDER UPHELD BY SUPREME COURT – APPEAL DISMISSED TO THIS EXTENT AGAINST APPELLANT.**

**REASSESSMENT – CHANGE OF OPINION - DE OILED CAKE SOLD IN COURSE OF INTERSTATE SALE - C FORMS PROCURED FROM DEALERS PRODUCED- BENEFIT OF NOTIFICATION DATED 31/5/2002 GRANTED THEREBY ACCEPTING LOWER RATE OF TAX @ 2% PAYABLE ON THIS ITEM- ASSESSMENT REOPENED LEVYING TAX AT HIGHER RATE @4% CONTENDING BENEFIT OUGHT TO BE GRANTED ON OIL CAKE AS PER NOTIFICATION AND NOT ON DE -OILED CAKE – APPEAL BEFORE COMMISSIONER ACCEPTED HOLDING REOPENING OF ASSESSMENT BEING BASED ON CHANGE OF OPINION IS NOT PERMISSIBLE – APPEAL BY REVENUE BEFORE HIGH COURT ACCEPTED ON GROUND OF TWO COMMODITIES BEING DISTINCT – APPEAL BEFORE SUPREME COURT CHALLENGING REOPENING OF ASSESSMENT - HELD: REOPENING OF ASSESSMENT BEING BASED ON EXPRESSION OF OPINION BASED ON MATERIAL ON RECORD IS NOT PERMISSIBLE – C FORMS PRODUCED EARLIER STOOD ACCEPTED BY ASSESSING OFFICER FOR GRANTING BENEFIT – ASSESSEE TO REAP BENEFIT OF INITIAL ASSESSMENT AS SAME COULD NTO BE REOPENED – APPEAL ACCEPTED TO THIS EXTENT** - *S. 12-A OF KERELA SALES TAX ACT*

***Facts***

*The assessee sold Sun Flower De- Oiled Cake (SF DOC) in the course of inter-state trade. On production of C Forms, the Assessing Officer granted the benefit in-terms of Notification dated 31.5.2002 whereby tax @2% instead of 4% was to be paid by the appellant. However, the succeeding Assessing Officer formed an opinion that there was an escapement of tax as actual liability of paying tax was at 4% and not 2% since the commodity de oiled cake which has been sold is different from Oil cake and thereby levied the higher rate of tax on Inter-State Sales of (SF DOC). Aggrieved by the order, an appeal was filed before Joint Commissioner who held that change of opinion could not be a ground for reopening for Assessment in exercise of power under Section 12-A of the Act. As there was no opinion expressed regarding rate of tax on Oil cake and De-oiled cake an appeal was filed before Tribunal which was allowed. This order of Tribunal was appealed against by Revenue before High Court. The High Court held that there is a distinction between Oil cake and De-oiled case and these are two different commodities and answered in favour of revenue. Thus, an appeal is filed before Supreme Court contending that the two commodities in question are same as per common parlance and would attract lower rate of tax in terms of the notification.*

***Held:***

*The notification reflects that reduction in tax is qua oil cake and not de oiled cake. In such a situation, it is obligatory to hold that the High court has correctly distinguished the two commodities. The conclusion of High court is agreed upon by the Supreme Court.*

*However, on perusal of Section 12-A of the Act it is observed that reopening of Assessment on the ground of lower rate of tax paid than what is payable is permissible. But in this case C-Forms had been produced for claiming the benefit of the notification dated 31.5.2002 and had been accepted by the Assessing Office. Regarding rate of tax, there was only an expression of opinion based on the material on record while scrutinizing `C' forms. There was no escapement of tax in respect of the sale made. The assessee shall reap the benefit of initial assessment as the same could not have been reopened. Therefore, the appeal is partly accepted.*

***Cases referred***

- Nagaraja Overseals Traders vs. The State of Mysore, JJ STC 315
- Mahaveer Drug House vs. ACCT Gandhinagar, Bangalore, [1994] 93 STC 51 (Kar)
- State of Andhra Pradesh vs. Ampro Food Products, 96 STC 618
- Giridharial Co. vs. State of Andhra Pradesh, 97 STC 442
- C. Sathiragu and Sons vs. State of Andhra Pradesh, 111 STC 703
- Somani Brothers vs. State of Bihar, 99 STC 47
- Eureka Forbes vs. State of Bihar 119 STC 460
- Sterling Foods vs. State of Karnataka, (1986) 63 STC 239
- State of Karnataka vs. M/s Goa Granites 2007 (5) VST 434 (Kar)
- Habeeb Protiens and Fats Extracts, Hiriyur, Chitradurga District vs. Commissioner of Commercial Taxes, Bangalore and Anr. 2005 (58) Kar.L.J. 155
- Binani Industries Limited v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore (2007) 6 VST 783
- Dy. CST vs. Pio Food Packers 1980 Supp. SCC 174
- Agricultural Produce Market Committee vs. Biotor Industries Limited and Anr. (2014) 3 SCC 732

**Present:** For Petitioner(s): Mr. Dhruv Mehta, Sr. Adv.
Mr. Yashraj Singh Dara, Adv.
Ms. Shreya Agarwal, Adv.
For M/s Mitter & Mitter Co.
Mr. Opratap Venugopal, Adv.

Ms. Surekha Raman, Adv.
Ms. Niharika, Adv.
Mr. Anuj Sarma, Adv.
M/s. K. J. John & Co.

For Respondent(s) Mr. Basavaprabhu S. Patil, Sr. Adv.
Mr. V.N. Raghupathy, AOR
Mr. Anirudh Sanganeria, Adv.
Mr. Chinmay Deshpande, Adv.
Mr. Parikshit Angad, Adv.

******

**DIPAK MISRA, J.**

**1.** Delay condoned.

**2.** Leave granted.

**3.** The assessee-appellant is engaged in the manufacturing of refined edible oil by solvent extraction process and refining along with trading in edible oil and oil-cake. For the assessment year ending 31-3-2003 the assessee had filed Revised Annual Return in Form 4, declaring the Gross Taxable Turnovers at Rs.19,76,37,615-00 and Rs.1,60,93,055-00 respectively.

**4.** As the factual narration would show the appellant sold Sunflower Deoiled Cake (SF DOC) and several other goods in the course of inter-State trade and commerce and in the course of the said transaction the appellant produced 'C' Forms obtained from the dealers in inter-State sales. The assessee had admitted the liability of tax at 2 per cent on the sale of SF DOC in the course of inter-State trade and commerce. The Deputy Commissioner of Commercial Taxes (Assessment) Chitradurga, the assessing authority, had passed an order of assessment under Section 9(2) of the Central Sales Tax Act, 1956 (for brevity, 'the CST Act') on 29th January, 2005, whereby it had expressed the view that a sum of Rs.4,75,68,764/- was subjected to tax at 2 per cent. The assessing officer had granted the benefit on production of 'C' Form in terms of the Notification No.FD 119 CSL 2002 (2) dated 31st May, 2002.

**5.** After the order of assessment was passed, the succeeding assessing officer formed an opinion that there was an escapement of tax due to the reason that the inter-State sales of SF DOC was actually liable to tax at 4 per cent and not at 2 per cent, which had been erroneously adopted by the earlier assessing authority. Following the principles of natural justice, he levied the tax at 4 per cent on the inter-State sales of SF DOC.

**6.** The aforesaid order was called in question in an appeal before the Joint Commissioner of Commercial Taxes (Appeals), Davansere Division, Davangere under Section 20(5) read with Section 9 (2) of the CST Act. The Appellate Authority noted the submissions advanced on behalf of the assessee as well as the revenue and thereafter referred to Section 12-A of the Karnataka Sales Tax Act, 1957 (for short, 'KST Act') and referred to the decisions in the cases of ***Nagaraja Overseals Traders vs. The State of Mysore, JJ STC 315 [1] Mahaveer Drug House vs. ACCT Gandhinagar, Bangalore, [1994] 93 STC 51 (Kar) [2] State of Andhra Pradesh vs. Ampro Food Products, 96 STC 618 [3] Giridharial Co. vs. State of Andhra Pradesh, 97 STC 442 [4] C. Sathiragu and Sons vs. State of Andhra Pradesh, 111 STC 703 [5] Somani Brothers vs. State of Bihar, 99 STC 47 [6] Eureka Forbes vs. State of Bihar 119 STC 460 [ 7]*** and came to hold that the change of opinion could not have been a ground for reopening of assessment in exercise of power under Section 12-A of the KST Act and, accordingly, set aside the order of re-assessment.

**7.** Though the assessee succeeded, yet it preferred an appeal, being STA No.425 of 2006 before the Karnataka Appellate Tribunal, Bangalore (for short, 'the tribunal'), as the first Appellate Authority had not expressed any opinion with regard to rate of tax on oil-cake and de-oiled cake. It was contended before the Tribunal that the oil cake and de-oiled cake as per the commercial parlance are one and the same and, therefore, the rate of tax has to be at 2 per cent and not 4 per cent. The tribunal after noting the submissions referred to the schedule in the notification and the decision in ***M/s Sterling Foods vs. State of Karnataka, (1986) 63 STC 239 [8] State of Karnataka vs. M/s Goa Granites 2007 (5) VST 434 (Kar) [9], M/s Habeeb Protiens and Fats Extracts, Hiriyur, Chitradurga District vs. Commissioner of Commercial Taxes, Bangalore and Anr. 2005 (58) Kar.L.J. 155 [10]*** and came to hold as under :

> *"Thus, we hold that the expression 'oil cake in sl. No. 6 of the CST Notification No. FD 119 CSL 2002(2) dated 31.5.2002 would include also de-oiled cake and that therefore the reassessment order passed by the AA under CST Act, 1956 for the year 2002-03 in so far as it concerned levy of CST at 4% on inter-State Sales of sunflower de-oiled cake covered by C Forms by denying the benefit of reduction in the rate of CST to 2% granted in the Notification dated 31.05.2002 is liable to be held unsustainable and set aside.*
>
> ....
>
> *Consequential to the decision taken by us as above, the appellate order of the learned FAA is liable for modification accordingly. As regards the reassessment order set aside by the learned FAA on the basis of lay that reassessment is not permissible by change of pinion, which is supported by the several case laws cited in the appellate order itself, it need to be placed on record that Hon'ble Supreme Court of India has reiterated the said legal position that reopening of an assessment by change of opinion is not permissible in the recent judgment rendered in the case of M/s Binani Industries Ltd. Vs. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and others (2007) 6 VST 783."*

**8.** On the aforesaid analysis, the tribunal issued the following directions:

> *"(i) Reassessment order passed by the DCCT (Transition), Chitradurga under CST Act, 1956 for the year 2002-03 in respect of rate of CST levied at 4% on the turnover of Rs.4,75,68,764 relating to inter-State sales of sunflower de-oiled cake covered by C Forms is modified to 2% allowing the benefit of reduction in the rate of CST to 2% granted in the Notification No.FD 119 CSL 2002 (2) dated 31-5-2002.*
>
> *(ii) The appellate order passed by the FAA in CST AP 27/2005-06 dated 20-4-2006 shall stand modified accordingly.*
>
> *(iii) Directions are issued that the AA shall accordingly issue revised demand notice."*

**9.** The aforesaid order of tribunal was assailed before the High Court in Revision Petition being STRP No. 32 of 2009. Be it noted, the High Court had formulated the following two substantial questions of law:-

(i) Whether, on the facts and in circumstances of the case, can it be held that the order dated 12.7.2007 passed by the Karnataka Appellate Tribunal in STA 425/2006 allowing the appeal is correct and in accordance with law?

(ii) Whether on the fact and in circumstances of the case, can it be held that the Appellate Tribunal was right in law in ignoring that under the KST

> Act in the Second Schedule in serial No.1 of Part O, oil cake and de-oiled cake are listed under two separate sub-headings as two different commodities?

**10.** After deliberating on the aforesaid two questions, the High Court referred to the provisions of the KST Act and the Notification issued under Section 8(5) of the CST Act, distinguished the decisions placed reliance upon by the first Appellate Authority and the tribunal as well as the decision rendered by this Court in ***M/s Sterling Foods*** (supra) and came to hold that there is distinction between oil cake and de-oiled cake and they are two different commodities and not one and the same. Elaborating the discussion, the Division Bench held thus:-

> *"The contention that the commodities will have to be understood in common parlance as understood by a common man is even harder to accept. What a common man understands need not necessarily mean what is understood in accordance with law. In the instant case, the framers of the schedule were aware of the distinction between oil cake and de-oiled case. Accordingly, they have treated it as two different commodities. Therefore, to hold that the view of a common man has to necessarily over ride the view of the Legislature is difficult to accept. The Distinction in law has been made which requires to be followed. Oil cake and de-oiled case cannot stand extended to de-oiled cake. The impact of the notification reducing the tax impact was every well known when the benefit was granted. A notification has to be strictly construed. The Court cannot read into the notification what is not there. The notification is clear and unambiguous. Any attempt to read it otherwise is not only uncalled for but would amount to redrafting the notification."*

Being of this view, it answered the two questions that were framed by it in favour of the Revenue and against the Assessee. The said judgment and order is the subject matter of challenge in this appeal by special leave.

**11.** We have heard Shri Dhruv Mehta, learned senior counsel along with Ms. Anupama, learned counsel for the appellant and Shri Basava Prabhu S. Patil, learned senior counsel along with Shri V.N. Raghupathy, learned counsel for the State.

**12.** First, we shall take up the issue pertaining to Section 12-A of the KST Act. Section 12-A(1) which is relevant for the present purpose is extracted below:

> *"12-A. Assessment of escaped turnover-(1) If the assessing authority has reason to believe that the whole or any part of the turnover of a dealer in respect of any period has escaped assessment to tax or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable under this Act or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, notwithstanding the fact that the whole or part of such escaped turnover was already before the said authority at the time of the original assessment or re-assessment but subject to the provisions of subsection (2), at any time within a period of [eight years] from the expiry of the year to which the tax relates, proceed to assess or re-assess to the best of its judgment the tax payable by the dealer in respect of such turnover after issuing a notice to the dealer and after making such enquiry as it may consider necessary."*

**13.** On a perusal of the aforesaid provision, it is limpid that it permits re-opening of an assessment on the ground that if the assessee has been assessed at a rate lower than the rate at which it is assessable under Act. The rate of tax is four per cent. The assessee had filed the return and the 'C' Forms claiming the benefit of the Notification dated 31.05.2002 in respect of

inter-State sale of oil-cakes. The assessing officer had accepted the 'C' Forms on verification and granted the benefit. The assessing officer on a proper security has accept the 'C' Forms on the basis of which reduced rate of tax was claimed. The assessment was reopened as there was no escapement of tax due in respect of inter-State sale in respect of SF DOC.

**14.** Mr. Dhruv Mehta, learned senior counsel for the appellant, would submit that once an assessment order was framed on all the material available on record and the rate of tax was accepted, the view expressed by the 1st appellate authority which had got the stamp of affirmance by the tribunal should be accepted to be correct more for the reason the revenue had not challenged the order of assessment and that apart the High Court has not appositely dealt with it. He would place heavy reliance on the pronouncement in ***M/s. Binani Industries Limited v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore (2007) 6 VST 783 [11]***.

**15.** It is submitted by Mr. Basava Prabhu S. Patil, learned senior counsel, that claiming of benefit on production of 'C' Forms had nothing to do with the nature of product that was sold. Learned senior counsel would contend that the first Appellate Authority, as well as the tribunal, has been erroneously guided that there has been change of opinion. Learned senior counsel has submitted that the words "reason to believe" have to be expansively understood to import a meaning to the provision, for when the assessment has taken place at a rate lower than the rate at which the turnover of a dealer is assessable, there can be reopening of assessment.

**16.** First, we shall proceed to consider the acceptability of the opinion expressed by the High Court. The Government of Karnataka in exercise of its powers conferred by Section 8 (5) of the CST Act, issued Notification No.119 FD 119 CSL 2002(2) dated 31.05.2002 granting reduction in the rate of central sales tax payable on inter-State sales of goods specified in Serial Nos.1 to 11 of the notification, subject to the condition that the Dealer produces declarations in Forms 'C' obtained from the registered Dealers/Government to whom the goods are sold. Be it noted oil cake is one of the goods specified in serial No. 6 of the notification. Submission of Mr. Mehta, learned senior counsel is that the High Court has clearly erred in law by distinguishing the facts and by opining that the judgment in the case of ***M/s Habeeb Protiens*** (supra) is not a decision in issue and an obiter. In the case of ***M/s Sterling Foods*** (supra), the question that arose for consideration was whether shrimps, prawns and lobsters subjected to processing like cutting of heads and tails, peeling, deveining, cleaning and freezing ceased to be the same commodity and became a different commodity for the purpose of the Central Sales Tax Act. The Court posed the question whether they still go under the description of shrims, prawns and lobsters or in other words, shrimps, prawns and lobsters would mean only raw shrimps, prawns and lobsters as caught from the sea or they also include process and frozen shrimps, prawns and lobsters. After referring to the various provisions and placing reliance on the decision in ***Dy. CST vs. Pio Food Packers 1980 Supp. SCC 174 [12]*** the Court held as under:-

> *".....when the State Legislature excluded processed or frozen shrimps, prawns and lobsters from the ambit and coverage of Entry 13a, its object obviously was that the last purchases of processed or frozen shrimps, prawns and lobsters in the State should not be exigible to State Sales Tax under Entry 13a. The State Legislature was not at all concerned with the question as to whether processed or frozen shrimps, prawns and lobsters are commercially the same commodity as raw shrimps, prawns and lobsters or are a different commodity and merely because the State Legislature made a distinction between the two for the purpose of determining exigibility to State Sales Tax, it cannot be said that in commercial parlance or according to popular sense, processed or frozen shrimps, prawns and lobsters are recognised as different commodity distinct from raw shrimps,*

> *prawns and lobsters. The question whether raw shrimps, prawns and lobsters after suffering processing retain their original character or identity or become a new commodity has to be determined not on the basis of a distinction made by the State Legislature for the purpose of exigibility to State Sales Tax because even where the commodity is the same in the eyes of the persons dealing in it the State Legislature may make a classification for determining liability to sales tax. This question, for the purpose of the Central Sales Tax Act, has to be determined on the basis of what is commonly known or recognised in commercial parlance. If in commercial parlance and according to what is understood in the trade by the dealer and the consumer, processed or frozen shrimps, prawns and lobsters retain their original character and identity as shrimps, prawns and lobsters and do not become a new distinct commodity and are as much 'shrimps, prawns and lobsters', as raw shrimps, prawns and lobsters, sub-section (3) of section 5 of the Central Sales Tax Act would be attracted and if with a view to fulfilling the existing contracts for export, the assessee purchases raw shrimps, prawns and lobsters and processes and freezes them, such purchases of raw shrimps, prawns and lobsters would be deemed to be in course of export so as to be exempt from liability to State Sales Tax."*

**17.** Relying on the said passage, it is contended by Mr. Mehta that when identity of the goods on the basis of commercial parlance is similar, the High Court would have been well advised to follow the principles set out in the aforesaid decision and should not have been guided by the concept of enumeration in the Notification. In essence, the submission is that there is no distinction between the oil cake and the de-oiled cake and both should be perceived as one in commercial parlance. Thus, the emphasis is on the commercial parlance test. To bolster the said stand, reliance has been placed on ***M/s Habeeb Protiens*** case, wherein the Division Bench of the High Court of Karnataka has drawn a distinction between sunflower oil cake and groundnut oil cake on the one hand and de-oiled sunflower cake and groundnut oil cake on the other. The aforesaid analysis made in the said judgment should not detain us long, for Mr. Patil learned senior counsel for the State has brought to our notice a recent decision of this Court in the case of ***Agricultural Produce Market Committee vs. Biotor Industries Limited and Anr. (2014) 3 SCC 732 [13]*** . In the said case, the two-Judge Bench had posed five questions and the question pertinent for our purpose reads thus:-

> *"13.4 Whether the Division Bench is justified in recording the finding on the second issue (see para 7, above at p.737 c-d) in connection with LPA NO. 195 of 2006 that the respondent concern is not liable to pay any market fee on the de-oiled cakes sold by it which are stated to be the by-product in the course of manufacturing castor oil which is not one of the items enumerated in the Schedule to the Act and the notification issued by the Directorate?"*

**18.** Dealing with the distinction between the oil-cake and the de-oiled cake, the Court referred to the process and quoted from the findings referred by the learned Single Judge. Though the said decision was rendered in the backdrop of Gujarat Agricultural Produce Markets Act, 1963 to levy of market fee, it is absolutely distinctly perceptible from the judgment that the Court has arrived at a definite conclusion that there is a distinction between the oil-cake and de-oiled cake and they are two different commercial products. Thus, when the difference has been drawn by this Court, the assessee herein cannot be allowed to advance a plea that the said test should not be applied, but the commercial parlance test should be adopted to determine the said goods for the purposes of Central Sales Tax Act. To have a complete picture, we may refer to the Notification dated 31.05.2002. The relevant part of it reads as follows :

*"In exercise of the powers conferred by sub-Section (5) of Section 8 of the Central Sales Tax, 1956 (Central Act 74 of 1956), the Government of Karnataka, being satisfied that it is necessary so to do in the public interest, hereby directs that which effect from the First day of June, 2002, the tax payable by a dealer under Section 8 of the said Act on the sale of goods specified below, made in the course of inter-State trade or commerce, to a registered dealer or the Government shall be calculated at the rate of two per cent subject to production of declaration in Form 'C' or certificate in Form 'D' duly filed and signed by the registered dealer or the Government to whom the said goods are sold:-*

1. *Cotton Yarn*
2. *Bicycles*
3. *Chemical fertilizers and chemical fertilizer mixtures*
4. *Edible oil-refined and non-refined*
5. *Khandasari Sugar*
6. *Liquid Glucose, Dextrine, Maixe Starch, gluten, grits, maize, husk, oil cake, corn steep liquor, dextrose, corn oil, maixe hydrol and maize germs."*

**19.** From the said Notification, it is evident that the competent authority while exercising power under sub-section (5) of Section 8 of the CST Act, has kept the reduction of tax qua de-oiled cake from the purview of Notification and has only provided oil cake to be taxed at the reduced rate of tax. In view of the fact that the goods have distinct and different identity which also get recognition from the Notification, we are obliged to hold that the High Court has correctly distinguished the authority in M/s Sterling Foods (supra) and we unhesitatingly agree with the same.

**20.** Though we have agreed with the said conclusion of the High Court, yet the fact remains that the assessing authority had expressed the opinion with regard to the rate of tax on the de-oiled cake while scrutinizing 'C' Forms which is an expression of opinion on the available materials brought on record and, therefore, the first appellate authority as well as the tribunal was justified in concurring with the said order. It is worthy to note that the revenue had not challenged the order passed by the Joint Commissioner. The High Court has not expressed any opinion on this score. Considering the cumulative effect of the facts and law we have stated, we have not an iota of doubt in our mind that there should not have been reopening of assessment. However, the finding recorded by the High Court overturning the view of the tribunal that oil-cake and de-oiled cake are the same product and, therefore, both are liable to reduced rate of tax despite the notification only mentions oil-cake, is not defensible.

**21.** Consequently, the appeal filed by the assessee is allowed in part. The finding of the High Court as regards oil-cake and de-oiled cake being different products as per the notification dated 31st May, 2002 is correct. However, the assessee shall reap the benefit of initial assessment as the same could not have been reopened. In the facts of the case, there shall be no order as to costs.

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# SUPREME COURT OF INDIA

**CIVIL APPEAL NO. 5037 OF 2006**

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**HARRISONS MALAYALAM LTD.**
**Vs**
**STATE OF KERALA**

**A.K. SIKRI AND ROHINTON FALI NARIMAN, JJ.**

4th April, 2016

**HF ▶ Assessee**

*As no rubber cess is leviable on sale of raw rubber, it cannot be included in turnover pertaining to rubber plantations.*

**TURNOVER – RUBBER CESS –RAW RUBBER – RAW RUBBER PLANTATIONS OWNED BY APPELLANT – RUBBER PRODUCED SOLD TO MANUFACTURERS OF RUBBER PRODUCTS – RUBBER CESS ALLEGED TO BE LEVIABLE ON SALE OF RAW RUBBER AS PER RUBBER ACT, 1947 AND TO BE INCLUDED IN TURNOVER FOR PURPOSE OF SALE TAX – APPEAL BEFORE SUPREME COURT – HELD: RAW RUBBER IS PRODUCED AT A STAGE MUCH PRIOR TO MANUFACTURING OF RUBBER PRODUCTS- FOLLOWING AN EARLIER JUDGMENT, IT IS HELD THAT RUBBER CESS IS PAYABLE ONLY BY MANUFACTURER OF RUBBER PRODUCTS – NO SUCH CESS EVER COLLECTED BY APPELLANT – RUBBER CESS NOT TO BE INCLUDED IN TURNOVER – *APPEAL ALLOWED- RUBBER ACT, 1947***

***Facts***

*The appellant is engaged in plantation and production of raw rubber which is sold to manufacturers of rubber products. The assessing officer held that rubber cess payable under Rubber Act by the manufacturer be treated as part of sales tax turnover of the appellant. It was contended by the appellant that since no such cess is paid or is payable by appellant, the same cannot be included in its turnover. An appeal is filed before Supreme Court.*

***Held:***

*The appellant is not a manufacturer of rubber goods. It is neither paying any cess not collecting the same from its traders. The liability to pay rubber cess is only on manufacturer of rubber products and the appellant was selling rubber at a stage much prior to manufacturing of goods. Thus, rubber cess is not to be included in the sales turnover of the appellant. The appeal is allowed.*

***Case followed:***

- *Jullunder Rubber Goods Manufacturers' Association vs. Union of India & Anr. 1969 (2) SCC 644*

**Present:** For Appellant(s): Mr. C.N. Sree Kumar, Advocate
Mr. Amit Sharma, Advocate

For Respondent(s): Mr. R. Sathish, Advocate

Ms. Bina Madhavan, Advocate

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**ORDER**

**1.** The appellants in these appeals are operating several rubber plantations and are engaged in the production of raw rubber which is sold by them to various trader. It is those traders who re-sell the same to the manufacturer of rubber products. The appellants are exigible to sales tax under the provisions of Central Sales Tax Act. The assessing officer while making assessments held that the rubber cess, which is payable under the Rubber Act, 1947 (in short 'the Rubber Act') by the manufacturer, be treated as the part of sales tax turn over and assessed sales tax thereupon. The appellants challenged the said orders with the submission that as the appellants were not paying any rubber cess at all nor is it payable by them under the provisions of the Rubber Act, the notional amount of rubber cess cannot be included in the sales tax turn over. This contention of the appellant have been rejected till the stage of High Court as by the impugned judgment of the High Court, revision petitions of the appellants have been dismissed.

**2.** It has been held in the case of ***M/s. Jullunder Rubber Goods Manufacturers' Association vs. Union of India & Anr. 1969 (2) SCC 644*** that it is the manufacturer of the rubber products alone which is liable to pay cess under the Rubber Act. It is clear from the above that the liability to pay the rubber cess is only that of a manufacturer and the event of liability is the manufacture of goods and not earlier. The stage of sale of goods by the appellant was much prior to the taxable event of rubber cess. The appellants herein, as pointed out above, were neither paying the rubber cess nor collecting the same from the traders with whom they have sold the goods. Therefore, the rubber cess could not be included, that to on notional basis, in the sales turn over of the appellant. The appeals are accordingly allowed and the impugned judgment of the High Court is set aside.

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# SUPREME COURT OF INDIA

**CIVIL APPEAL NO. 4434 OF 2009**

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**COMMERCIAL TAX OFFICER,SILIGURI & ORS.**
**Vs**
**SOVAVITA TEA SEED GARDEN & ANR.**

**SHIVA KIRTI SINGH AND R.K. AGRAWAL, JJ.**

4th February, 2016

**HF ▶ Respondent- assessee**

*Interpreting the clause literally, 'Camellia Flower Seed' is held to be exempted in view of Entry 37 of Schedule I of the West Bengal Sales Tax Act, 1994.*

**ENTRIES IN SCHEDULE – CAMELLIA FLOWER SEED – EXEMPTION – EXEMPTION ALLOWED ON 'CAMELLIA FLOWER SEED' IN VIEW OF ENTRY 37 OF SCHEDULE I AND ORDER UPHELD BY HIGH COURT – APPEAL BY REVENUE BEFORE SUPREME COURT CONTENDING THAT THE COMMODITY IN QUESTION IS NOT USED TO OBTAIN FLOWERS THOUGH CAPABLE OF FLOWERING – REJECTING THE CONTENTION IT IS HELD THAT THE RELEVANT ENTRY IS SILENT ABOUT THE USE OF FLOWER AS MAIN PRODUCT – CLAUSE NEEDS TO BE INTERPRETED LITERALLY TO PREVENT ADVERSE EFFECT ON ASSESSEE – ORDER OF HIGH COURT UPHELD AND APPEAL FILED BY REVENUE DISMISSED –** *ENTRY 37 OF SCHEDULE I OF WEST BENGAL SALES TAX ACT, 1994.*

***Facts***

*Affirming the orders of Tribunal, it has been held by High court that the 'Camellia Flower Seed' is exempted under the Act as it falls under Entry 37 of Schedule I. This order has been challenged by the revenue on the ground that there are two Camellia plants, one used for growing flowers and the other is used to grow bushes , roots for purpose of manufacturing tea although the latter is also capable of flowering which is otherwise not used to obtain flowers. On this ground, it is contended that the said commodity is liable to sale tax and should not be exempted.*

***Held:***

*The submission that the use of ultimate product 'flower' as the main product has no relevance with the way flower seeds have been defined in the Act for purpose of exemption. The clause needs to be interpreted literally so as to not to have any kind of restrictive meaning and adverse effect on the assessee. Subsequent amendment in the Schedule supports the view taken by High court. Therefore, the appeal filed by revenue is dismissed.*

**Present:** For Appellant(s): Mr. Devjyoti Basu, Advocate
Parijat Sinha, AOR
For Respondent(s): None

******

**ORDER**

**1.** Mr. Devjyoti Basu, learned counsel appearing for the appellants in both the appeals has argued at length to assail the impugned orders dated 15th October, 2007 passed by the High Court at Calcutta in WPTT Nos. 616 and 615 of 2007.

**2.** The High Court has affirmed the order passed by the Tribunal under the West Bengal Sales Tax Act, 1994 (for short "the 1994 Act") and agreed with the finding that the "Camellia Flower Seed" comes within Entry 37 of Schedule I to the 1994 Act and is, thus, exempt from the sales tax leviable under the 1994 Act.

**3.** Nobody has appeared on behalf of the respondents, but with the help of learned counsel for the appellants, we have gone through the impugned orders as well as the relevant materials. Learned counsel for the appellants submits that there are two varieties of Camellia plants, while one is used only for growing flowers and is known as "Camellia Japonica", the other variety botanically known as "Camellia Sinensis" is used to grow as bushes for plucking out shoots or leaves for manufacture of tea and the latter variety though capable of flowering is generally not used to obtain flowers.

**4.** The High Court has considered the aforesaid aspect in detail and also noted the relevant Entry 37 of Schedule I to the 1994 Act, which reads as follows:

*"Flower Seeds, that is to say, seed for growing flower"*

**5.** We are unable to agree with the submission that the use of the ultimate product "flower" as the main product has any relevance with the way flower seeds have been defined in the 1994 Act for the purpose of exemption. The Clause needs to be interpreted literally so as not to have any kind of restrictive meaning and adverse effect on the assessee. Even the subsequent amendment of Schedule with effect from 1st April, 2000 supports the view taken by the High Court and, hence, we find no good reasons to interfere with the impugned orders.

**6.** The appeals are, therefore, dismissed. No costs.

———

# SUPREME COURT OF INDIA

**CIVIL APPEAL NO. 4434 OF 2009**

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**BOC INDIA LTD.**
**Vs**
**COMMISSIONER OF COMML.TAXES & ANR.**

**SHIVA KIRTI SINGH AND R.K. AGRAWAL, JJ.**

3rd February, 2016

**HF ▶ Revenue / Department**

*Delivery charges received from the buyer by the supplier which are part of his invoice and not treated separately are to be included in the calculation of sale price.*

**SALE PRICE – DELIVERY CHARGES/ FREIGHT – WHETHER INCLUDED IN SALE PRICE – DELIVERY OF INDUSTRIAL GAS THROUGH PIPELINE – FACILITY CHARGES RECEIVED ON THIS ACCOUNT BY SUPPLIER FROM BUYER INCLUDED IN SALE PRICE BY REVENUE – APPEAL FILED AGAINST SUCH INCLUSION OF PRICE DISMISSED BY TRIBUNAL AND HIGH COURT HOLDING THAT FREIGHT CHARGES/ DELIVERY CHARGES ARE TO BE INCLUDED IN SALE PRICE IF THEY FORM PART OF INVOICE AND ARE NOT TREATED SEPARATELY IN INVOICE - APPEAL BEFORE SUPREME COURT DISMISSED IN THE LIGHT OF JUDGMENT FOLLOWED BY HIGH COURT – *S. 2(h) OF BENGAL SALES TAX ACT, 1941.***

***Facts***

*The appellant claimed that certain charges received by it from its buyer for supplying industrial gases through pipeline be treated as facility charges and be kept out of 'sale price'. The appeal was dismissed by High court. An appeal is filed before Supreme Court.*

***Held:***

*Following a judgment passed by the Supreme Court whereby the provision of sale price have been considered. The relevant paras have been reproduced which make it clear that sale price includes the freight charges which may be paid by the dealer and charged from the purchaser thereby making it obligatory on part of seller to deliver the goods. Another para suggests that second part of definition of sale price says that all sums are included in which are charged for anything done by the dealer in respect of goods delivery , other than the cost of freight or delivery or the cost of installation where such cost is charged separately.*

*Thus, in the light of the judgment , the case is dismissed.*

***Cases referred:***

- *Black Diamond Beverages and Another Vs. Commercial Tax Officer, Central Section, Assessment Wing, Calcutta and Others [(1998) 1 SCC 458]*
- *Hindustan Sugar Mills Vs. State of Rajasthan & Others [(1978) 4 SCC 271]*

**Present:** For Appellant(s): Mr. Dhruv Mehta, Sr. Advocate

Mr. Rajesh Kumar, Advocate
Mr. Gaurav Kumar Singh, Advocate
Mr. Rakesh Chaurasiya, Advocate
for M/s Mitter & Mitter Co.

For Respondent(s): Mr. Soumik Ghosal, Advocate
Mr. Parijat Sinha, AOR

******

**ORDER**

**1.** Heard Mr. Dhruv Mehta, learned senior counsel appearing for the appellant and Mr. Soumik Ghosal, learned counsel appearing for the respondents.

**2.** This appeal is directed against the judgment and order dated 19th January, 2009 in WPTT No.55 of 2008. The High Court dismissed the writ petition preferred by the appellant and affirmed the order of the West Bengal Taxation Tribunal which had disallowed the appellant's claim that certain charges which it had received from the Indian Iron and Steel Company Limited (IISCO) at Burnpur on account of supply of industrial gases through pipeline be treated as facility charges and be kept out of sale price for the purpose of Bengal Finance (Sales Tax) Act, 1941 (for short "the 1941 Act").

**3.** The High Court has extracted the definition of "sale price" in the relevant Act and has thereafter relied upon a judgment of this ***Court in Black Diamond Beverages and Another Vs. Commercial Tax Officer, Central Section, Assessment Wing, Calcutta and Others [(1998) 1 SCC 458]***.

**4.** On behalf of the appellant, an attempt was made to distinguish that judgment by pointing out that ***Black Diamond Beverages*** (supra) arose out of a subsequent Act, viz., the West Bengal Sales Tax Act, 1954 (for short "the 1954 Act") wherein the term "sale price" has been defined in Section 2(d).

**5.** No doubt, the aforesaid submission is factually correct, but it does not affect the outcome of this case because in ***Black Diamond Beverages*** (supra), in paragraph 9, this Court noticed that first part of Section 2(h) of the 1941 Act defined "sale price", with which we are presently concerned, as well as the first part of Section 2(d) of the 1954 Act as also the first part of Section 2(p) of the Rajasthan Act, 1954 are similar. It was also noticed that the first part of such provisions were interpreted by this Court in the case of ***Hindustan Sugar Mills Vs. State of Rajasthan & Others [(1978) 4 SCC 271]***. This view also runs totally against the appellant's case.

**6.** In order to avoid any scope for confusion, we would like to extract paragraphs 9 and 16 of the judgment in the case of ***Hindustan Sugar Mills*** (supra), which are as follows:

> *"9. We may now take another example which is very much near to the one which we have already discussed. The dealer may, instead of transporting the goods from his factory or his place of business and selling them there, enter into a contract of sale F.O.R. destination railway station. Where such a contract is made, the seller undertakes an obligation to put the goods on rail and arrange to have them carried to the destination railway station at his expense. The delivery of the goods to the purchaser in such a case is complete at the destination railway station and till then the risk continues to remain with the dealer. The freight is payable by the dealer since he has to arrange for the goods to be carried by rail to the destination railway station at his expense and there is*

*no obligation on the purchaser to pay the freight. The purchaser is concerned only to pay the agreed price for the delivery of the goods at the destination railway station. The agreed price being inclusive of the freight, it would be a matter of indifference to the purchaser as to what is the amount of freight. Even if there is any fluctuation in the amount of freight, since the making of the contract, the purchaser would have no concern, because he is liable to pay only the agreed price which includes the freight, whatever it be. The dealer may, in such a case, pay the freight and charge the agreed price to the purchaser, or he may obtain a railway receipt on the basis of freight to pay and request the purchaser to pay the freight at the time of taking delivery of the goods from the railway at the destination railway station and give the purchaser credit for the amount of the freight against the agreed price. The latter would merely be a convenient mode of paying the agreed price. Since it is the obligation of the dealer to deliver the goods free on rail destination railway station, the dealer is liable to pay the freight as between him and the purchaser and the purchaser can very well refuse to accept the railway receipt which is not "freight pre-paid" but "freight to pay". But he may, ordinarily as a reasonable businessman he would, accept such railway receipt and pay the amount of freight on behalf of the dealer. When the purchasers pay the amount of freight in such a case, it would be as part of the agreed price and not as freight vis-a-vis the dealer. The amount of freight paid by the purchaser and shown in the bill as deducted from the agreed price would, therefore, clearly form part of "sale price" and fall within the first part of the definition.*

*16. This renders it unnecessary to consider the second part of the definition, but the latter clause of the second part was strongly relied upon on behalf of the assessee to support the exclusion of the amount of freight from 'sale price' and hence we must proceed to consider it. The second part enacts an inclusive clause. It says that 'sale price' includes "any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged." Therefore, 'any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof' is to be regarded as part of 'sale price', even if it does not fall within the first part of the definition. But there is an exception carved out of this inclusion. Not all sums charged for something done by the dealer in respect of the goods at the time of or before the delivery thereof are covered by the inclusive clause. The cost of freight or delivery or the cost of installation certainly represents an amount charged for transportation or installation of the goods at the time of or before the delivery thereof and would, there fore, fall within the inclusive clause on its plain terms but it is taken out by the exclusion clause, "other than the cost of freight or delivery or the cost of installation in case where such cost is separately charged". This exclusion clause does not operate as an exception to the first part of the definition. It merely enacts an exclusion out of the inclusive clause and takes out something which would otherwise be within the inclusive clause. Obviously, therefore, this exclusion clause can be availed of by the assessee only if the State seeks to rely on the inclusive clause for the purpose of bringing a particular amount within the definition of 'sale price'. But if the State is able to show that the particular amount falls within the first part of the definition and is, therefore, part of the 'sale price', the exclusion clause cannot avail the assessee to take the amount in question out of the definition of 'sale price'. Here on the view taken by us, the amount of freight forms part of the*

*'sale price' within the meaning of the first part of the definition and it is not necessary for the State to invoke the inclusive clause and in fact the State has not done so. The exclusion clause is, therefore, irrelevant and cannot be called in aid by the assessee. We may point out that even if the exclusion clause were read as an exception to the first part of the definition which, as we have pointed out, cannot be done, it cannot avail the assessee. It is only where the cost of freight is separately charged that it would fall within the exclusion clause and in the context of the definition as a whole, it is obvious that the expression "cost of freight is separately charged" is used in contradistinction to a case where the cost of freight is not separately charged but is included in the price. It is not intended to apply to a case where the cost of freight is part of the price but the dealer chooses to split up the price and claim the amount of freight as a separate item in the invoice. Where the cost of freight is part of the price, it would fall within the first part of the definition and to such a case, the exclusion clause in the second part have no application."*

**7.** In the light of law so well enunciated in the aforesaid paragraphs, which has been followed by the High Court, we find no merit in this appeal and hence it is dismissed. No costs.

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# PUNJAB & HARYANA HIGH COURT

**CWP Nos. 26998, 27449, 27466 of 2015,**
**1805, 3742, 428, 638 and 660 of 2016**

**LUXMI TRADING COMPANY AND OTHERS**
**Vs**
**STATE OF PUNJAB AND ANOTHER**

**RAJESH BINDAL AND HARINDER SINGH SIDHU, JJ.**

27th April, 2016

**HF ▶ Assessee**

*No Entry Tax leviable on sugar after 14th December 2015 in absence of Notification. For the past, recovery stayed subject to furnishing of Surety Bond/Bank Guarantee.*

**ENTRY TAX – SUGAR – INTERIM ORDER – NO NOTIFICATION ISSUED UNDER SECTION 4 OF NEW ORDINANCE – IN ABSENCE OF NOTIFICATION, THERE IS NO LEVY OF TAX – STATE COUNSEL ALSO AGREES TO THAT – FOR THE PERIOD PRIOR TO NEW ORDINANCE – RECOVERY STAYED SUBJECT TO FURNISHING OF DETAILS OF IMPORT OF SUGAR AND FURNISHING OF SURETY BOND/BANK GUARANTEE – PETITIONS ADMITTED.**

*In a challenge to Punjab Development of Trade, Commerce and Industries Ordinance, 2015, notified on 14.12.2015, the High Court has passed the interim order. No notification under clause 4 of the New Ordinance has been issued for levy of tax and thus there is no tax being levied. Even the counsel for the State has taken the same stand.*

*The dispute pertains to period prior to 14.12.2015 when Punjab Ordinance No. 1of 2015 was issued. Considering the fact that recovery of said tax was stayed during the period when Punjab Ordinance No. 1 of 2015 remains in force, the recovery for the aforesaid period shall remain stayed subject to the petitioner furnishing the details of sugar imported by it during that period. It is also ordered that the dealer would furnish Surety to the satisfaction of Assessing authority to the extent of amount of tax payable under Punjab Ordinance No. 1 of 2015 to secure interest of the State. The dealer can furnish Bank Guarantee also.*

**Present:** Mr. Akshay Bhan, Senior Advocate with
Mr. Aman Bansal, Advocate and Mr. Alok Mittal, Advocate,
Mr. Rishab Singla, Advocate,
Mr. Pankaj Middha, Advocate,
Mr. Prabhdeep Singh, Advocate,
Mr. Rohit Khanna, Advocate for Mr. Saurabh Gautam, Advocate,
Mr. Parveen K. Kataria, Advocate,
Mr. Aman Bansal, Advocate, and
Mr. Avneesh Jhingan, Advocate and
Ms. Tanvi Gupta, Advocate for the petitioner(s).
Mr. Jagmohan Bansal, Additional Advocate General, Punjab.

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**AJAY KUMAR MITTAL,J.**

**1.** Challenge in the present set of petitions is to the Punjab Development of Trade, Commerce and Industries (Validation) Ordinance, 2015 notified on 14.12.2015 Punjab Ordinance No.9 of 2015 made effective from 6.5.2015. Prior to that the State had promulgated Punjab Ordinance No.l of 2015. The Punjab Ordinance No.l of 2015 was challenged by the various dealers. The writ petitions were disposed of by this Court on 17.12.2015 by passing the following order:-

> *"By way of this order we shall dispose of the above referred writ petitions.*
>
> *For the sake of convenience, facts are being taken from CWP-15286-2015.*
>
> *Counsel for the parties agree that ordinance subject matter of the writ petitions has lapsed and as the State of Punjab, has issued a fresh ordinance bearing No.40-Leg./2015 dated 14.12.2015 called the Punjab Development of Trade, Commerce and Industries (Validation) Ordinance, 2015, the writ petition has been rendered infructuous.*
>
> *Counsel for the petitioner(s), however, pray that interim orders dated 29.07.2015 and 12.10.2015, may be ordered to continue for a week from today so as to enable the petitioner(s) to challenge the vires of the new ordinance.*
>
> *We have heard counsel for the parties and while dismissing the writ petitions as infructuous with liberty as prayed directed that interim orders dated 29.07.2015 and 12.10.2015, shall remain in force for a period of one week from today.*
>
> *A photocopy of this order be placed on the files of other connected cases."*

**2.** It is not in dispute that under the Punjab Ordinance No.9 of 2015, no notification under Clause 4 thereof has been issued for levy of tax. Even the stand of learned counsel for the State is that for the period subsequent to the issuance of Punjab Ordinance No.9 of 2015, there is no levy of tax, as no notification has been issued. The dispute pertains to the period prior to that when Punjab Ordinance No.l of 2015 was issued. During the pendency of the petitions challenging the notification, inter alia, on the ground that there was no schedule with Punjab Ordinance No.5 of 2015 specifying the case, tax could be levied, this Court had granted interim stay on 29.7.2015 in CWP No. 15286 of 2015 directing that no coercive steps will be taken for recovery of the tax. The period during which, the Punjab Ordinance No.l of 2015 remained in force, has already elapsed. Some of the dealers have paid tax for that period partly, whereas some amount is yet to be paid.

**3.** Considering the aforesaid factual matrix, in our opinion, the recovery of tax for the period, when Punjab Ordinance No.l of 2015 remained in force shall remain stayed subject to the petitioners' furnishing details of sugar imported by it within the State during that period to the Assessing Authority. They shall furnish surety to the satisfaction of the assessing officer to the extent of the amount of tax payable under Punjab Ordinance No.l of 2015 to secure interest of the State. Any of the dealer, if so wish, may furnish bank guarantee also.

**4.** Admitted.

**5.** A copy of this order be placed on the files of connected cases.

———

# PUNJAB & HARYANA HIGH COURT

**STA NO. 15 OF 2015**

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**COMMISSIONER OF CENTRAL EXCISE**
**Vs**
**VOICE TELESYSTEM**

**AJAY KUMAR MITTAL AND RAJ RAHUL GARG, JJ.**

20th January, 2016

**HF ▶ Respondent Company**

*There is no bar on Tribunal to permit its interim order of stay to remain in force beyond the period of 365 days in deserving cases.*

**INTERIM STAY – POWER OF TRIBUNAL – EXTENSION OF INTERIM STAY BEYOND THE STIPULATED PERIOD – PENALTY IMPOSED ALONGWITH INTEREST DUE TO NON-PAYMENT OF SERVICE TAX – APPEAL FILED BEFORE COMMISSIONER DISMISSED – APPEAL BEFORE TRIBUNAL – INTERIM STAY GRANTED - EXTENSION OF STAY APPLIED FOR AFTER EXPIRY OF 365 DAYS WHICH WAS GRANTED FOR ANOTHER SIX MONTHS – APPEAL BY REVENUE AGAINST THE POWER OF TRIBUNAL TO GRANT EXTENSION OF STAY BEYOND THE PERIOD PRESCRIBED U/S 35C(2A) OF THE ACT – HELD: W.E.F. 6/8/2014 BY FINANCE ACT, THE PROVISOS BARRING THE TRIBUNAL IN GRANTING EXTENSION OF INTERIM STAY ARE REMOVED THEREBY EMPOWERING TRIBUNAL TO LET ITS STAY ORDERS REMAIN IN FORCE UNLESS LIMITED BY TRIBUNAL ITSELF – WHERE DELAY IN DISPOSAL OF APPEAL IS NOT ATTRIBUTABLE TO ASSESSEE , INTERIM PROTECTION CAN CONTINUE BEYOND 365 DAYS IN DESERVING CASES –** *S.35C (2A) OF CENTRAL EXCISE ACT, 1944*

***Facts***

*The Respondent was engaged in the promotion of marketing of its services without getting itself registered for service tax. The Addl. Commissioner imposed penalty alongwith interest after issuing a show cause notice. An appeal was filed before Commissioner which was rejected. Aggrieved by the order an appeal was filed before Tribunal and the Tribunal granted stay in the matter vide order dated 4.7.2011. After the expiry of 365 days, the assesee again filed an application for extension of stay. The Tribunal vide order dated 10.12.2014 extended the stay for a period of 6 months. Hence, an appeal is filed by revenue before the High Court raising a question against power of Tribunal to extend the interim order beyond the specified maximum period prescribed under Section 35C (2A) of the Central Excise Act, 1944.*

***Held:***

*Referring to the statutory provisions under sub section 2A of the Act, as it stood before omission, the Tribunal was barred from extending the stay beyond the period of 365 days in the total. However, w.e.f. 6.08.2014 by Finance (No.2) Act 2014, the proviso which earlier barred the Tribunal beyond the mentioned period has been omitted. Though it is mandate to decide the appeal within three years there is no provision for making any further application for extension of stay.*

*The appeals filed have to be disposed of within a period of 3 years and stay orders passed by Tribunal would continue to remain in force unless it is limited by the Tribunal itself. Hence, it is concluded that where the appeal could not be decided by Tribunal due to the pressure of pending cases and delay in disposal of appeal is not attributable to the assessee, the interim protection can continue beyond 365 days in deserving cases. The appeals filed by the revenue are dismissed and Tribunal is directed to decide the pending appeals within a period of 6 months.*

***Cases referred:***

- *Salasar Steel and Power Limited vs. Commissioner of C.Ex. & Customs, 2015(316) ELT 177*
- *Central Excise, Meerut vs. Vadafone Essar South Limited, 2015(323) ELT 249 (Allahabad)*
- *Commissioner of Central Excise, Delhi vs. Brew Force Machine Pvt. Limited, 2015 TIOL-1873-HC-DEL-CX-LB*
- *Pepsi Foods Pvt. Limited now merged with Pepsico India Holding Pvt. Limited vs. Assistant Commissioner of Income Tax and another, 2015-TIOL-1306 HC-DEL-IT*
- *Commissioner of Customs & Central Excise, Ahmedabad vs. Kumar Cotton Mills Pvt. Limited, (2005) 180 ELT 434*
- *Jagjit Singh and others vs. Union of India and others, (2014) 211 DLT 15*
- *Commissioner of Customs & Central Excise, Kanpur vs. J.P. Transformers, (2014) 307 ELT 436 (All.)*

**Present:** Mr. Sunish Bindlish, Advocate for the appellant.
Mr. Amar Pratap Singh, Advocate, Mr. R.K.Hasija,
Advocate and Mr. S.J.Singh, Advocate for the respondents.
Mr. Jaiender Saini, Advocate for the respondent in STA No.21 of 2015.

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**AJAY KUMAR MITTAL,J.**

**1.** This order shall dispose of STA Nos. 15, 20 to 22 and 28 of 2015 and CEA Nos.34, 43, 41 and 48 of 2015 as learned counsel for the parties are agreed that the issue involved in all these appeals is identical. However, the facts are being extracted from STA No. 15 of 2015.

**2.** STA No. 15 of 2015 has been preferred by the appellant-revenue under section 35G of the Central Excise Act, 1944 (in short, "the Act") read with section 83 of the Finance Act, 1994 against the final order dated 10.12.2014, Annexure A.5 in appeal No. ST 1664/2010, passed by the Customs, Excise and Service Tax appellate Tribunal, New Delhi (in short, "the Tribunal") claiming following substantial question of law:-

> *"Whether Hon'ble CESTAT was right in holding that as per the third proviso to Section 35C(2A) of the Central Excise Act, 1944, it has got the power to grant extension of stay beyond 365 days from the initial grant of an order of stay?"*

**3.** A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The respondent assessee company was engaged in providing business Auxiliary service w.e.f November 2002 to M/s BSNL. Later on, it got itself registered for the category of business auxiliary service as per Section 65 of the Finance Act, 1994 and was not paying service tax under the service tax provisions. Investigation in the matter was carried out on the basis of information that the respondent was a channel partner of M/s BSNL and was engaged in the promotion of marketing of its services since November 2002 without getting itself registered for service tax. The respondent did not disclose the fact of providing this service to the department. In response to the letters dated 10.5.2008 and 11.9.2008 issued by the department, the assessee submitted that it received an amount of Rs.1,18,78,093/- from BSNL during the period from April 2007 to March 2008. Hence a Show Cause notice was issued to it on 3.10.2008, Annexure A.l. The case was adjudicated by the Additional Commissioner and vide order dated 29/30.9.2009, Annexure A.2, the demand was confirmed alongwith interest. A penalty of Rs.12 lacs was also imposed. Aggrieved by the order, the respondent-assessee filed appeal before the Commissioner (Appeals) which was rejected vide order dated 16.8.2010,

Annexure A.3. The assessee filed appeal before the Tribunal. Vide order dated 4.7.2011, Annexure A.4, the Tribunal granted stay in the matter. As the period of 365 days had lapsed, the assessee again filed application for extension of stay. The Tribunal vide order dated 10.12.2014, Annexure A.5 extended the stay for a period of six months. Hence the instant appeals by the revenue.

**4.** We have heard learned counsel for the parties.

**5.** In this bunch of appeals, the solitary question of law arising for adjudication is whether the Tribunal is empowered to extend the interim order beyond the specified maximum period prescribed under Section 35C (2A) of the Act?

**6.** Reference is made to the statutory provision contained in Section 35C(2A) of the Act before omission of three provisos by Finance (No.2) Act, 2014 effective from 6.8.2014, which is quoted below:-

> *"**35C (2A)** The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:*
>
> > ***Provided** that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of section 35B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:*
> >
> > ***Provided** further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.*
> >
> > ***Provided** also that where such appeal is not disposed of within the period specified in the first proviso, the Appellate Tribunal may, on an application made in this behalf by a respondent and on being satisfied that the delay in disposing of the appeal is not attributable to such party, extend the period of stay to such further period, as it thinks fit, not exceeding one hundred and eighty-five days, and in case the appeal is not so disposed of within the total period of three hundred and sixty-five days from the date of order referred to in the first proviso, the stay order shall, on the expiry of the said period, stand vacated."*

**7.** It would be expedient to explore the legislative history of the said provision. Section 35C of the Act provides for the orders that may be passed by the Tribunal. It was amended by Section 140 by the Finance Act, 2002 with effect from 11.5.2002 whereby sub section 2A was inserted as under:-

> *"(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed:*
>
> *Provided that where an order of stay is made in any proceedings relating to an appeal filed under sub section (1) of section 35B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:*
>
> *Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated."*

**8.** Section 98 of the Finance Act, 2013 had further amended Section 35C(2A) of the Act with effect from 10.5.2013 wherein a third proviso was added in the following terms:-

> *"Provided also that where such appeal is not disposed of within the period specified in the first proviso, the Appellate tribunal may, on an application made in this behalf by a party and on being satisfied that the delay in disposing of the appeal is not attributable to such party, extend the period of stay to such further period as it thinks fit, not exceeding one hundred and eighty five days and in case the appeal is not so disposed of within the total period of three hundred and sixty five days from the date of order referred to in the first proviso, the stay order shall, on the expiry of the said period, stand vacated."*

**9.** On plain reading, Sub section 2A of the Act indicates that it would be the endeavour of the Tribunal to hear and decide the appeal within a period of three years from the date of filing of the appeal. The first proviso to sub section 2A of Section 35C of the Act mandates that if any interim order was passed by the Tribunal, the appeal shall be adjudicated within 180 days from the date of such order. According to the second proviso, where the appeal was not decided within 180 days from the date of interim order, the protection prescribed under the interim order would cease to operate upon the expiry of 180 days. The third proviso added by Finance Act, 2013 effective from 10.5.2013 had empowered the Tribunal to grant interim protection to the assessee beyond 180 days wherever the delay in disposal of the appeal before the Tribunal was not attributable to the assessee. The stay was not effective beyond the period of 365 days in total. The issue which requires deliberations remains "whether the assessee is entitled to interim protection even beyond 365 days where delay in disposal of appeal is not attributable to him".

**10.** Now with effect from 6.8.2014 by Finance (No.2) Act 2014, all the three provisos in sub section (2A) of Section 35C of the Act have been omitted and the bar which was upon the Tribunal to grant limited stay orders has now been removed even though the mandate to decide the appeal within three years as far as possible still continues to operate. In other words, there is no provision for making any further application for extension of stay. The appeal filed by an assessee needs to be disposed of within a period of three years and stay orders which are passed by the Tribunal would continue to remain in force unless it is limited by the Tribunal itself.

**11.** The aforesaid provisions have been subject matter of interpretation by various courts.

**12.** In ***Salasar Steel and Power Limited vs. Commissioner of C.Ex. & Customs***, 2015(316) ELT 177 (Chhattisgarh), it was observed by the Chhattisgarh High Court that the statutory provision is itself discretionary in nature and its operation would depend upon the facts and circumstances of each case. If despite diligence on the part of the assessee, the Tribunal has not been able to take up the appeal due to pressure of pendency of cases, stay cannot be vacated. It was recorded as under: -

> *"7. A bare reading of the statutory provision shows that the appellate Tribunal will endeavour to decide the appeal within a period of three years from the date it is filed. The significance of the words - "where it is possible to do so" cannot be lost site of in interpreting the provision. The statutory provision is therefore not a complete embargo that under all circumstances, notwithstanding any other issue involved, stay has to be mandatorily vacated. In other words, the statutory provision is itself discretionary in nature and its operation would depend upon the facts and circumstances of each case. If the assessee after obtaining stay plays truant to delay disposal, the statutory provision can certainly be invoked. It cannot be invoked if the respondents play truant to delay disposal so that the statutory period would lapse, stay would have to be vacated and the appeal rendered futile. If despite diligence on the part of the appellant, the Tribunal has*

*not been able to take up the appeal due to pressure of pendency of cases, stay cannot be vacated. Any interpretation to the contrary shall be doing complete violence to the statutory provision and has to be rejected."*

**13**. In Commissioner of ***Central Excise, Meerut vs. Vadafone Essar South Limited***, 2015(323) ELT 249 (Allahabad), the question before the Allahabad High Court was whether the Tribunal was vested with the power to extend the stay order beyond the specified maximum time limit prescribed in Section 35C(2A) of the Act and if so, to what extent. After discussing the relevant statutory provision and the case law on the point, it was held by the court that there is no provision for making any further application for extension of stay. The appeal filed by an assessee needs to be disposed of within a period of three years and stay orders which have been passed by the Tribunal would continue to remain in force unless it is limited by the Tribunal itself. The relevant observations read thus:-

*"8. Upon the insertion of Section 35C (2A) of the Act, a mandate was given to the Tribunal to decide the appeal within a period of three years "where it is possible to do so".*

*9. The first proviso to sub section (2A) of Section 35C of the Act indicates, that if any order of stay was passed by the Tribunal in which case, the appellate tribunal shall dispose of the appeal within 180 days. The second proviso stated that if the appeal was not disposed of within 180 days then the stay order would stand vacated upon the expiry of 180 days. The third proviso, which was added by the Finance Act, 2013, further stipulated that when the appeal was not disposed of within 180 days, the appellate Tribunal, if it was satisfied that the delay in disposal of the appeal was not attributable to the assessee, would extend the period of stay for another 185 days and, if the appeal was not disposed of within a total period of 365 days, the stay would stand vacated upon the expiry of 365 days.*

*10. Section 35C (2A) of the Act and its three proviso was interpreted by various courts including this Court.*

*11. In Writ Tax No.375 of 2014,* ***M/s Garg Industries vs.Union of India through Secretary Revenue and two others****, decided on 1.7.2014, 2014(307) ELT 432 (All.), a Division Bench of this Court held that the Tribunal in an appropriate case can extend the stay order, but not exceeding 365 days, and that, in an appropriate case, the High Court under Article 226 of the Constitution of India could extend the stay order.*

*12. In* ***L.G. Electronics India Private Ltd. vs. Commissioner of Income Tax****, in Writ Tax No.390 of 2015, decided on 22.4.2015, the Writ Court held that Section 35C (2A) of the Act does not prohibit the appellant in filing a second stay application where the appeal was not disposed of within 365 days and that the interim order would stand vacated upon the expiry of 365 days. The Court further held, that where a fresh stay application was filed, the Tribunal was competent to dispose of such application.*

*13. In* ***Central Excise Appeal No. 117 of 2015, Commissioner of Central Excise vs. M/s Mayank and Company****, decided on 2.7.2015, a Division Bench of this Court held that the interim order passed by the Tribunal under Section 35 C (2A) of the Act had a limited shelf life and that upon the expiry or immediately before the expiry, it would be open to the assessee to move a fresh stay application, which would be decided by the Tribunal in accordance with law.*

*14. In* ***Commissioner of Customs and Central Excise, Kanpur vs. J.P. Transformers****, 2014 (307) E.L.T. 436 (All.) another Division Bench of this Court held that the Tribunal did not have the power to extend the interim order after the expiry of 365 days inasmuch as such order could be misused by the assessee.*

*15. Section 35F of the Act and Section 35C (2A) of the Act were amended by Finance (No.2) Act 2014 w.e.f. 6.8.2014. Section 35F of the Act, as amended by Finance Act 2014, is extracted hereunder:*

> *"35F. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal.—The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal –*
>
> *(i) under sub-section (1) of section 35, unless the appellant has deposited seven and a half per cent, of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of Central Excise lower in rank than the (Principal Commissioner of Central Excise or Commissioner of Central Excise);*
>
> *(ii) against the decision or order referred to in clause (a)of sub-section (1) of section 35B, unless the appellant has deposited seven and a half per cent, of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;*
>
> *(iii) against the decision or order referred to in clause (b) of sub-section (1) of section 35B, unless the appellant has deposited ten per cent, of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against:*
>
> *Provided that the amount required to be deposited under this section shall not exceed rupees ten crores:*
>
> *Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014.*
>
> *Explanation. - For the purposes of this section "duty demanded" shall include,—*
>
> *(i) amount determined under section 11D;*
>
> *(ii) amount of erroneous Cenvat credit taken;*
>
> *(iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002 or the Cenvat Credit Rules, 2004."*

*16. By the aforesaid amendment the power given to the Tribunal to waive or impose a condition on the pre-deposit of duty has now being dispensed with.*

*Now if an appeal is preferred, the assessee is required to deposit 7.5% of the duty levied before the appeal could be entertained.*

*17. Section 35C (2A) was amended by the provision of Section 103 of the Finance Act (2) of 2014 as under:*

> *"103. In the Central Excise Act, in Section 35C, in subsection (2A) the first, second and third proviso shall be omitted."*

*18. Section 35C (2A) of the Act as amended in 2002 and 2013 makes it apparently clear that the Tribunal was mandated to hear every appeal within a period of three years "where it is possible to do so". These words indicate that though a mandate was given to the Tribunal to decide the appeal within three years, it was not a mandatory provision, but, only a directory provision. Consequently, the first, second and third proviso directing the Tribunal to decide the appeal within 180 days in the first instance or within 365 days in the second instance, failing which, the stay order would stand vacated also has to be read as directory in nature. If the main provision cannot be treated as mandatory, the first, second and third proviso also cannot be treated as mandatory.*

*19. We are, therefore, of the opinion, that if the Tribunal would not dispose of the appeal within 365 days under the first, second and third proviso of Section 35C (2A) of the Act which was not attributable to the assessee, it would not mean that the Tribunal was divested with its incidental powers in not extending the interim order. The three proviso, in our view, cannot be read as mandatory in nature.*

*xxxx xxxx xxx xxx xxx xxx xxx xxx xxx*

*23. In any case, the three provisos in sub section (2A) of Section 35C of the Act has now been omitted w.e.f. 6.8.2014 and the bar which was upon the Tribunal to grant limited stay orders has now been removed even though the mandate to decide the appeal within three years, as far as possible, still continues to operate.*

*24. The omission of the first, second and third proviso to Section 35C(2A) of the Act in effect means that there is no provision for making any further application for extension of stay. The omission of the first, second and third proviso would mean that the appeal filed by an assessee needs to be disposed of within a period of three years and stay orders which have been passed by the Tribunal would continue to remain in force unless it is limited by the Tribunal itself."*

**14.** In ***Commissioner of Central Excise, Delhi vs. Brew Force Machine Pvt. Limited***, 2015 TIOL-1873-HC-DEL-CX-LB, the question before the Full Bench of Delhi High Court was with regard to the power of the Tribunal to grant or extend stay of recovery of demand beyond 365 days from the date when the stay order was initially passed notwithstanding that the delay in disposal of the appeal was not attributable to an assessee. After considering the relevant case law on the point, the answer was given in the affirmative. It was recorded as under:-

> *"Thus, it is clear that in* ***MarutiSuzuki (India) Ltd.,*** *(2014) 362 ITR 215, the Division Bench was of the opinion that as per the earlier provisions before substitution of the third proviso by Finance Act, 2008, Income Tax Appellate Tribunal had power and authority to extend stay of demand beyond 365 days and the provisions as they then existed were to curtail long delays and ensure*

*expeditious disposal of the appellate proceedings, but without curtailment of power to grant stay beyond 365 days. Reliance was placed on the observations of the Supreme Court in* ***Commissioner of Customs and Central Excise Vs. Kumar Cotton Mills Pvt. Ltd.*** *[2005] 180 ELT 434 (SC), the relevant portion of which was quoted.*

*8. It is, therefore, clear that the legislature had by Finance Act, 2008 inserted the words, ever if the delay in disposing of the appeal is not attributable to the assessee, in the third proviso to Section 254(2A) of the IT Act, but no such amendment or substitution was made in Section 35C (2A) of the CE Act. The ratio and decision in the case of* ***Maruti Suzuki (India) Ltd****., therefore, would not be applicable to CEGAT while dealing with an application for stay or their power and jurisdiction to grant stay beyond 365 days, when the assessee is not responsible, under Section 35C (2A) of the CE Act. Therefore, we are unable to agree with the reasoning of the Division Bench of this Court in* **Haldiram India Pvt. Ltd.***, 2014-TIOL- 1965-CESTAT-DEL-LB, observing that the ratio of the aforesaid decision in Maruti Suzuki (India) Ltd. would apply even to Section 35C(2A) of the CE Act. The decision of the Division Bench in* ***Haldiram India Pvt. Ltd.*** *is hereby overruled.*

*9. In view of the limited question involved, we are not examining other aspects. However, for the purpose of record, we note that a Division Bench of this Court in the case of* ***Pepsi Foods Pvt. Ltd****. (supra) [2015-TIOL-1306-HC-DEL, has struck down the amendments inserted/substituted by Finance Act, 2008 as being violative of Article 14 of the Constitution of India. The question raised before us, however, is different. The reference is accordingly answered..."*

**15.** In ***Pepsi Foods Pvt. Limited now merged with Pepsico India Holding Pvt. Limited vs. Assistant Commissioner of Income Tax and another***, 2015-TIOL-1306 HC-DEL-IT, the challenge was to the constitutional validity of third proviso to Section 254(2A) of the Income Tax Act, 1961 which was amended to mean that the Tribunal could not grant any further extension of the stay after expiry of 365 days even though the appeals filed by the assessee before the Tribunal were pending and the delay in the disposal of the appeals was not on account of any conduct attributable to the assessee. After considering the relevant statutory provisions and the case law on the point, it was held that the Tribunal has the power to grant extension of stay beyond 365 days in deserving cases. The relevant observations recorded read thus:-

*"23. Keeping in mind the principles set out by the Supreme Court in* ***Dr Subramanian Swamy*** *(supra), [(2014) 8 SCC 682 (SC)] we need to examine whether the present challenge to the validity of the third proviso to Section 254(2A) can be sustained. This is not a case of excessive delegation of powers and, therefore, we need not bother about the second dimension of Article 14 in its application to legislation. We are here concerned with the question of discrimination, based on an impermissible or invalid classification. It is abundantly clear that the power granted to the Tribunal to hear and entertain an appeal and to pass orders would include the ancillary power of the Tribunal to grant a stay. Of course, the exercise of that power can be subjected to certain conditions. In the present case, we find that there are several conditions which have been stipulated. First of all, as per the first proviso to Section 254 (2A), a stay order could be passed for a period not exceeding 180 days and the Tribunal should dispose of the appeal within that period. The second proviso stipulates that in case the appeal is not disposed of within the period of 180 days, if the*

*delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to extend the stay for a period not exceeding 365 days in aggregate. Once again, the Tribunal is directed to dispose of the appeal within the said period of stay. The third proviso, as it stands today, stipulates that if the appeal is not disposed of within the period of 365 days, then the order of stay shall stand vacated, even if the delay in disposing of the appeal is not attributable to the assessee. While it could be argued that the condition that the stay order could be extended beyond a period of 180 days only if the delay in disposing of the appeal was not attributable to the assessee was a reasonable condition on the power of the Tribunal to the grant an order of stay, it can, by no stretch of imagination, be argued that where the assessee is not responsible for the delay in the disposal of the appeal, yet the Tribunal has no power to extend the stay beyond the period of 365 days. The intention of the legislature, which has been made explicit by insertion of the words - 'even if the delay in disposing of the appeal is not attributable to the assessee'- renders the right of appeal granted to the assessee by the statute to be illusory for no fault on the part of the assessee. The stay, which was available to him prior to the 365 days having passed, is snatched away simply because the Tribunal has, for whatever reason, not attributable to the assessee, been unable to dispose of the appeal. Take the case of delay being caused in the disposal of the appeal on the part of the revenue. Even in that case, the stay would stand vacated on the expiry of 365 days. This is despite the fact that the stay was granted by the Tribunal, in the first instance, upon considering the prima facie merits of the case through a reasoned order.*

*24. Furthermore, the petitioners are correct in their submission that unequals have been treated equally. Assessees who, after having obtained stay orders and by their conduct delay the appeal proceedings, have been treated in the same manner in which assessees, who have not, in any way, delayed the proceedings in the appeal. The two classes of assessees are distinct and cannot be clubbed together. This clubbing together has led to hostile discrimination against the assessees to whom the delay is not attributable. It is for this reason that we find that the insertion of the expression - 'even if the delay in disposing of the appeal is not attributable to the assessee'- by virtue of the Finance Act, 2008, violates the non-discrimination clause of Article 14 of the Constitution of India. The object that appeals should be heard expeditiously and that assesses should not misuse the stay orders granted in their favour by adopting delaying tactics is not at all achieved by the provision as it stands. On the contrary, the clubbing together of 'well behaved' assesses and those who cause delay in the appeal proceedings is itself violative of Article 14 of the Constitution and has no nexus or connection with the object sought to be achieved. The said expression introduced by the Finance Act, 2008 is, therefore, struck down as being violative of Article 14 of the Constitution of India. This would revert us to the position of law as interpreted by the Bombay High Court in Narang Overseas (supra), [(2007) 295 ITR 22 (Bom.)] with which we are in full agreement. Consequently, we hold that, where the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to grant extension of stay beyond 365 days in deserving cases. The writ petitions are allowed as above.*

**16.** The Apex Court in ***Commissioner of Customs & Central Excise, Ahmedabad vs. Kumar Cotton Mills Pvt. Limited***, (2005) 180 ELT 434, interpreting sub section 2A of Section 35C of the Act as introduced on 11.5.2002 had noticed as under:-

> *"6. The sub section which was introduced in terrorem cannot be construed as punishing the assessees for matters which may be completely beyond their control. For example, many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed within the time specified. The reasoning of the Tribunal expressed in the impugned order and as expressed in the Larger Bench matter namely IPCL vs. Commissioner of central Excise, Vadodara (surpa) cannot be faulted. However, we should not be understood as holding that any latitude is given to the Tribunal to extend the period of stay except on good cause and only if the Tribunal is satisfied that the matter could not be heard and disposed of by reason of the fault of the Tribunal for reasons not attributable to the assessee."*

**17.** In view of the above, the question posed in para 5 above is answered in the affirmative. Accordingly, it would be concluded that wherever the appeal could not be decided by the Tribunal due to pressure of pendency of cases and the delay in disposal of the appeal is not attributable to the assessee in any manner, the interim protection can continue beyond 365 days in deserving cases.

**18.** Adverting to the judgments relied upon by the learned counsel for the revenue, it may be noticed that in ***Jagjit Singh and others vs. Union of India and others***, (2014) 211 DLT 15, while dealing with a case of land acquisition, it was held by a Full Bench of Delhi High Court that the deeming provision of section 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (in short, "the 2013 Act") is a legal fiction which is created and an imagined situation. Once the state of affairs is imagined as real, the consequences and instances would also have to be imagined as real. That was a case where question was of lapse of acquisition proceedings on account of applicability of Section 24(2) of the 2013 Act. The situation in the present case is different. In ***Commissioner of Customs & Central Excise, Kanpur vs. J.P. Transformers***, (2014) 307 ELT 436 (All.), it was held by the Allahabad High Court that the entire object and purpose of insertion of sub section (2A) in Section 35C by Section 140 of the Finance Act 2002 w.e.f 11.5.2002 and the third proviso by Finance Act, 2013 would stand defeated if the waiver of pre-deposit is granted indefinitely. In Garg Industries vs. Union of India, (2014) 307 ELT 432 (All.), it was held by the Allahabad High Court that it was not open to the Tribunal to extend the stay to cover a period exceeding three hundred and sixty five days. This however would not exclude in an appropriate case the power of the High Court under Article 226 of the Constitution of India to pass a protective order provided the court comes to the conclusion that the delay in the disposal of the appeal was not attributable to the conduct of the party which had obtained an order of stay. In view of the consistent opinion of all other High Courts and the observations of the Apex Court as noticed herein above, we are unable to subscribe to the aforesaid approach of the Allahabad High Court and record our dissent.

**19.** In view of the legal position enunciated above, while dismissing the appeals, we direct that the appeals pending before the Tribunal shall be decided expeditiously within a period of six months from the date of receipt of a certified copy of this order.

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# PUNJAB & HARYANA HIGH COURT

**VATAP NO 18 OF 2016.**

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**STATE OF PUNJAB AND OTHERS**
**Vs**
**OM SHANTI STEEL INDUSTRIES**

**AJAY KUMAR MITTAL AND RAJ RAHUL GARG, JJ.**

16th March, 2016

**HF ▶ Assessee**

*As necessary documents required to cover the transaction stood produced, enquiry ought to have been conducted instead of levying penalty u/s 51.*

**PENALTY – CHECK POST/ ROAD SIDE CHECKING – ATTEMPT TO EVADE TAX - INGENUINE DOCUMENTS – TWO CONSIGNMENTS LOADED IN TRUCK IN FAVOUR OF TWO DIFFERENT DEALERS – INVOICE AND GR DULY PRODUCED ON INTERCEPTION – INVOICE SUSPECTED TO BE FICTITIOUS IN RESPECT OF ONE TRANSACTION – PENALTY IMPOSED – PENALTY DELETED BY TRIBUNAL ON APPEAL BASED ON THE FACT THAT THE REQUIREMENT OF PRODUCING INVOICE AND GR STOOD FULFILLED – APPEAL FILED BEFORE HIGH COURT BY DEPARTMENT – HELD: DOCUMENTS PRODUCED BY DEALER AS RECORDED BY TRIBUNAL – SUPPORTING DOCUMENTS PRODUCED BEFORE AUTHORITIES BELOW TO PROVE THE BONAFIDES WHICH WERE OTHERWISE NOT NECESSARY – WRONGLY RECORDED BY AETC REGARDING ACCOUNT BOOKS BEING NOT PRODUCED – IN CASE OF DOUBT ENQUIRY COULD HAVE BEEN CONDUCTED – FINDINGS OF TRIBUNAL NOT SHOWN TO BE PERVERSE- APPEAL DISMISSED AND ORDER OF TRIBUNAL UPHELD –** *S. 51 (7) OF PVAT ACT, 2005*

***Facts***

*The goods vehicle was in transit from Mandi Gobindgarh to Jalalabad. The vehicle was intercepted and the driver produced the invoice and GR in respect of two consignments being sent to two different dealers. The goods were detained and penalty was imposed on account of one bill suspecting it to be fictitious. On appeal before Tribunal penalty was set aside. Hence, an appeal is filed by the department before High court.*

***Held:***

*As recorded by Tribunal, all the requisite documents like invoice and GR were in possession of driver and duly produced. Other supporting documents in respect of the transaction were produced by the dealer. If there were any doubt, an enquiry could have been conducted. Also, it has been wrongly recorded by AETC that account books were not produced by the respondent dealer. The findings of Tribunal have not shown to be perverse. The order of Tribunal is upheld and penalty stands deleted. The appeal is dismissed*

**Present:** Mr. Jagmohan Bansal, Additional Advocate General, Punjab, for the appellants..

******

**AJAY KUMAR MITTAL,J.**

**1.** This appeal has been filed by the State of Punjab under Section 68 of the Punjab Value Added Tax Act, 2005 (in short "the Act") against the order dated 1.12.2015 (Annexure A-3) passed by the Chairman, Value Added Tax Tribunal, Punjab, Chandigarh (hereinafter referred to as "the Tribunal") in VAT Appeal No. 219 of 2015, claiming the following substantial questions of law:-

*(i) Whether the order passed by the Ld. VAT Tribunal is sustainable in law?*

*(ii) Whether the order passed by the Ld. VAT Tribunal is sustainable in law when in the present case, the respondent had intentionally made an attempt to evade the tax by adopting the modus operandi as discussed in the foregoing paragraphs?*

*(iii) Whether the Ld. Tribunal had rightly allowed the appeal of the Respondent when an attempt to evade the tax is proved on the basis of facts and documents available on record?*

**2.** Briefly stated, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. It is mandatory for every taxable person under Section 51(2) of the Act to cover the transactions of sale and purchase, whether inter-state or intra state sale with goods receipt, a trip sheet or a log book, as the case may be, and a sale invoice or bill or cash memo or delivery challans containing such particulars, as may be prescribed in respect of such goods meant for the purpose of business. During the course of checking under Section 51(2) of the Act, the Excise and Taxation Officer, Mobile Wing, Bathinda, intercepted vehicle bearing registration No. HR-57-4097 loaded with TMT Bar from Mandi Gobindgarh to Jalalabad. On asking, the driver of the said vehicle had produced the following documents before the Detaining Officer:-

*(i) Invoice No. 19 dated 7.5.2013 issued by M/s Om Shanti Steel Industries, Mandi Gobindgarh, in favour of M/s Vikram Enterprises, Jalalabad for 3910 Kgs of TMT Bars amounting to Rs.1,68,245/- including VAT charged.*

*(ii) GR No. 12849 of Khanna Calcutta Transport Co. GT Road, Khanna.*

*(iii) Invoice No. 786 dated 7.5.2013 issued by M/s Aar Kay Industries, Mandi Gobindgarh in favour of M/s Baldev Krishan & Sons, Jalalabad, in respect of 6080 Kgs of TMT Bars amounting to Rs. 2,64,809/- including excise duty and VAT.*

*(iv) GR No. 12850 dated 7.5.2015 of Khanna Calcutta Transport Co., GT Road, Khanna, and*

*(v) Self generated E-trip slip No. XXXIV-D (Intra State slip) covering the goods against invoice No. 786.*

**3.** According to the appellants, the taxable person had not issued excise invoice in respect of 3910 Kgs of TMT Bar nor any information by way of e-trip as required under Rule 64-B of the Punjab Value Added Tax Rules was furnished. Accordingly, the goods were detained and notice was issued. However, the goods were got released on furnishing of bank guarantees of Rs. 37,875/- and Rs. 12,625/- totalling Rs. 50,500/-. Appellant No.3 vide order dated 16.5.2013 (Annexure A-1) imposed the penalty of Rs. 50,500/- under Section 51(7)(b) of the Act. Feeling aggrieved, the respondent filed an appeal before the Deputy Excise and Taxation Commissioner (Appeals) who vide order dated 27.10.2014 (Annexure A-2) upheld the order, Annexure A-1, and dismissed the appeal. Against the order, Annexure A-2, the respondent filed an appeal before the Tribunal. The Tribunal vide order dated 1.12.2015

(Annexure A-3) allowed the appeal and deleted the penalty of Rs. 50,500/-. Hence, the present appeal by the appellants.

**4.** After hearing learned counsel for the appellants, we do not find any merit in the appeal.

**5.** The Tribunal had recorded that two consignments, i.e., one issued vide invoice No. 19, dated 7.5.2013 for 3.910 MT from Mandi Gobindgarh to Jalalabad and the other issued vide invoice No. 786 dated 7.5.2013 of M/s Aar Kay Industries, Mandi Gobindgarh in favour of M/s Baldev Krishan & sons, Jalalabad for 6.080 MT were in possession of the driver of the truck bearing No. HR-57-4097. Further, it was held that GR No. 12849 related to the transporting of the goods by the assessee. However, to show the bonafides, he had produced the purchase bill of 3.910 MT from M/s Aar Kay Industries in his favour even though there was no requirement of law to produce the same. Even the wrong fact was recorded by the Assistant Excise and Taxation Commissioner that the books of account were not produced before the Excise and Taxation Officer. The essential requirement that the bill and G.R. Should accompany the goods at the time of its transport/movement of the goods had been fulfilled. If there was any doubt about the sale of the TMT bars by M/s Aar Kay Industries to the assessee then the notice of enquiry could have been issued to the said selling firm or its business premises could have been inspected but this factor could not be attributed to the assessee. Even the sale voucher issued by the assessee to Vikram Enterprises was produced before the Designated Officer and this fact is duly mentioned in the order. In view of the above, it appeared that the goods carried by the assessee from Mandi Gobindgarh to Jalalabad through the truck were covered by the proper and genuine documents. The confusion was created on account of the fact that these were two consignments and the Designated Officer doubted that the bill issued by the assessee in favour of Vikram Enterprises was fictitious. It was further observed by the Tribunal that the said doubt was just a camouflage in order to pass incorrect order of penalty. The relevant findings recorded by the Tribunal read thus:-

> *"After deliberating over the arguments raised by the rival parties, I find merit in the contentions raised by the counsel for the appellant. The driver of the truck bearing No. HR-57-4097 was in possession of two consignments; one issued vide invoice No. 19, dated 7.5.2013 for 3.910 MT from Mandi Gobindgarh to Jalalabad. The other transaction was under invoice No. 786 dated 7.5.2013 of M/s Aar Kay Industries, Mandi Gobindgarh in favour of M/s Baldev Krishan & sons, Jalalabad for 6.080 MT. The GR No. 12849 related to the transporting of the goods by the appellant. There was no requirement of law to produce the purchase bill of the goods from M/s Aar Kay Industries, Mandi Gobindgarh to the appellant, yet in order to prove all bonafides, produced the purchase bill of 3.910 MT from M/s Aar Kay Industries in his favour. The Assistant Excise and Taxation Commissioner has recorded a wrong fact that "the books of account were not produced before the Excise and Taxation Officer. The invoice of e-trip was not produced relating to the present consignment. The selling roller mill had issued Bill No. 787 for his own sale to another firm and bill No. 788 to the present appellant. It seems that bill No. 788 was issued after detention of the goods. But these facts apparently are not correct. The essential requirement that the bill and G.R. Should accompany the goods at the time of its transport/movement of the goods has been fulfilled. If the authorities had doubted about the sale of the TMT bars by M/s Aar Kay Industries to the appellant then the notice of enquiry could have been issued to the said selling firm or his business premises could have been inspected but this factor could not be attributed to the appellant. The law does not require that the purchase voucher as issued by M/s Aar Kay Industries to the appellant should also accompany the goods. The sale voucher is issued by the appellant to Vikram*

*Enterprises was produced before the Designated Officer which also finds mention in the order.*

*All this goes to show that the goods carried by the appellant from Mandi Gobindgarh to Jalalabad through the truck were covered by the proper and genuine documents. The confusion was created on account of the fact that these were two consignments and the Designated Officer doubted that the bill issued by the appellant in favour of Vikram Enterprises was fictitious. This doubt to my mind was just a camouflage in order to pass incorrect order of penalty. Having examined the orders passed by the authorities, the same are not correct and need to be set aside.*

*Resultantly, the appeal is accepted, impugned order is set aside and the order of penalty is quashed."*

**6.** The Tribunal on appreciation of material on record had deleted the penalty of Rs. 50,500/- imposed by Assistant Excise and Taxation Officer. Learned State counsel was not able to demonstrate that the approach of the Tribunal was erroneous or perverse or that the findings recorded were based on misreading or misappreciation of evidence on record. The view of the Tribunal is a plausible view and deletion of the aforesaid penalty could not be faulted.

**7.** In view of the above, no substantial question of law arises in this appeal. Accordingly, the instant appeal is dismissed.

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# PUNJAB VAT TRIBUNAL

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**APPEAL NO. 505 & 539 OF 2014**

**BALAJI SALES CORPORATION**
**Vs**
**STATE OF PUNJAB**

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

26th April, 2016

**HF ▶ Assessee**

*Adequate evidence being produced by appellant to prove sale of cloth (tax free goods) made out of imported yarn shifts the onus on department to prove otherwise.*

**TURNOVER – TAX FREE GOODS – SALE OF – YARN IMPORTED INTO PUNJAB AFTER DEFERMENT OF ENTRY TAX TO MANUFACTURE CLOTH FOR SALE WHICH IS TAX FREE IN THE STATE – INSPECTION OF PREMISES – NON OPERATIONAL MACHINES, NO STOCK OF CLOTH, ONE WORKER ONLY DETECTED – STATEMENT OF WORKER RECORDED ALLEGING NO MANUFACTURING OF CLOTH – NEIGHBOUR AND PETROL PUMP OWNER'S STATEMENT RECORDED STATING BONAFIDES OF APPELLANT - DEMAND RAISED ALONGWITH PENALTY AND INTEREST – APPEAL BEFORE TRIBUNAL – HELD: ELECTRICITY BILLS PRODUCED TO SHOW WORKING OF BUSINESS PREMISES – FACTUM OF EXEMPTION CERTIFICATE BEING GRANTED AFTER INSPECTION AND DECLARATION BY DEPARTMENT REGARDING MANUFACTURING OF CLOTH TAKEN INTO ACCOUNT – DEPARTMENT NOW STOPPED FROM ALLEGING OTHERWISE – MERE STATEMENT OF ONE WORKER NOT ENOUGH TO SUSPECT EVASION - GR PRODUCED SHOWING MOVEMENT OF GOODS – PAYMENT MADE THROUGH BANKING CHANNELS BY PURCHASERS OF CLOTH – MACHINES WERE NON OPERATIONAL DUE TO OFF SEASON –ICC DOCUMENTS SHOW MOVEMENT OF CLOTH – ORDER IS SILENT REGARDING HUGE STOCKS LYING AT BUSINESS PREMISES – REQUISITE DOCUMENTS DULY PRODUCED BEFORE LOWER AUTHORITIES AS PER OPENING LINES OF THEIR ORDER – CERTIFICATE OF TRANSPORT COMPANY PRODUCED – REQUIREMENT OF TIN IS NOT MANDATORY WHERE SALE IS TAX FREE – ADEQUATE EVIDENCE GIVEN BY APPELLANT THEREBY SHIFTING ONUS ON DEPARTMENT – APPEAL ACCEPTED – ASSESSING AUTHORITY TO FRAME FRESH ASSESSMENT- DEDUCTION OF SALE OF CLOTH TO BE ALLOWED FROM GROSS TURNOVER .**

***Facts***

*The appellant has been importing yarn against deferment of entry tax and manufacturing cloth which was tax free in the State of Punjab. Subsequently, it sold the cloth within and outside the State of Punjab which was used to make woolens for sale in winter season. An inspection was conducted at the business premises and it was detected that only one worker was present in the business premises, no cloth was being manufactured due to non operation of machines, no*

*stock of cloth available. Relying on the statement of a worker it was recorded that the appellant was not manufacturing cloth. After some time an officer again visited the premises and recorded the statement of an owner of Automobiles, neighbour of appellant, who stated that the appellant had been working in the premises for a few years. He explained that he had seen trucks loading and unloading at the premises of appellant. Another statement was recorded by Manager of Petrol Pump who stated that Diesel was purchased by appellant from him. The appellant was called to explain the position wherein, he produced electricity bills to the tune of Rs.14 lakhs which he had paid during the year in question. It was submitted that the appellant was himself the owner of the premises and the electric connection since 1999. The manufactured cloth was sold to different hosiery manufacturers who did not claim any ITC. Regarding non-operation of machine it was explained that since it was an off- season and there were no further orders machines were not in production. It was also submitted that the appellant had stock of 400 kg of manufactured cloth in its possession at the time of inspection which was not recorded. The purchase vouchers were alleged to have been seized by the authorities. However the Excise and Taxation Officer raised an additional demand and penalty alongwith interest under the local Act and under the CST Act holding that :-*

*(i) No sufficient evidence regarding ownership of machines or electricity connection was found.*

*(ii) That the manufacturer did not manufacture cloth but sold the yarn as it is therefore he is liable to pay tax.*

*(iii) Failure to produce GR, Payment slip, Sales bill and complete address of the buyers, led to inability to verify the genuineness of the sale.*

*(iv) Sales bills were not issued properly and TIN Number was missing. No certificate of transport company was submitted.*

*Aggrieved by the order, an appeal was filed before Tribunal.*

***Held:***

*When the exemption certificates were granted thrice to the appellant, the premises of appellant was inspected by the Department and it was specifically certified that "the appellant was engaged in the manufacturing of the cloth". Now the department is estopped from alleging otherwise. Also, if the pending writ petition against the order passed by high court in case of Bhushan Power and steels Ltd. Vs state of Punjab is decided thereby passing an adverse order, the appellant would be liable to pay the entry tax which is otherwise exempted. In such a situation , concealing sale of yarn would put him in a high risk .The case appears to be camouflaged. The contention that the appellant is not owner of the premises or the electricity connection of which bills are produced have been put down by the sale deed shown by appellant whereby it is clear that it is the owner of both. The statement of the two people i.e. the Automobile owner and petrol pump owner regarding bondfides of appellant have been taken into account .Mere statement of one worker without probing the case could not be believed in. The appellant has shown GR which reveals that he has sold the cloth outside the State of Punjab. The payments made to him by Bangalore purchaser were through Banking Channels. It is obvious that machines had gone in silence at the time of inspection due to off season. The department is completely silence about presence of stock amounting to 15 tonnes of yarn lying at business premises. The plea of department that the appellant is involved in job work is based on assumption. The allegation that the appellant is projecting sale of cloth is without any evidence as certain admissions made by the department in its certificates allowing the sale of cloth proves so. The documents at ICC prove that the appellant was manufacturing cloth. The appellant has proved adequately regarding its bonafides now it is for the department to rebut such evidence which means that the onus is shifted upon the department. The plea*

*raised by revenue that no account books were produced by appellant is not tenable as the opening lines of the orders passed by the officer and DETC reflect that account books, sale bills, copy of bank accounts, sale purchase accounts were duly produced. The certificate of transport company has also being produced showing movements of goods. The plea that no TIN number was recorded in sale invoice is without any merit as the cloth sold is tax free which does not mandate mentioning of TIN number of the seller or buyer. Thus, the findings recorded by the authorities below are set aside and the appeal is allowed. The deduction from gross turnover on account of sale made of cloth is allowed to be deducted under the VAT Act as well as under the CST Act. The Assessing Authority is directed to frame fresh assessment.*

**Present:** Mr. K.L. Goyal, Sr. Advocate alongwith
Mr. Rohit Gupta, Advocate Counsel for the appellant.
Mr. N.K. Verma, Sr. Dy. Advocate General for the State.

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

**1.** This order of mine shall dispose off two connected appeal Nos. 505 and 539 of 2014 against the order dated 30.9.2014 passed by the Deputy Excise and Taxation Commissioner (A), Ludhiana Division, Ludhiana (herein referred as the First Appellate Authority). Since both the appeals involve common questions of law and facts, therefore, both are decided together.

**2.**The Assessing Authority vide order dated 26.12.2013 framed additional demand to the tune of Rs.72,59,687/- under the Punjab Value Added Tax Act, 2005 and Rs.8,27,538/- under Central Sales Tax Act, 1956 for the assessment year 2012-13.

**3.** The appellant firm is a taxable person registered under the Punjab Value Added Tax as well as Central Sales Tax Act, 1956. He is engaged in the business of manufacturing and sale of cloth and also fabrication of the cloth owned by other persons. He has been filing the annual statements regularly with the department on time but there was"-no occasion to point out any deficiency in the returns regularly filed by the appellant. It would also be worthwhile to mention here that the appellant was importing. yarn against deferment of entry tax and manufacturing cloth which was tax free in the State of Punjab. The appellant had a manufacturing unit consisting of seven machines over which he used to manufacture cloth.

**4.** On 31.1.2013, it was admittedly an off season because the cloth which is being prepared by the appellant and other manufacturers, is sold to the dealers of Ludhiana and surrounding areas in and outside the State of Punjab which is used to make woolens for sale in the winter season.

**5.** During inspection on 31.1.2013 by the inspection team, it was detected that only one worker was present in the business premises; no cloth was being manufactured as the machines were not operating; no stock of cloth was available in the business premises; four knitting machines were installed in two rooms and three knitting machines were installed in the third last room of premises. The Excise and Taxation Officer took stock of fact situation at the spot recorded the statement of Ankit Malhotra, proprietor of M/s Balaji Sales Corporation (Appellant), Mr. Shatrudhan, a worker, Sonu S/o Shambu another worker consequently, while believing the statement of Shatrudhan, notice for the provisional assessment was given. It is also noticed that on the orders of the higher authorities, Mr Shalinder Singh, Excise and Taxation Officer again visited the premises of the appellant on 5.2.2013 and recorded the statements of Ankit Malhotra to the effect that there were seven knitting machines. The premises were videographed. He also recorded the statement of Mr. Vipar Manager of petrol pump who stated that the diesel was purchased by the appellant from him. Sh. Paramjit Singh an owner of the automobiles stated that the appellant firm was working in the premises for a few years. He has been seeing the truck loads, the tempos (tata 407) and small tempos coming

and going from the premises. Consequently, Shalinder Singh Excise and Taxation Officer, without making any further opinion submitted, his report.

**6.** Explanation of the Balaji Sales Corporation was called for wherein the appellant submitted that the firm had total seven machines at its business premises over which the cloth was being manufactured. The firm had paid the electricity bills to the tune of Rs.14.58 lacs to the electricity board during the year 2012-13 and it also furnished a copy of the electricity expenses for the said year alongwith the explanation and also receipts issued by the Punjab State Power Corporation Ltd. with regard to the payment of bills. It was also, submitted that the firm was the owner of the premises and the electric connection is with it since 1999. They had sold the manufactured goods (cloth) to different Hosiery manufactures and those manufacturers have manufactured the woolens and have not claimed any input tax credit. Most of those dealers are of the Punjab State and their accounts could be verified. Since the firm had sold the cloth (which was tax free in the State of Punjab) therefore the question of evasion of tax does not arise.

**7.** It was also submitted that the inspection was made on 31.1.2013 when it was an off season. The cloth which is used in manufacturing of hosiery items, is ordinarily prepared from July to December. In December they had exhausted their stock. Thereafter some raw material remained in the stock and some goods (raw material) in packed conditions were lying there. Because there were no further orders from the purchasers of cloth, therefore there may not be any stock of cloth on the last date of January 2013. It was also submitted that the appellant had a stock of 4oo kgs of manufactured cloth in its possession at the time of inspection but the Excise and taxation Officer did not notice the same and recorded the statements of the witnesses arbitrarily. He had produced the purchase vouchers which were seized by the authorities but same were not returned to him. We were also asked not to tamper with the goods i.e. the stock lying at the spot on 31.1.2013. Since the TIN No. of the appellant was also locked therefore, they could not proceed further to continue the business dealings. He has also submitted that there was no question of evasion of entry tax as all those goods purchased from, outside the State of Punjab were reported at the ICC and the appellant had been issued Deferment Certificate by the Department. The appellant had to wait and abide by the decision of the Hon'ble High Court. Since no tax is payable on sale of cloth, therefore, there is no question of evasion of tax.

**8.** In nutshell, it was submitted that they had not made any evasion of tax as the goods alongwith copies of import bills were disclosed at the ICC and those purchases were duly reflected in their returns. More so, in the light of the order granting protection by the Hon'ble High Court against payment of entry tax Certificate were issued by the Department that no tax would be payable at the time of the entry of goods and the appellant was to deposit tax only, after any adverse order is passed by the Hon'ble High Court. Since they had converted yarn into cloth by putting it into process over the machines, therefore question of evasion of tax does not arise. They paid a sum of Rs. 14.58 lacs on account of electricity consumption during the year whereas total payment of entry tax was not more then Rs. 17-18 lacs. In these circumstances no prudent man would take risk by paying a sum of Rs.14.58 lacs on account of electricity and that too when risk involved in payment of entry tax was still subject to the decision of the Courts.

**9.** Since the stipulated period for framing the provisional assessment had expired, therefore, the appellant was asked to file the annual return in form VAT 20 which was filed accordingly by the appellant.

**10.** After considering all the objections and contentions raised by the appellant, the Excise and Taxation Officer, vide his order dated 26.12.2013, created additional demand to the

tune of Rs.72,59,687/- including tax penalty and interest under the VAT Act and Rs.8,27,538/- under the Central Sales Tax Act on the following grounds:-

1. No sufficient evidence regarding ownership of the machines as well as the electricity connection was found.
2. Taxable person was a very petty dealer having G.T.O of Rs. 18.98 lacs and Rs. 2.41 lacs respectively during the years 2009-10 and 2010-11. However, after the order was passed by the Hon'ble High Court in CWP No.15378 of 2008 and CM No. 5160 of 2010 dated 28.3.2011 in case of Bhushan Power and Steels Ltd. regarding exemption of entry tax. The appellant obtained exemption/Deferment Certificate from entry tax and purchased yarn to the tune of Rs. 2,47,57,464/- w.e.f. 5.7.2011 to 31.3.2011with the undertaking that if the case is decided against the assessee then he would pay the entry tax. He also purchased yarn to the tune of Rs.3,75,71,557/- during the year 2012-13 against such Deferment Certificate from outside the State of Punjab. However, he did not manufacture the cloth and sold the yarn as such therefore he was liable to pay tax.
3. The appellant failed to produce any GR, payment slips, sale bills and complete address of the buyers therefore the genuineness of the sales could not be verified.
4. The sale bills being of high amount suggest that these were not issued properly and correctly in the name of actual buyers as the TIN No. etc. are missing over the bills.
5. The electricity connection is not in the name of the appellant.
6. The appellant did not report any yarn prior to the order dated 28.3.2011 as referred to above. It. also indicated that the appellant did not manufacture" the cloth and sold yam. No certificate of the transport company was submitted.

Being aggrieved by this order dated 26.12.2013, the appellant filed the appeal which was also dismissed on 30.9.2014.

Arguments heard. Record perused.

**11.** In order to make a serious attack on the observations made by the authorities below, he Counsel has submitted that the present case is the result of manipulations, conspiracy, enmity and jealousy of the persons in the back ground who were envious of budding business of the appellant.

**12.** It is admitted case of the department that the appellant was engaged in the business of manufacturing of cloth having registered TIN No.03272035110. The appellant has been filing returns regularly since earlier and were approved. The case relates to the assessment year 2012-13. The appellant had enhanced his business obviously in view of protection as granted by Hon'ble Punjab & Haryana High Court in case of Bhushan Power & Steels Ltd. Vs State of Punjab on deferred payment of entry tax over the yarn, on furnishing of the under taking and filing of an affidavit before the department that payment of entry tax would be subject to the decision of Hon'ble High Court. Accordingly, the appellant being eligible for exemption, furnished an undertaking. After getting his business of manufacturing of cloth, verified, exemption certificates were granted to the appellant, thrice i.e. on 1.3.2012, 20.6.2012 and 25.10.2012 i.e. at the end of each quarter. At the time of grant of exemption, the premises of the appellant were inspected by the department officials and it was specifically certified that

"the appellant was engaged in the business of manufacturing of cloth." The yarn so brought by the appellant was reported at the ICCs so the appellant could not keep the goods out of account books. The said yarn was put into process over seven machines installed in his premises and he paid the electricity bills to the tune of Rs. 14.58 lacs during the year 2012-13, but the departmental authorities while scumbing to the pressure of opposing forces and with the intention to take back the benefit which was granted by the Hon'ble High Court in vented a device by way of inspecting not only the premises of the appellant but also got registered a case against him.; The statement of one Sh. Shatrudhan a worker was not worth reliance. He was not supposed to know about the ownership of the property assets and the machines installed in the premises of the appellant. He could also be supposed, to be annoyed with the appellant. No opportunity was provided to the appellant to test his varsity. As a matter of fact, the manufacturing of cloth is a seasonal, work as the cloth is used by the businessmen in making woolens which could be sold in winter season, therefore the appellant had manufactured the cloth from July, 2012 to December 2012 and inspection was made on 31.1.2013 and 5.2.2013 respectively. It would be pertinent to mention here that prior to this inspection, the appellant had applied for seeking exemption from payment of entry tax on 1.3.2012 as well as 20.6.2012 and 25.10.2012 in the light of the CWP No. 6536 of 2011.

**13.** The counsel has further urged that the authorities have not accepted the plea regarding electricity bills paid by the appellant on the ground that the electric meter was not in the name of the appellant. In this regard he has submitted that he had purchased the premises from Hakumat Rai Gupta in the year 1999 who was running Paper and Straw Mill in the premises before selling the same to the appellant. Some litigation was going on with regard to electricity meter in the court. The matter went up to the High Court. Ultimately it was decided in favour of Mr. Hakumat Rai Gupta who then transferred the said connection in the name of the appellant i.e. Ankit Malhotra.

**14.** As regards the plea raised by the department that no manufacturing was done in the premises. Mr. Paramjit Singh proprietor of Ludhiana automobiles has categorically stated in his statement that the appellant has been engaged in the business of cloth but he was disbelieved for the only reason that it was an afterthought.

**15.** The authorities have levied the tax on the sale value of the cloth @ 6.5% for the whole year inspite of the fact that the rate of tax on yarn upto 3.9.2012 was 5%. In any case the tax was to be levied then the same should have been levied on the value of yarn used in manufacturing of cloth and not on the value of sale of cloth. As regards non production of sale invoices at the time of inspection, it is urged that the said invoices were not called at that time. However he had produced said invoices before the First Appellate Authority when he asked to produce the same. No material evidence was brought or record by the department in order to prove the allegation that the appellant was not manufacturing the cloth but was doing the job work. It was further urged that on one side the department states that no cloth was being manufactured but on the other side, the Assessing Authority allowed the sale of Rs.8,21,692/- as tax free sale of cloth from which it is evident that the appellant has been engaged in manufacturing of the cloth. The state did not raise any allegation regarding misuse of exemption certificate. The appellant had. brought the yarn within state of Punjab after seeking due exemption deferment of tax from the authorities. It was next contended that the case of Gulraj Industries Vs. Commercial Tax Officer (2007) 30 PHT 300, is not applicable to the facts of the present case in view of the complicated issues to be decided by the Assessing Authority, no penalty and interest could be imposed against the appellant. He has also urged that the judgments as cited by the appellant were not distinguished by the First Appellate Authority. Thus while concluding, the counsel has urged that since the appellant, after bringing yarn from outside the state manufactured the cloth and sold the same to the small cottage industry people, therefore, he was not liable to pay any tax penalty and interest.

**16.** To the contrary Mr. N.K. Verma, Sr. DAG Punjab, while supporting the orders passed by the authorities below contended that the appellant had made huge purchases of yarn to the tune of Rs.3,75,71,557/- during the year 2012-13 from outside of the State of Punjab on account of exemption/deferment of entry tax but he did not manufacture the cloth out of it. During inspection of the premises, the appellant failed to produce any account books, sale vouchers and stock of cloth which he manufactured out of the yarn. Doubting that the appellant was making misuse of the deferment certificates, the inspection was conducted, consequently, the provisional assessment was initiated but on account of expiry of time for provisional assessment, the notice for regular assessment was issued. During those proceedings, since the appellant failed to produce (i) GRs and weighment slips (as the goods were sold by the weight), (ii) the sale bills produced were shorn off complete address of the buyer in the absence of which the sale could not be verified (iii) the gross turnover of the appellant swelled many times then turnover for the year 2010-11 and 2011-12. The purchase of yarn increased from 2.47 crore in the year 2011-12 to 3.75 crores in the year 2012-13, (iv) the sale invoices produced by the appellant for sale of cloth were found to be doubtful (v) the appellant has manipulated transactions of yarn into cloth by issuing fake and false invoices of cloth and had generated only a retail invoice copy marked "original for the buyer" and kept the same in the record as proof of the cloth sale, thereto inference would be drawn that, the sale invoice were forged in order to show the fictitious sales. It is also urged that the appellant failed to produce the day to day cloth production record as well as the proof of yarn consumed. The appellant has failed to produce any evidence of bardana which was left after consuming the yarn as nothing such was found at the time of inspection. In the absence of any evidence regarding disposal/sale of packing material, it would be difficult to draw the inference that the appellant had been manufacturing cloth out of yarn. The appellant did not: maintain any account of payment, address of the buyers and the huge sales are shown against cash payments. The electricity meter found in the premises was not in the name of the appellant but in the name of some paper mills and the said connection was later on transferred in the name of the appellant. Such huge manufacturing could not be made during the period of six months by only, one employee who has not supported the case of the appellant by saying that: he is not the owner of the machines. Eventually, he has prayed for dismissal of the appeal.

**17.** The first question arises as to "whether the appellant was engaged in the business of converting cloth from yarn or was doing job work as alleged by the state?" In this regard it is observed that the appellant has categorically stated that he has been engaged in the business of manufacturing the cloth from 1999 and has been filing returns since then. During enquiry made by Sh. Shalinder Singh, Excise and Taxation Officer on 5.2.2013 Sh. Paramjit Singh owner of the Ludhiana automobiles, neighbour of the appellant, Sh. Vipan Manager Petrol Pump owner and also the appellant have consistently stated that the appellant has been manufacturing the cloth by bringing the yarn from outside the state. The appellant also produced three quarterly certificates issued by the Excise and Taxation Officer Ludhiana i.e. dated 1.3.2012, 20.6.2012 and 25.10.2012 whereby he was granted exemption/deferment from payment of entry tax. Needless to reproduce all the certificates I would like to refer to a certificate dated 20.6.2012 which is reproduced as under:-

*CERTIFICATE No.8/LDH-3* *DATED 20.6.2012*

*It is certified that M/s Balaji Sales Corporation, Daulat Colony. G.T. Road, Near Basti Jodhewal, Ludhiana having Tin No.03272035110 has filet application alongwith under taking and an affidavit for deferment to pay entry tax on yarn for consumption in Punjab for manufacturing of cloth.*

*The ETI as well as ETO have reported after verification that the taxable person is a manufacturer of cloth and has filed all the returns regularly. Taxable person has sought deferment for entry tax on the following items:-*

*1. Yarn*

*Therefore, vide the directions of Hon'ble Court in writ petition No. 6536 of 2011 the taxable person is given deferment from the entry tax for the said item mentioned at serial No 1 i.e. yarn.*

*Sd/-*

*Dated 20.6.2012* *Assistant Excise and Taxation Commissioner, Ludhiana-III*

**18.** The other two certificates dated 1.3.2012 and 25.10.2012 are also in the same language and confer same protection to the appellant. Now the department can't wriggle out of its own verifications and inspection and is estopped to say without any basis that the appellant has been doing the job work. The word job work also implies that the appellant was engaged in manufacturing cloth but for others. Even otherwise the reports made by the Shalinder Singh Excise and Taxation Officer dated 6.2.2013 reveals that he had videographed the fact situation at the spot but that has not been produced by the department. He intentionally did not mention if the appellant was not manufacturing the cloth in the premises. The appellant has been regularly paying electricity bills and had paid Rs. 14.58 lacs in the year 2012-13 on account of electricity bill expenses. In comparison to this payment, the entry tax could not be more then 17-18 lacs and the tax on yarn also could not be more than that [@ 5%]. The appellant has not denied the purchase of yarn valuing of Rs. 3.75 crores therefore he was bound by the judgment if passed against him by the Hon'ble High Court therefore he would not have put himself to such a huge risk by making false payment of electricity bills and conceal the true facts regarding sale of yarn as he would have paid that much amount of tax if he had sold the yarn in the state of Punjab. The case appears to have been camouflaged against the appellant at the instance of his enemies to derail his business.

**19.** As regards the ownership of the machines as well as the electricity connection, it may be observed that the department did not specifically deny about premises where the seven machines were installed. In any case, the copy of the sale deed dated 9.4.1999 placed at page/91 of the paper book reveals that M/s Pali Paper Board through its partner Madhu Bala daughter of Hakumat Rai sold the premises through Sh. Hakumat Rai alongwith the electric connection to the Suneeta Rani W/o Ashok Kumar S/o Barkat Ram for a consideration of Rs. 1,70,000/-. Sh. Ashok Kumar is the partner of appellant/proprietor of appellant firm Ankit Malhotra is the son of Ashok Kumar judgment dated 6.5.2008 passed by the Hon'ble High Court reveals that Hakumat Rai Gupta from whom property devolved upon the appellant by way of sale filed a writ petition No. 3338 of 2007 against Punjab State Electricity Board with regard to connection account No. LS-4 (MS-1 and MS/82 i.e. the connection in question) against the Electricity Board. In the said writ petition the claim of the petitioner Hakumat Rai Gupta was that the connection be not disconnected and he may not to compel to deposit a certain amount, which was allowed. Thereafter, Sh. Hakumat Rai Gupta transferred the said connection in the name of the appellant. That apart, there is a certificate issued by Assistant Executive Engineer, Ludhiana dated 26.3.2015 which reveals that the said connection is in the name of Ankit Malhotra (appellant) proprietor Balalji Sales Corporation. The appellant has also produced the receipts of payment of electricity expenses for the year 2012-13 which reveal that total electricity consumed by the appellant had costed Rs.14,58,317/- which he had made. Another certificate issued by PSPCL regarding the said connection is placed at page/84 which reveals that the appellant had paid all the expenses of electricity w.e.f. 1.4.2012 to 31.3.2013. It is not disputed that the electricity meter account Nos. E41/SN01/00004 is operative in the

premises in question which were transferred to the appellant by the seller Sh. Hakumat Rai alongwith the property.

**20.** As regards the ownership of the machines operative in the premises in question, Sh. Ankit Malhoatra disclosed in his statement before the detection officer that there are seven machines in the premises of the firm and he has been manufacturing the cloth over those machines. The department has disputed that in two different rooms, there are seven machines for manufacturing the cloth but has denied the ownership of the appellant over the machines. It does not matter, if the appellant was owner or otherwise in occupation of these machines in a different capacity but it is a fact that the appellant had seven machines in his premises. The Designated officer has not believed the version of the appellant only on the ground that one worker who found in the business premises did not support the appellant and it was not plausible and possible for one man to run 7 machines; no stock was available and no cloth was found. Such solitary statement made by worker who had disclosed against the appellant for the reasons best known to him, could not be believed without probing the case thoroughly from the other available evidence. The whole plea of the appellant could not be thrown in the dustbin merely on the basis of the statement of a worker. In this regard, it may be submitted that the department has been caught on another leg. On one side, the department itself admits that the appellant had manufactured the cloth to the tune of Rs. 8,21,692/- and qua that exemption was granted. The worker was not supposed to know about the ownership of the machines and also did not disclose as to who was the owner of those machines. The appellant had sold the cloth not only inside the state but also sold it to the dealers outside the State of Punjab which is evident from the details of the goods receipts placed at pages/ 82C to 82E of the paper book. All these payments made by the purchaser of Banglore were through banking channels as is revealed from page/82F of the paper book.

**21.** Admittedly, it was an off season, work regarding the manufacturing of the cloth to be used for manufacturing of woolens is certainly and surely has to be completed before winter season sets in so that the same could be used by the manufacturers of the woolens for sale of their goods in winter season and it was month of January when the raid was conducted. At this juncture, it was obvious that the machines had gone in silence, that is why the department at the time of inspection, could not find the machines in operation.

**22.** The department is completely silent on the presence of stock amounting to 15 tonnes of yarn found at the business premises of the appellant (which was lying in the premises for manufacturing of the cloth). The stand taken by the department that no stock was found in the business premises of the appellant does not hold water.

**23.** The plea raised by the department that he was doing the job work is also based on assumptions and is without any basis. The Assessing Authority has failed to establish, by any evidence, that the appellant has been doing the job work for others. Neither material has been placed on record nor was any person, for whom he has been doing job work, examined.

**24.** The department has come with the specific allegation that the appellant is camouflaging the sale of yam by projecting it to be sale of cloth. But the said plea has no legs to stand. There is not a little evidence to infer that there is an attempt to evade or avoid the payment of tax. The appellant came with the specific plea that he has been manufacturing the cloth from yari brought by him from outside the state. The plea stands proved from the admissions made by the department in its certificates as also by allowing the sale of cloth to some extent. The documents pertaining to the ICCs where the appellant had reported about the said sale invoices also go a long way to prove that the appellant was manufacturing cloth, but to the contrary department has failed to rebut this evidence and lead any such evidence that the appellant sole the yarn without manufacturing cloth out of it.

**25.** Notwithstanding the fact that as per section 90 of the Punjab Value Added Tax Act, he onus to prove that any sale or purchase effected by a person, is not liable to tax under the Act is upon the taxable person. Since the appellant, in all bona fides, successfully and effort fully, has led adequate evidence in order to establish that he had brought the yarn; manufactured the cloth thereof and then sold the same in and outside the State of Punjab, then it is for the department to rebut such evidence. The established legal position is that if some fact is proved by the assessee by leading certain evidence which apparently is legal and valid then the onus is shifted upon the department to rebut the same by leading specific evidence.

**26.** The assessee has proved by specific evidence that in light of the protection granted by the Hon'ble High Court, the appellant with the intention to enhance his business after taking the exemption certificates, had imported the yarn for a heavy price and after manufacturing the cloth thereof, sold the same to the dealers in and outside the State of Punjab. He has proved this plea by placing on record list of the details of the cloth with price thereof to the different dealers. In these circumstances, it was obligatory on the part of the department to bring certain evidence or at least little evidence in order to establish that the appellant sold the yarn and not the cloth to certain dealers under some VAT invoices and those dealers had claimed/showed such sales in their annual statements which the department had failed to prove. As a matte: of fact it can't be denied that the businessman is an opportunist and remains vigilant about the occasion and the flexibility of the rules through which he could earn profits therefore to say that the gross turnover of the appellant in the year 2011-12 was comparatively so low, and for the year 2012-13 it was so high, can't be said to be a surprise for raising a doubt over his conduct. The department appears to be poised against the appellant in many aspects in as much as he wanted to compensate the loss of revenue which it suffered on account of grant of protection extended to the assessees.

**27.** Admittedly the appellant purchased the yarn worth Rs.3,75,71,557/-. It is also settled that if the department finds that the yarn was to be sold as yarn, it was taxable but if it is converted in to cloth it was not taxable. The department being poised against the appellant imposed tax, penalty and interest by presuming that the appellant had sold the yarn.

**28.** It is further noticed that the department proceeded to impose the tax against gross sale of Rs.5,05,11,471/- @ 6.02% which was not prevailing at that time. Furthermore the department has imposed tax @ 6.05.% over the cloth for whole of the year whereas the rate of tax on yarn upto 3.9.2012 was 5% and it was 6.05% w.e.f. 4.9.2012. The department also failed to segregate the tax for the aforesaid periods. As regards non production of the accounts, I find force in the contention raised by the counsel for the appellant that plea is not tenable because at the opening lines of the orders dated 26.12.2013 passed against the Assessee, it is recorded that the appellant had shown the cash book ledger sale and purchase bills. Similarly, the Deputy Excise and Taxation Commissioner has also recorded, in his order, that Ankit Malhotra proprietor alongwith Mr. B.K. Gupta Advocate appeared and produced the account books the ICCs data, sale bills, copy of the bank account and the sale purchase account. The certificate of the transport company, was also produced which proves of the movement of goods and freight of goods paid to the transport company, but the same appear to have been discarded by the Deputy Excise Commissioner on filmsy grounds.

**29.** It is not understandable as to how without any positive evidence; on mere surmises; in the light of payment of electricity bills made by the appellant, reporting of goods (cloth) at ICC and payment of transport charges through banking channels and existence of machines in the premises, the department still insists that the appellant has not been manufacturing cloth and selling yarn. The plea of the department that no TIN number was recorded or the sale invoice is without any merit. The judicial notice could be taken that in Ludhiana there is a lot of small scale industry dealing with the woolens. The people are engaged in manufacturing of

woolens after purchasing raw material (i.e. cloth or yarn) from the market. Since the cloth sold is the tax free, therefore there was no necessity to mention the TIN number of the seller or buyer. Such sales could be easily verified from those purchasers on the basis of the particulars which were mentioned by the appellant over the sale invoices.

**30.** The Hon'ble Supreme Court of India in case of CIT Vs. Daulat Ram Rawatmull (1973) 3 SCC 133 held that onus to prove that the apparent is, not the real is on the party who claims it to be so. As it was the department which claimed the amount of fixed deposit receipt belonged to the respondent firm even though the receipt had been issued in the name of Biswanath, the burden lay on the department to prove that the respondent was the owner of the amount despite the fact that the receipt was in name of Biswanath. A simple way of discharging the onus and resolving the controversy was to trace the source and origin of the amount and find out its ultimate destination. Both as regards the source as well as the destination of the amount, the material on the record gives no support to the claim of the department.

**31.** Thus in the light of the aforesaid judgment when the department had setup specific plea that the appellant did not manufacture the cloth and sold the yarn as it was, the onus lay upon of the department to prove the same. But the department has failed to do so by leading any cogent evidence and appears to have discarded the genuine plea of the appellant by raising superfluous objections.

**32.** Resultantly, this Tribunal is of the opinion that the findings returned by other authorities below are erroneous and are liable to be set- aside. Accordingly, the appeal is allowed, the orders passed by the authorities below are set-aside and the deduction be allowed from gross turnover on, account of sale made of cloth as shown in the annual statement amounting to Rs. 4,51,00,325/- under the Punjab VAT Act and Rs. 53,81,127/- under the CST Act. The Assessing Authority would now frame the fresh assessment accordingly.

**33.** Pronounced in the open court.

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# PUBLIC NOTICE (Punjab)

## E-FILING OF VAT-15 DATE EXTENDED FOR 4th QUARTER OF 2015-16

GOVERNEMTN OF PUNJAB
DEPARTMENT OF EXCISE & TAXATION
PUBLIC NOTICE

**KIND ATTENTION: DEALER/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 2015-16 has been extended till 9th May, 2016.

Dated: 6th May, 2016 Excise & Taxation Commissioner, Punjab

# NOTIFICATION (Haryana)

**EXTENTION OF DATE FOR FILING OF RETURNS FOR DEALERS EFFECTED BY RESERVATION AGITATION**

Consequent upon implementation of the electronic governance under sub section (1) of section 54-A of the HVAT Act, 2003, vide order dated 05.08.2015, I am satisfied that circumstances exist for extension of period prescribed for furnishing of online quarterly returns. Therefore, in exercise of powers conferred upon me under sub section (3) of section 54-A of the Haryana Value Added Tax Act, 2003, I, Shyamal Misra, IAS, Excise and Taxation Commissioner, Haryana, do hereby extend the period for filing online quarterly returns for the quarter ending 31.03.2016, upto 16.05.2016.

(SHYAMAL MISRA)
Excise and Taxation Commissioner,
Haryana, Panchkula.

Panchkula
04.05.2016

# CIRCULARS (Haryana)

## GUIDELINES REGARDING COMPUTERIZED BASED RISK IDENTIFICATION AT THE TIME OF GRANT OF REGISTRATION AND AMENDMENTS

From

Excise and Taxation Commissioner,
Haryana, Panchkula.

To

All Jt. Excise & Taxation Commissioners (Range)
All Dy. Excise & Taxation Commissioners (ST)
In the State of Haryana.

Memo. No. 664 /ST-5
Panchkula, dated, the 06.05.2016

**Subject:** **Guidelines regarding computerized based risk identification at the time of grant of registration and amendments under the HVAT Act, 2003/CST Act, 1956 and Rules framed thereunder**.

Memo

On the captioned subject, the matter has been examined in this office to facilitate Ease of Doing Business and in view of formulation of Enterprise Promotion Policy, 2015 in the State. It has been decided that the following high risk and medium risk establishments/trades needs to be inspected/visited at the time of grant of new RC and amendments if new goods are required for addition in the RC.

- Iron and Steel Traders (EAC 20140) - High
- Non - ferrous Metal Traders - (EAC - 20151) - High
- Tobacco Product, Cigarette, Bidi - (EAC 20176) - High
- PanMasala; Gutka Traders - (EAC 20176) - High
- Ferrous Metal Traders - (EAC 20140) - High
- Tile Traders - (EAC 20109) - Medium
- Cotton Traders (EAC 20120) - Medium
- Building Material (EAC 20109) - Medium
- Paint and Varnishes - (EAC 20109) - Medium
- Edible Oil Traders - (EAC 20183) - Medium
- Yarn Traders - (EAC 20102) - Medium

The above identified high risk and medium risk trades are dynamic and will be reviewed from time to time.

The above guidelines be brought to the notice of officers/officials working under your control for compliance.

Addl. Excise & Taxation Commissioner (T)
For Excise & Taxation Commissioner, Haryana

SGA
LAW OFFICES

## NEWS OF YOUR INTEREST

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### PETROL PUMP DEALERS BEGIN HUNGER STRIKE

MOHALI, APRIL 29: Members of the Petrol Pump Dealers Association, Punjab, started an indefinite hunger strike in protest against the higher value added tax (VAT) being imposed by the Punjab Government as compared to other states.

The oil dealers from nine districts bordering other states held a peaceful protest in Phase VII here. However, they raised slogans against the Punjab Government and oil companies.

Paramjit Singh Doaba, president of the association, GS Chawla, owner of a petrol pump in Phase VII, and Girish Sapra, oil dealer from Zirakpur, sat on fast today.

Doaba said the protest would continue till their demands were met. If the authorities concerned failed to take any action, dealers would stop purchasing fuel from May 1.

He said since long they had been asking the Punjab Government to reduce VAT and bring it on a par with neighbouring states. The government had promised that VAT of northern states would be equalised, but the promise was not fulfilled.

Ashwinder Mongia, president of the Mohali district unit of the association, said the sale of petrol had gradually shifted to neighbouring states over the past 15 years due to the higher rate of VAT imposed in Punjab as compared to Haryana, Himachal and Chandigarh.

He said Punjab levied 36.54 per cent VAT, including taxes, on petrol, whereas in others states VAT varied between 26.25 per cent and 27 per cent.

He said the sale of diesel had also gone down in Punjab after the IOCL scrapped entry tax in Haryana.

He alleged that the IOC was overcharging in Punjab by fixing the retail selling rate on the basis of the Panipat refinery, instead of the Bathinda refinery.

He said there were 64 petrol pumps in Mohali district and another 800 in areas adjoining other states, which were adversely affected.

***Courtesy: The Tribune***
***29th April, 2016***

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# NEWS OF YOUR INTEREST

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## RS 10-CR BOGUS BILLING SCAM BUSTED WITH ARREST OF THREE

**LUDHIANA:** Cracking whip on tax evaders, Ludhiana police department have busted a multi-crore rupees bogus billing scam with the arrest of three persons, including owners of two Shimlapuri-based private companies and a techie.

Deputy commissioner of police Dhruman Nimbale said, "The accused have been identified as Manoj, owner of Pinky Garments Shimlapuri; Manish, owner of Jai Shree Ram Knitwear, who prepared fake bills; and Prince, a techie who hacked passwords and Tax Identification Number (TIN) numbers of other firms for duping the excise department of crores of rupees."

"The three hacked passwords of other firms with the help of a techie, forged bills and sought value-added tax (VAT) return of more than Rs 10 crore from the excise department. The accused were running two fake companies (unregistered)," Nimbale said.

Police said they were also investigating whether any insider of the excise department was involved as such a scam could not be executed without any insider's involvement.

The accused have been booked under Section 66-C (Punishment for identity theft, fraudulently use password or any other unique identification feature of any other person or firm) of the Information Technology (IT) Act, and Sections 65 (tampering with computer source documents), 379 (theft), 419 (cheating by impersonation) and 420 (cheating inducing delivery of property) of the Indian Penal Code (IPC).

"We are still in the process of investigation and have detained all three accused. Considering the volume of the scam, there are firm chances of bigger names from business circles in Ludhiana cropping up later," said a police official.

Division Number 8 station house officer (SHO) Gaurav Toora said, "After getting a tip-off, policed started investigation in the case around 25 days ago. We got some clues on April 16 and pursued the matter seriously. First Information Report (FIR) has been lodged in the case and accused have been detained at Shimlapuri police station. It was a clear-cut case of VAT evasion where the accused had forged bills and sought VAT return to the tune of more than Rs 10 crore for the past many years. The investigation is still on and there are possibilities of involvement of chartered accountants in the case."

Deputy excise and taxation commissioner (DETC) LK Jain said, "This particular case is not in my knowledge. But, there are a number of firms that often indulge in bogus billing scams. We keep a check on such firms through our assistant excise and taxation commissioners of the respective areas. I will check with the area official concerned and take necessary action against the party involved."

***Courtesy: Hindustan Times***
***2nd May, 2016***

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LAW OFFICES

## NEWS OF YOUR INTEREST

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### ED ATTACHES PROPERTIES OF LUDHIANA EXPORTERS

**JALANDHAR, MAY 12:** The Enforcement Directorate has attached two properties belonging to Vinod Garg and Raman Garg of Jaldhara Exports, Ludhiana, who had reportedly claimed bogus VAT refunds from the Excise and Taxation Department. The action has come after the authorities found that the company had violated provisions of the Prevention of Money Laundering Act.

The two properties attached include a house measuring 405 sq yards at Gehlewal and a 20 kanal 16 marla land at Budhewal, Koom Kalan, in Ludhiana. Both properties have a market value ranging between Rs 2.5 crore and Rs 3 crore.

The Excise and Taxation Commissioner, Ludhiana-1, had lodged a police complaint on July 18, 2013, alleging that Jaldhara Exports had shown readymade garments worth Rs 33.36 crore to Bangladesh during 2012-13 on the basis of which the firm claimed a VAT refund of Rs 1.56 crore from the government. After an inquiry was conducted with the Customs authorities, Petrapole Land, West Bengal, it was confirmed that all shipping bills produced by the firm were forged. An FIR was lodged under Sections 177, 420, 465, 467, 468 and 471 of the IPC.

The ED had lodged an Enforcement Case Information Report (ECIR) in the matter on August 14, 2013, and then started probing violations of PMLA. The officials of the central investigative agency probed the money trail to check how the exporter sent money to fake consignees. Two other Ludhiana-based companies are also being tracked in the same case and their reported links with nearly 30 other companies in the racket are also being investigated.

***Courtesy: The Tribune***
***12th May, 2016***