

(2019) 04 J&K CK 0127

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 1183 Of 2010

Basantar Bottles

APPELLANT

Vs

State Of Jammu & Kashmir And Others

RESPONDENT

Date of Decision : 09-04-2019

Acts Referred:

Jammu And Kashmir Levy Of Tolls Act 1995 — Section 2(2), 3, 4, 4A, 5, 5A, 8, 13, 15, 17

Jammu And Kashmir Levy Of Toll Rules, 1995 — Rule 58, 58(ii), 58(iii)

Marine Products Export Development Authority Rules, 1972 — Rule 43

Citation : (2019) 04 J&K CK 0127

Hon'ble Judges : Rajesh Bindal, J;Tashi Rabstan, J

Bench : Division Bench

Advocate : R. S. Thakur, Ashwani Thakur, Jagpaul Singh, Amit Gupta, K.D.S. Kotwal

Final Decision : Allowed

Judgement

Rajesh Bindal, J

1. This order will dispose of a bunch of petitions bearing OWP Nos. 1183/2010, 1185/2010, 1186/2010, 1384/2010, 1423/2010, 1442/2010 and 1443/2010. All the cases have been taken up together as the legal issues involved are common.

FACTS OF THE CASES

OWP No. 1183/2010

2. As pleaded, the petitioner (M/s Basantar Bottlers) herein is a sole proprietorship concern. He is engaged in business of blending and bottling of Indian Made Foreign Liquor and JK Desi Whisky. He is having his Unit at Industrial Growth Centre, SIDCO, Samba under license No. 06/JKEL-6. It is claimed that during the period from February 26 to October 10, 2009 the petitioner exported Indian Made Foreign Liquor (for short 'IMFL' hereinafter) to other States against export permits issued by the Excise Department. The

permits were got issued for export of IMFL to the importers in the State of Goa. The export of IMFL from the State of Jammu and Kashmir to any other State against due permission was exempted from payment of Excise Duty. The petitioner availed that exemption. Later on, the department found that the export was on the basis of some fake documents. Accordingly, demand notice dated 25.09.2010 was issued against the petitioner, directing the petitioner to remit an amount of Rs. 4,51,65,600/- as Excise Duty within a period of 15 days from the date of service of the notice failing which same was to be recovered as arrears of land revenue. Against the demand raised, the petitioner has filed the present writ petition.

OWP No. 1384/2010

3. Subsequently, the respondents issued notice dated 07.10.2010, directing the petitioner-M/s Basantar Bottlers to remit an amount of Rs. 2,70,000/- as toll tax and fine of Rs. 27,00,000/- on account of misuse of Toll Tax exemption on fake documents. The petitioner was further directed to explain his as to why he should not be debarred from claiming toll tax exemption for a period of one year in terms of Rule 58 of the Jammu and Kashmir Levy of Toll Rules, 1995 (hereinafter referred to as 'the Rules'). The aforesaid notice was followed by final notice dated 08.11.2010, whereby the petitioner was directed to deposit the aforesaid amount and was further directed to explain his position within 15 days as to why he should not be debarred from claiming the toll tax exemption for a period of one year. Both the aforesaid notices have been challenged by the petitioner by filing the present writ petition.

OWP No. 1423/2010

4. After demand of Excise Duty and toll tax with fine was raised against the petitioner vide Notice dated 07.10.2010, which is subject matter of OWP Nos. 1183/2010 and 1383/2010, the respondents issued notice dated 27.11.2010, debarring the petitioner from claiming toll tax exemption for a period of one year from 21.09.2010 and further demand of Rs. 29,556/- was raised as toll tax from 21.09.2010 till the date of notice. The petitioner has challenged the aforesaid notice dated 27.11.2010 in the present writ petition.

OWP No. 1186/2010

5. As pleaded, the petitioner (M/s New India Breweries) herein is a sole proprietorship concern. He is engaged in business of blending and bottling of Indian Made Foreign Liquor and JK Desi Whisky. He is having his Unit at Sujwan, Samba under license No. 10/B-1. It is claimed that during the years 2008-09 and 2009-10, the petitioner exported Indian Made Foreign Liquor (for short 'IMFL' hereinafter) to other States against export permits issued by the Excise Department. The permits were got issued for export of IMFL to the importers in the State of Goa. Export of IMFL from the State of Jammu and Kashmir to any other State against due permission was exempted from payment of excise duty. The petitioner availed that exemption. Later on, the department found that the

export was on the basis of some fake documents. Accordingly, demand notice dated 25.09.2010 was issued against the petitioner, directing the petitioner to remit an amount of Rs. 67,03,200/- as Excise Duty within a period of 15 days from the date of service of the notice failing which same was to be recovered as arrears of land revenue. Against the demand raised, the petitioner has filed the present writ petition.

OWP No. 1442/2010

6. After raising the demand of Excise Duty, as above, the respondents issued notice dated 07.10.2010 to the petitioner-New India Breweries for recovery of toll tax of Rs. 4,06,922/- and fine amounting to Rs. 40,69,220/-. The petitioner was further directed to explain his as to why he should not be debarred from claiming toll tax exemption for a period of one year in terms of Rule 58 of the Rules. The aforesaid notice was followed by another notice dated 23.10.2010. By final notice dated 08.11.2010, the petitioner was directed to deposit the aforesaid amount and was further directed to explain his position within 15 days as to why he should not be debarred from claiming the toll tax exemption for a period of one year. Both the aforesaid notices and vires of Rule 58 of the Rules have been challenged by the petitioner by filing the present writ petition.

OWP No. 1185/2010

7. As pleaded, the petitioner (M/s New India Distillery) herein is a sole proprietorship concern. He is engaged in business of blending and bottling of Indian Made Foreign Liquor and JK Desi Whisky. He is having his Unit at Sujwan, Samba under license No. JKEL07/D-2. It is claimed that during the years 2008-09 and 2009-10, the petitioner exported Indian Made Foreign Liquor (for short 'IMFL' hereinafter) to other States against export permits issued by the Excise Department. The permits were got issued for export of IMFL to the importers in the State of Goa. Export of IMFL from the State of Jammu and Kashmir to any other State against due permission was exempted from payment of excise duty. The petitioner availed that exemption. Later on, the department found that the export was on the basis of some fake documents. Accordingly, demand notice dated 25.09.2010 was issued against the petitioner, directing the petitioner to remit an amount of Rs. 9,18,08,640/- as Excise Duty within a period of 15 days from the date of service of the notice failing which same was to be recovered as arrears of land revenue. Against the demand raised, the petitioner has filed the present writ petition.

OWP No. 1443/2010

8. After raising the demand of Excise Duty, as above, respondents issued notice dated 08.11.2010 to the petitioner- New India Distillery for recovery of toll tax of Rs. 5,36,654/- and fine amounting to Rs. 53,66,540/-. The petitioner has challenged the aforesaid notice dated 08.11.2010 and vires of Rule 58 of the Rules by filing the present writ petition.

ARGUMENTS OF THE PARTIES

9. Mr. R. S. Thakur, learned senior counsel appearing for the petitioners submitted that in terms of exemption granted under the provisions of the Jammu and Kashmir Levy of Tolls Act, Svt. 1995 (hereinafter referred to as 'the Tolls Act'), export of IMFL from the State of Jammu and Kashmir is exempted from payment of toll tax. The object is to promote industrialization in the State. The State has to ensure that the product had moved out of the State. The moment the goods left the toll barriers of the State, the Officers lost jurisdiction. They were not to follow the goods to see its destination. Exemption granted to the petitioners has not been withdrawn by the State. Once the goods had left the toll barrier, the Deputy Excise Commissioner, Lakhanpur did not have any jurisdiction to demand toll from the petitioners and issue notice to show cause as to why the petitioners be not debarred from availing exemption for one year. The only jurisdiction vested with the in-charge of the check post is to ensure that the documents accompanying the goods are proper and nothing beyond that.

10. He further argued that Rule 58 of the Rules is ultra vires the provisions of the Act as it is beyond the rule making powers vested in the State. If the goods had left the State toll barriers, the only authority which could take action may be some officer in the office and not at the Toll barrier. The provision regarding penalty is totally vague and excessive besides being without jurisdiction. Though Section 8 of the Act deals with certain situations where penalty could be levied, however, the situation of this kind has not been provided for in the Toll Act or the Rules. No penalty could be levied on the petitioners merely for the reason that the goods did not reach the destination. Penal provisions have to be construed strictly. In the absence of enabling provision, such powers cannot be assumed by the official concerned. In fact if the Rules have to be held to be intra vires, these will have to be read down.

11. As far as merits of the controversy is concerned, it was submitted that the Deputy Excise Commissioner at Lakhanpur did not have jurisdiction to inquire about the import permits on the basis of which, export permits had been issued. Import and export permits have been issued by different authorities situated in two different States. Rule 58 of the Rules does not envisage any such eventuality. Once exemption had been granted by the State, the Deputy Excise Commissioner at Toll Post, Lakhanpur exceeded its jurisdiction in issuing show cause notice and subsequently withdrawing the same. In fact, the goods are excisable, which were manufactured and dispatched from the factory of the petitioners under supervision of the Excise Officials. Action of the respondents is bad on account of doctrine of dictation. In fact, the official concerned did not apply his mind, as he was directed to proceed in certain manner. Opportunity of hearing was not afforded to the petitioners and even the order passed has not assigned any reason, whatsoever. The notice suggests that there had been certain inquiries conducted by the officials of the Department or Vigilance. Neither the petitioners were associated in that process nor were they confronted

with the inquiry report. Mere allegation was that import permits on the basis of which export permits were issued, were fake. He further submitted that the petitioners had made a specific request for supply of the documents but the same was never acceded to.

12. Mr. Thakur, learned senior counsel further submitted that the notice dated 07.10.2010 was never served upon the petitioners. Specific averment to that extent in the writ petition has not been denied. A perusal of the aforesaid so called show cause notice suggests that it was an order as direction had been issued to deposit the amount of toll along with fine without even affording any opportunity of hearing. Any subsequent order passed was merely a formality. He further argued that a criminal case was also registered alleging that there had been certain fake import permits on the basis of which, export permits were got issued. However, after investigation, the case was closed and report was accepted by the Magistrate. Hence, nothing survived to take action against the petitioners on the basis of same very facts. The show cause notices issued to the petitioners were totally vague.

13. Learned counsel further submitted that the petitioners were never associated in the enquiry, if any, conducted by the respondents. They were never supplied with any material placed before the enquiry officer, on the basis of which the enquiry report was submitted. The demand notice is totally non-speaking as no reasons have been assigned therein for raising such huge demand against the petitioners.

14. As far as demand of excise duty raised against the petitioners, the learned senior counsel for the petitioners submitted that from a perusal of the show cause notice it is evident that some enquiry was conducted regarding genuineness of the Import and Export permits, on the basis of which the petitioner claimed exemption from payment of excise duty under the Jammu and Kashmir Excise Act, Svt. 1958. The petitioners were not associated during the process of enquiry. The petitioners had filed detailed reply to the aforesaid show cause notices, specifically stating that they were not aware of any complaint filed as neither the copy of the complaint nor copy of the enquiry report was supplied to the petitioners. Despite request made no material which was relied upon by the authorities for raising huge demand against the petitioners was supplied to them and they were condemned unheard. There was violation of principles of natural justice. Hence, the demand of excise duty raised against the petitioners also deserves to be set aside.

15. On the other hand, learned counsel for the respondents submitted that the petitioners, were able to defraud the State of its large revenue by producing fake import permits before the authorities for getting export permits of IMFL issued in their favour. The State with a view to promote Industrialization, had granted exemption from payment of toll tax and excise duty on export of IMFL manufactured in the State, to any other State. The sale of IMFL could be to a licensee only and not to any common person. The destination of IMFL for which,

export permits had been issued was in the State of Goa. The State was within its power to check as to whether the goods had reached the destination for which the export permits were got issued by the petitioners. When, on receipt of a complaint, genuineness of the permits was checked, it was found that the entire transaction was originated on the basis of fake import permits purportedly issued by the authorities in the State of Goa. On the basis thereof, no benefit can accrue to the petitioners. It was a clear case of evasion of tax. The petitioners availed of exemption to which they were not entitled to. The show cause notice clearly mentioned about the fake permits, hence, the petitioners cannot raise that grievance. In fact, they knew the entire story. They were part of this whole game plan and now they are trying to plead ignorance. In one of the communications, the stand taken is that petitioners had been cheated. In fact, they are experienced businessmen as they are licensees from the year 2005 onwards. The criminal case was closed as the jurisdiction to enquire into the same was with Goa authorities. Reference was made to the judgment of Hon'ble the Supreme Court in AIR 1960 SC 415, titled as FEDCO (P) Ltd. And anr vs. S. N. Bilgrami and others, in support of the plea that no further material except what had been mentioned in the show cause notice was required.

16. The learned State counsel further submitted that there is alternate remedy of appeal under the Tolls Act but the petitioners failed to avail of that remedy and rushed to this Court. They should be relegated to avail remedy of appeal.

17. He further submitted that Rule 58 of the Rules cannot be said to be ultra vires in any manner whatsoever as the same has been framed in exercise of powers vested with the State to give effect to Section 8 of the Toll Act. No specific situations are required to be mentioned either in the Act or Rules. The action is taken wherever any device or method is used, resulting in evasion of tax.

18. Learned State counsel further submitted that petitioners had been granted due opportunity of hearing but they failed to avail the same. Hence, there was no option with the authorities except to pass the order.

19. In response, learned senior counsel for the petitioners submitted that alternate remedy will not be a bar for entertainment of the writ petitions, once vires of the Rules is under challenge and secondly, when there is blatant violation of principles of natural justice. The judgment in FEDCO (P) Ltd's case (supra) is not applicable as the same is distinguishable. Even the department had admitted that a deeper probe was needed in the matter. The enquiry in fact remained inconclusive. Once there is a procedure prescribed in the Act and the Rules providing for verification of the import permits before issuance of the export permits, the department should have followed the same. If it has failed, the petitioners cannot be faulted with. A huge demand cannot be created against the petitioners, including fine, once the officers of the department are at fault. Even the petitioners have been cheated in the process.

20. Heard learned counsel for the parties and pursued the paper book.

DISCUSSIONS

21. The pleadings in the case in hand from both the sides are quite sketchy and so the documents placed on record. In none of the petitions comprehensively all the documents have been placed on record. Similar is the case with the respondents.

22. The facts in the bunch of petitions, which emerge from the pleadings and the contentions raised at the time of hearing, are that the petitioners had got certain export permits issued on the basis of import permits issued by the authorities in the State of Goa. These were for export of IMFL manufactured in the State of Jammu and Kashmir. Levy of tolls tax was exempted in case IMFL manufactured in the State is exported outside the State.

23. Section 5 of the Tolls Act enables the State Government to grant exemption from payment of toll tax. In exercise of powers there under, notifications were issued by the State bearing SRO 129 dated 30.03.2001 and SRO 117 dated 27.04.2002. Action was taken against the petitioners on a complaint received from one Romesh Kumar. It came to the notice of the department that certain duplicate import permits were got issued by the parties in the State of Goa. IMFL, which was meant to be exported to Goa, was in fact sold unauthorizedly in the States of Haryana, Rajasthan, Uttar Pradesh, Maharashtra, Gujarat, etc. Enquiry was conducted. The stand of the respondents is that in the enquiry it was found that the import permits issued by the Goa authorities, on the basis of which export permits were issued by the State of J&K, were found to be either fake or duplicated. As export permits originated on the basis of fake/ duplicated import permits shown to be issued by the authorities in the State of Goa and the goods never reached the destination, action was taken against the exporters in the State of J&K.

24. Notices were issued to the petitioners under the Tolls Act on 07.10.2010 giving reference to the complaint, for clandestine export of IMFL on the basis of fake/duplicated import permits shown to be issued by the Goa authorities. The Excise Commissioner directed the Deputy Excise Commissioner, Toll Post Lakhampur to initiate action to assess the amount of illegal exemption availed by the petitioners and also to proceed further in terms of the Tolls Act. The liability of the toll tax, of which the petitioners claimed exemption, was assessed and fine to the tune of ten times of the amount of toll tax was levied. The petitioners were directed to deposit the same vide notice dated 07.10.2010, failing which proceedings under the Tolls Act were to be initiated. Notices were also issued to show cause as to why action be not taken for debarring the petitioners from availing toll tax exemption for a period of one year. Though complete documents in each case have not been placed on record by either of the parties, however, it is evident that the aforesaid notices dated 07.10.2010 were followed by reminder dated 23.10.2010 and thereafter final notice dated 08.11.2010 was issued.

25. In OWP No. 1423/2010, subsequent to final notice dated 08.11.2010, vide order dated 27.11.2010 the petitioner was debarred from claiming the toll tax exemption for a period of one year from 25.09.2010 onwards. Further a sum of Rs. 29,556/- was assessed as toll tax exemption availed of from 21.09.2010 onwards. Subsequently a notice was issued on 27.11.2010 for depositing the aforesaid amount.

RELEVANT PROVISIONS AND SCHEME OF THE TOLLS ACT AND THE RULES

26. Before considering the rival contentions raised by the learned counsel for the parties, it would be useful to refer to relevant provisions of the Levy of Tolls Act, Svt. 1995, which are extracted as under:-

"Section 3. Rate of Tolls to be levied:- (1) The government may from time to time prescribe, annual or alter rates of tolls to be levied upon any road, ferry or bridge in the state in respect of men, animals, vehicles, machinery, commodities and goods in any form whatsoever and may place the collection of such tolls under such management as may appear to it proper, and all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of the Excise Revenue under the Jammu and Kashmir Excise Act, 1958.

(2) The rates prescribed to be levied at the commencement of this Act, shall be the rates mentioned in the first schedule hereto annexed. The rates shall continue to be levied till they are annulled or altered in accordance with the provisions of this section.

Provided that a vehicle carrying goods beyond the limit/capacity prescribed under the Motor Vehicles Act, 1988 shall be liable to pay double the amount of basic toll fixed for such vehicle.

(3) The power to annul or alter the rates vested in the Government under the forgoing provisions of this section may be exercised from time to time after publication in the Government Gazette. The amendment and alteration shall have the same force and effect as if they had been contained in the first schedule.

(4) The persons under whose management the tolls are levied at the commencement of this Act shall levy the tolls prescribed and shall be held to have been appointed for collection of tolls under the provisions of this Act.

(5) The Government may, from time to time, notify the commodities in respect of which tolls may be levied on advalorem basis, subject to a maximum of 15% of the value of goods.

Section 4. Toll-gates or Stations:- The Government may establish toll-gates or stations at such places as the Government may deem necessary.

The Toll gates or stations in existence at the time of the commencement of this Act shall be deemed to have been established under provisions of this Act.

Section 4-A. Assessment of vehicles, goods or animals etc. Any officer mentioned in sub-section (2) of Section 2 of this Act may assess the vehicles, goods or animals reaching a Toll Post for levy of toll.

Explanation: For the purposes of this section assessment shall mean scrutiny of invoices, challans, or bills or documents, or declaration or physical verification of goods, vehicles or animals, or such evidences which the Assessing Officer may collect in order to ascertain correctness of the statement of the driver or the person incharge of goods or animals and to assess toll leviable on such vehicles, goods, or animals on challan weight or actual weight whichever is higher or ad-valorem, as the case may be.

Section 5. Exemption from tolls:- The Government may from time to time define and grant exemptions from payment of tolls levied under this Act.

Section 5-A. Recovery and refund of toll short levied or erroneously paid etc.:-

(1) When toll or charges have been short levied through inadvertence, error, collusion or misconstruction on the part of the Toll Officer, or through misstatement as to the quantity, number or description of the goods, animals or vehicles on the part of the owner, or when such toll or charges after having been levied has been owing to any such cause erroneously refunded, the person chargeable with toll, or the charge so short levied, or to whom such refund has erroneously been made, shall pay the deficiency or repay the amount paid to him in excess on demand being made within twelve months from the date of the first assessment or the making of the refund and Toll Officer may refuse to pass any goods, animals or vehicle(s) belonging to such person until the deficiency or excess be paid or repaid.

(2) No toll or charges which have been paid and of which repayment, wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error or misconstruction shall be refunded unless such claim is made within three months from the date of such payment.

Section 8. Offences:- Whosoever transships, abets or attempts the transshipment of goods from a carriage or animal on which the tolls is chargeable at a higher rate to a carriage or animal on which the toll is chargeable at a lower rate, or vice versa, or whosoever adopts any device to evade payment of toll at a toll gate or station, shall be liable to a fine equal to ten times the amount of actual toll leviable or one thousand rupees, whichever is higher.

Section: 13. Offences by whom punishable: (1) The Officer incharge of the toll gate or station may, by order, impose fine on any person guilty of an offence under Section 8.

(2) Before passing any order under sub-Section (1) such Officer shall give the person in the default an opportunity of being heard.

(3) The fine imposed under sub-Section (1) may, on a requisition being made in this behalf by the officer inflicting fine, be realized by a Magistrate having

jurisdiction as if it had been inflicted by himself.

(4) Copy of the order passed under sub-section (1) shall be sent to the Excise Commissioner if Officer incharge is a Deputy Excise Commissioner and to the Deputy Excise Commissioner if the Officer is other than a Deputy Excise Commissioner.

Section 15. Deposit pending appeal :- Where any toll or penalty has been demanded under the provisions of this Act, the person desirous of appealing against such decision or order shall, notwithstanding his intention of appealing or filing an appeal, deposit in the hands of the Toll Officer at the toll-gate or station the amount demanded by the officer passing such decision or order.

Section 17. Power to make rules :- The Government may, by notification in the Jammu & Kashmir Government Gazette, make rules from time to time for the purpose of carrying out the provisions of this Act.?

27. Section 3 of the Tolls Act provides for levy of toll and the rates thereof. Section 4 of the Act authorizes the Government to establish toll gates/stations at such places as it may decide. Section 4-A provides that any Officer mentioned in Section 2(2) of the Tolls Act may access the vehicles, goods or animals reaching at the toll post for levy of the tax. Section 5 authorizes the State Government to define and grant exemption from toll leviable under the Tolls Act. In exercises of power conferred under Section 5 of the Tolls Act, the State Government issued notification vide SRO 129 dated 30.03.2001 exempting the IMFL/Beer manufactured in the State and exported outside the State from payment of additional and special tax leviable under the Tolls Act for a period of two years. The exemption came into force w.e.f. 01.04.2001. Vide notification bearing SRO 117 dated 24.04.2002 the words 'two years' were deleted from the notification dated 30.03.2001. Section 5-A deals with recovery and refund of toll short levied or erroneously paid.

Section 8 deals with the offences under the Act. It provides that whosoever adopts any device to evade payment of toll, shall be liable to pay fine equal to ten times the amount of actual toll leviable or Rs. 1,000/-, whichever is higher. Section 13 provides for the officers, who are authorized to deal with the offences committed under Section 8. It authorizes the officer in-charge of the toll gate to impose fine, after affording an opportunity of being heard. The recovery thereof can be made through the Magistrate having jurisdiction in the area. Any order passed under Section 13 of the Act is appealable by any person aggrieved against that. It also authorizes the Excise Commissioner to exercise suo-moto revisional powers.

Section 15 provides that notwithstanding the intention of the person aggrieved to appeal against the order passed against him, he is liable to deposit the amount of demand raised against him. Section 17 of the Act authorizes the State Government to make rules for the purpose of carrying out the provisions of the Act.

28. In exercise of the aforesaid power, 1995 Rules have been framed. Rule 58, the vires of which is under challenge, authorizes the officers mentioned therein, including the officer in-charge at the toll gate, to watch the movement of goods on which exemption had been granted, in order to ensure that such goods actually reach the declared destination. Relevant provisions of Rule 58 are extracted below:-

58. Check on misuse of exemption:- (i) The Officer Incharge at a toll gate / station or any Officer not below the rank of Excise & Taxation Officer as may be authorised by the Commissioner in this behalf, shall have the powers to watch the movement of goods on which exemption has been granted in order to ensure that such goods actually reach the declared destination.

(ii) For purpose of sub-rule (i), the goods found to have been loaded at a place other than the declared premises or being transported to a place beyond the declared premises shall be liable to seizure by the officer concerned who shall proceed against the defaulter as if the offence was committed at the toll post itself. An order passed in this behalf shall be communicated to the concerned Officer Incharge Toll Post, for recovery of toll due and (the concerned Industrial Unit shall not be entitled to claim further exemption for a period of any one year from the date of such violation.

(iii) The Dy. Excise Commissioner (Executive) or any other Officer not below the rank of Excise and Taxation Officer duly authorised by the Commissioner shall have the power to enter and inspect any industrial unit / premises to verify and examine the books and account, stock of raw material / finished goods to ensure that the facility of toll exemption being availed of by the concerned Industrial Unit is not being misused. An Industrial Unit misusing toll exemption or claiming exemption on toll fraudulently shall, besides penal action warranted for evasion to toll, be debarred from claiming any further exemption of toll.

(iv) Where misuse of industrial incentives comes to the notice of the Sales Tax Department the officer concerned of that Department shall immediately inform the concerned toll authorities about the facts of the case. Proceedings under section 8 and 13 of the Act shall be initiated against the defaulter besides any other action as envisaged in sub-rule(ii).

(v) Where an industrial unit has availed exemption on import of raw material or export of finished goods and such raw material or finished goods have been rejected by the consignee, such consignment shall be liable to double the amount of toll leviable on such goods while crossing the toll post.?

29. Rule 58(ii) provides that if the goods are found to have been unloaded or being unloaded at a place other than the declared destination, the same are liable to be seized by the officer concerned. He shall proceed against the defaulter as if the offence was committed at the toll post. In case the exempted unit is found guilty, he shall not be entitled to claim exemption for a period of one year from the date of such violation. Rule 58(iii) authorizes the officers

mentioned therein to even enter and inspect any industrial unit claiming toll exemption to verify as to whether exemption is being claimed genuinely. In case it is found that the unit is misusing the exemption or has claimed exemption fraudulently, such a unit can be debarred from claiming any further exemption of toll.

RE. VIRES OF RULE 58 OF THE RULES

30. Vires of Rule 58 is sought to be challenged by the petitioners, claiming that the same exceeds the power vested with the State for framing of the Rules in terms of the Tolls Act. The argument is that the situation, as has been envisaged in Rule 58(i) is not even mentioned in Section 8 of the Act; the State will lose its jurisdiction the moment the goods leave the toll gate. All that can be examined at the toll gate is whether the goods were accompanied by proper documents. In the alternative, the plea raised was that the Rule should be read down to mean that the same will apply only in a situation where any defect is found in the documents accompanying the goods or a case of evasion of tax is made out and not otherwise.

31. We are not impressed with the arguments raised. A perusal of Section 8 of the Act shows that the same is couched in the language which is quite wide in its application. It inter alia provides that whoever adopts any device to evade payment of toll shall be liable to pay fine equal to ten times of the actual toll leviable or one thousand rupees, whichever is higher.

32. Section 17 of the Act enables the State to frame Rules to carry out the purposes of the Act. As per the scheme of the Act, as has been briefly noticed above, Section 3 being a charging Section, provides for levy of toll, whereas Section 4 provides for establishment of toll gates or stations. Section 5 authorizes the State Government to grant exemption from payment of toll tax. It was in exercise of powers conferred under Section 5 of the Act that the petitioners had been granted exemption from payment of toll tax on export of IMFL/Beer manufactured in the State to any other State in the country. As tax is leviable on the goods which leave the boundary of the State, there is power conferred on the authorities to assess the amount of toll. To promote industrialization, as the power has been vested with the government to grant exemption, the petitioner being manufacturer and exporter of IMFL/Beer, claimed exemption.

33. Section 8 of the Tolls Act provides that for any attempt to evade payment of toll, fine to the extent to the ten times the amount of toll is leviable. Section 13 defines the officers who can exercise powers under Section 8. Rule 58 enables the authorized officers to watch the movement of goods on which exemption has been granted to ensure that such goods actually reach the declared destination. These Rules form part of Chapter 4 in the Rules dealing with exemptions.

34. In the case of the petitioners exemption was claimed by the petitioners and had been granted from payment of toll on IMFL/Beer manufactured in the State

for being exported against permits, to the State of Goa. Liquor is a commodity in which each and every individual cannot trade as it has to be permitted against licenses. Any Unit, which gets exemption from payment of toll tax, claiming that the goods are meant for a particular destination but in fact the statement is found to be incorrect, can certainly be charged with evasion of toll tax as the documents, on the basis of which exemption was claimed, were not genuine. Once power to check evasion of tax has been given under Section 8 of the Act in general terms without any limitation, there is nothing wrong in Rule 58(i), which authorizes the officers concerned to watch movement of goods and in case need be, to follow the same even up to the declared destination. The Officers at the check post may not have ways and means to check the genuineness of all the documents furnished at the time of export of goods from the State, however, in case subsequently those documents are found to be fake or ungenuine or wrong declaration is found to have been made, there is nothing wrong in authorizing the Officer concerned to exercise power to recover toll tax and levy fine.

35. Further, even Rule 58 (ii) cannot be said to be ultra vires which provides for debarring an Industrial Unit, found of evading toll tax, for a period of one year from the date of such violation or for even under Rule 58 (iii), in the circumstances mentioned therein.

36. A person, who is charged with evasion of tax, cannot be allowed under any normal circumstances to raise issue that checking of evasion for tax should be in the manner which suits him and not in the manner which achieves the object for which the provisions have been enacted. It is not somebody's fundamental right to evade taxes as everyone is duty bound to pay taxes due under the Statute and the State is entitled to collect the same but in the process the State is not allowed to harass the honest tax payers. Due process of law is required to be followed.

37. In our opinion, in the case in hand the manner provided in Rule 58, to check evasion of tax in the form of misuse of exemption, cannot be said to be ultra vires to the provisions of the Act.

REGARDING JURISDICTION OF THE DEPUTY EXCISE COMMISSIONER, LAKHANPUR

38. As far as the contention raised by learned counsel for the petitioners, regarding jurisdiction of the Officer at Toll Post to assess the amount of toll and levy of fine is concerned, in our opinion the contention raised is totally misconceived.

39. Section 8 talks about the offences for which fine can be levied. The same is permissible in case any person adopts any devise to evade payment of toll tax. Section 13 deals with the Officers who can exercise the powers under Section 8 of the Act. It provides that the Officer in-charge of the Toll Gate may impose fine on any person guilty of an offence under Section 8. Hence, to claim that the Officer at the Toll Post was not competent to levy fine as the same could be done

only by the Officers in the office, is totally misconceived, hence, is rejected.

VIOLATION OF PRINCIPLES OF NATURAL JUSTICE

40. The undisputed facts which are available in the pleadings and what transpired at the time of hearing are that, there was some complaint received by the Chief Minister from one Romesh Kumar resident of Faridabad regarding evasion of toll tax and excise duty. The matter was enquired into by the department at different levels. In the process the petitioners were not associated. First notice served upon the petitioners under the Tolls Act was dated 07.10.2010. It refers to the fact that a complaint was received from one Romesh Kumar resident of Faridabad and on enquiry it was found that permits issued by Goa authorities, on the basis of which export permits were issued by the authorities at Jammu, were fake. On the basis of the report, the Administrative Department vide communication dated 30.03.2010 directed for taking action in the matter. The notice dated 07.10.2010 further mentions that during enquiry it was found that the goods, for which export permits were issued, never reached the destination. It was further added therein that there was no Unit registered in the name of the importer with the Excise Department of Goa State. The brand names of the IMFL/Beer manufactured and exported by the Units in the State of J&K were not even registered for sale in Goa. Even at the check post for entry of goods in the State of Goa, there was no entry regarding import of the goods. As per the list furnished by the Deputy Commissioner Excise, Distilleries Jammu, vide letter dated 28.09.2010, liability of the toll tax, exemption of which was availed by the petitioners, was assessed and fine to the tune of ten times was added thereon. Final direction in the aforesaid so called notice dated 07.10.2010 was for deposit of the amount of toll and fine and to show cause as to why action be not taken for debarring the petitioners from claiming exemption from payment of toll tax for a period of one year. The relevant part of the notice in one of the case, is extracted below:-

?i) Keeping in view the aforementioned facts, you are hereby directed to :-

ii) Remit an amount of Rs. 2,70,000/- as toll on goods and fine Rs. 27,00,000/- totaling Rs. 29,70,000/- (Rupees twenty nine lacs seventy thousand only) on account of misuse of Toll Tax exemption within 15 days to this office from the date of issue of this notice failing which proceedings against you under J & K Levy of Tolls Act, 1995 and rules made there under shall be initiated.

iii) Explain your position within the said period of 15 days as to why further action for debarring you from claiming of toll tax exemption for a period of one year in terms of rule 58 of J & K Levy of Toll Rules, 1995 shall not be taken.?

41. A perusal of the aforesaid communication does not suggest that it was a notice issued to show cause rather it was an order directing payment of toll along with fine. Show cause was only limited to debarring the petitioners from claiming exemption for a period of one year. The petitioner denied receipt of the aforesaid communication and nothing was referred to by the respondents to substantiate

their plea that the aforesaid communication was served upon the petitioners. It was followed by another notice dated 23.10.2010, clearly mentioning that vide earlier letter dated 07.10.2010 the petitioners were directed to remit the toll along with fine and show cause as to why action for debarring them from claiming exemption from toll tax be not taken, which had not been responded to, therefore, further time was granted. It was followed by final notice dated 08.11.2010, which was in similar terms. It was at this stage that the present writ petitions were filed in this Court, except OWP No. 1442/2010, where in exercise of powers conferred under Rule 58(ii) of the Rules, the petitioner therein was debarred from claiming exemption from payment of toll tax for a period of one year w.e.f. 21.09.2010 and amount of toll tax exemption claimed by the petitioner therein from 21.09.2010 till issuance of the order dated 08.11.2010 was also worked out, for deposit of which a separate notice was issued.

42. From the aforesaid communications, it is evident on the face of it that in the cases in hand, the petitioners were not confronted with the material which was collected by the respondents, on the basis of which it was found that export of IMFL/Beer from the State was on the basis of fake documents. The stand taken by the petitioners was that, in case opportunity was afforded to the petitioners, they could have proved that the documents, on the basis of which export permits were issued, were not fake.

43. The principles of law laid down by Hon'ble the Supreme Court in *ORYX Fisheries Private Limited v. Union of India and others*, (2010) 13 SCC 427, would be relevant in the present case. In the aforesaid case Hon'ble the Supreme Court opined on the issue regarding the contents of a show cause notice and held that before an opportunity of hearing is afforded to any party to the show cause notice, there should not be prejudging of the issue. How the principles of natural justice are to be followed? The findings of the quasi-judicial authority have to inspire confidence in the minds of those subjected to its jurisdiction, hence, fairness in the action is must. The contents of show cause notice should not show a close mind. Though it is not to be read hyper-technically but has to be read reasonably. The noticee should get an impression after receipt of notice that he will get an effective opportunity to rebut the allegations and prove his innocence. Subject matter of dispute in the aforesaid case was consideration of a show cause notice for cancellation of certificate of registration, served upon an exporter. While invoking Rule 43 of the Marine Products Export Development Authority Rules, 1972, show cause notice was issued, after a series of meetings with the buyer, but still when notice for cancellation of certificate of registration was issued, the language used therein to the extent that 'it has been proved beyond doubt' was held to be bad, amounting to pre-judging the issue. It was opined to be in violation of principles of natural justice. The relevant paragraphs, 22, 31, 32 and 33 thereof are extracted below:-

?24. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a

show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

x x x x

31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it.?

44. If we consider the provisions of Section 8, which enables the authority to levy fine and Section 13 which prescribes the Officers who can take action under Section 8, especially sub Section (2) thereof, it clearly provides that before passing an order under Sub Section (1) thereof, such an officer shall give the person in default an opportunity to being heard. The same has been totally denied in the case in hand. The language of the first notice itself shows that it was a demand notice for deposit of toll tax along with fine rather than a notice to show cause as to why demand of toll tax for which exemption was claimed by the petitioners be not raised and further as to why fine in terms of Section 8 of the Act be not levied. The first alleged notice dated 07.10.2010 calls upon the petitioners to show cause only to the extent as to why they be not debarred from claiming exemption of toll tax for a period of one year in view of Rule 58(ii).

45. Grant of opportunity of hearing to any party against whom action is sought to be taken is sine-qua-non. The action of an authority deserve to be deprecated and any order passed in violation of principles of natural justice can be set aside only on that ground as the same entails civil consequences. In the case in hand, it is not demand of toll only which has been raised against the petitioners alleging that they had wrongly availed of the exemption, rather fine to the tune of ten times of the toll has also been levied. The aforesaid principle was dealt

with in a judgment of Punjab & Haryana High Court in (2012) 168 PLR 741 titled as Ved Prakash and others v. State of Haryana and others and while referring to various judgments of Hon'ble the Supreme Court on the issue, it was observed as under:-

?13. The grievance raised by learned counsel for the petitioners in the present case is also that before deciding the appeal, the petitioners were not given any opportunity of hearing by the Commission. It cannot be disputed that no one can be condemned unheard. In case, the petitioners had filed appeal, minimum that was required was intimation of date of hearing to them so as to enable them to appear before the Commission and present their case. Reference can be made to Sayeedur Rehman v. State of Bihar, (1973) 3 SCC 333; Maneka Gandhi v. Union of India, (1978) 1 SCC 248; Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405; Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664; Special Leave Petition (Civil) No. 23781 of 2007-Indu Bhushan Dwivedi v. State Jharkhand and another, decided on 5.7.2010. The same having not been done, it has resulted in prejudice to the petitioners. This ground alone is also sufficient to set aside an order passed by any authority.

14. A similar issue came up for consideration before this court in C.W.P. No. 17157 of 2010-M/s Mahindra and Mahindra Ltd. v. The Employees Provident Fund Appellate Tribunal and another, decided on 24.7.2012, where the Employees Provident Fund Appellate Tribunal, which has its principal seat at New Delhi, heard some cases by holding Camp Court at Chandigarh. However, proper intimation about the date of hearing was not given to the party concerned. The order was set aside and the matter was remitted back. This Court had also made certain suggestions regarding conduct of proceedings, requirement of mentioning of name and designation of the Presiding Officer in all the interim and final orders and service of notice by use of technology. The same are extracted below:

25. Before parting with the order, this court would like to comment on the manner in which the proceedings have been conducted. As has already been noticed above, the case was not being taken up date-wise i.e. on a date fixed for hearing. There are two different orders passed on one date fixing two different dates of hearing. The Tribunal is discharging important quasi judicial function. The cases cannot be dealt with in the manner in which the same has been dealt with in the present case. In some of the zimni orders even it has not been mentioned as to who had signed that order. Neither the name of the person who had signed it nor his designation has been mentioned. In future it is directed that in all interim or final orders whatever are passed in an appeal or other proceedings by the Tribunal, the officer who signs those orders, his name and designation shall be clearly mentioned.

26. In courts all proceedings take place in writing. As the file shows in the present case after 21.9.2007 when the case was adjourned to 14.12.2007, only a notice is available on record fixing the date of hearing as 19.5.2010 at Chandigarh. There is no order to take up the file on any date and directing for

fixing next date of hearing and issuance of notice to the parties. In the absence thereof, under what authority a notice was issued to the parties is not available on record. The Principal seat of the Tribunal is at Delhi. As was informed, some times, it holds Circuit Bench at different places. Whichever cases are to be fixed at Circuit Bench, there has to be specific order in the file fixing the case in a particular bench. The aforesaid order should either be passed in the presence of the counsels or the parties when it listed at the Principal Bench or it should be ensured that the notice has, in fact, been served upon both the parties. Whatever the appeal is taken up for hearing there has to be an interim order on record passed on that date showing the proceedings. One of the method to ensure service of notice on the parties could be through the concerned Regional office of Employees' Provident Fund Organisation, as the establishment normally pertains to that area. We are living in the era of technology. For the means of communication, the same should be utilised. Wherever the establishments are having fax or email I.D. efforts should be made to sent a copy of the notice through that mode as well. In case it is successful, this can be adopted as the method of service of notice in future. In addition thereto, the counsel who filed the appeal should also be informed. The same can also be by way of emails. At the time of filing of the appeal, it should be a requirement that the party, and the counsel who has filed the appeal should provide their complete address, telephone number, fax number and email address so as to enable the Tribunal to communicate with them.?

ORDER BEING NON-SPEAKING

46. Impugned order also deserves to be set aside on the ground of its being totally non-speaking. No reasons have been assigned in any of the orders for taking action against the petitioners and raising huge demand of toll and fine against them. Considering the issue regarding requirement of an order being speaking, Hon'ble the Supreme Court in *Kranti Associates (P) Ltd. V. Masood Ahmed Khan*, (2010) 9 SCC 496, formulated certain principles, which are extracted below:-

- ?(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.
- (b) A quasi-judicial authority must record reasons in support of its conclusions.
- (c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.
- (d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.
- (e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
- (f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-

judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior Courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harvard Law Review 731-737).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

47. In the case in hand a perusal of the impugned order shows that the same is totally non-speaking and lacking in reasons, hence, the same deserves to be set aside on this score as well.

REGARDING EXCISE DUTY

48. With reference to the raising the demand for excise duty, a perusal of the notice dated 29.07.2010 shows that reference has been made to certain enquiry conducted regarding genuineness of the Import and Export permits, on the basis of which the petitioner claimed exemption from payment of excise duty under the Jammu and Kashmir Excise Act, Svt. 1958. There is no dispute about the fact that the material, which was produced before the Enquiry officer and the report of enquiry, on the basis of which show cause notices were issued to the petitioners, were not served on the petitioners. They were not associated during the process of enquiry. The petitioners had filed detailed reply to the aforesaid show cause notices, specifically stating that they were not aware of any complaint filed as neither the copy of the complaint nor copy of the enquiry report was supplied to the petitioners. They were not at all party to the fraud, if any, committed. After receipt of the aforesaid reply filed by the petitioners, vide impugned demand notices dated 29.07.2010, while mentioning certain facts giving rise to the situation where certain enquiry was required to be conducted, issuance of show cause notices to the petitioners and the factum of reply from them, huge demand was raised against the petitioners. Regarding the contents of the reply, only what was mentioned in the impugned demand notices was that 'the reply was considered and found lacking merit'. None of the issues raised by the petitioners in their replies were dealt with. Hence, orders were totally non-speaking, besides being in violation of principles of natural justice.

ALTERNATIVE REMEDY

49. As far argument of learned counsel for the respondents regarding alternative remedy of appeal available to the petitioners is concerned, the same needs to be noticed and rejected as vires of the provisions of the Rules is under challenge in the bunch of petitions and the appellate authority will not be competent to examine the same. Even otherwise the writ petitions were entertained by this Court against the demand notices issued more than 8 years back. The ground raised by the petitioners is that they were condemned unheard and there has been violation of principles of natural justice.

RELIEF

50. For the reasons mentioned above, the writ petitions are allowed. Impugned demand notices are set aside with liberty to the competent authority to issue action oriented show cause notices to the petitioners and thereafter proceed further in the matter in accordance with law, after affording due opportunity of hearing to the petitioners. As the matter has already been delayed, it is expected that process of issuance of show cause notice and passing of order shall be completed within a period of six months from the date of receipt of copy of the order.