(2015) 03 P&H CK 0248

In the Punjab And Haryana At Chandigarh

Case No : VATAP-47, 48, 49, 50, 51, 52 and 53-2014 (O and M)

CEBON India Limited — APPELLANT

Vs

State of Haryana and Others — RESPONDENT

Date of Decision : 24-03-2015

Acts Referred:
Haryana Value Added Tax Act, 2003 — Section 36(1)

Citation : (2015) 81 VST 129

Hon'ble Judges : S.J. Vazifdar, Acting C.J.;Gurmeet Singh Sandhawalia, J.

Bench : Division Bench

Advocate : Piyush Kant Jain and Suresh Kumar Yadav, for the Appellant; Mamta Singla Talwar, AAG, Advocates for the Respondent

Judgement

S.J. Vazifdar, Actg. C.J.—The above seven appeals are filed under Section 36(1) of the Haryana Value Added Tax Act, 2003 against a common order dated 22.10.2013 passed by the Haryana Tax Tribunal. The appeals are, therefore, disposed of by a common order and judgement. We will for convenience refer to the facts from VATAP-47-2014.

2. The above seven VATAPs No. 47 to 53 pertain to the assessment years 1997-1998, 1996-1997, 1998-1999, 1997-1998, 1996-1997, 1995-1996 and 1995-1996, respectively. There are two appeals each for the three assessment years 1995-1996, 1996-1997 and 1997-1998 as there were separate assessments under the Central Sales Tax Act and the Haryana General Sales Tax Act. For the assessment year 1998-1999, the assessment was only under the Haryana General Sales Tax Act and there is, therefore, only one appeal in respect thereof.

3. The appellant had set up an industrial unit at Gurgaon in the State of Haryana. The appellant is a registered dealer under the Haryana General Sales Tax Act, 1973 and the Central Sales Tax Act, 1956. The appellant was allowed exemption from payment of tax under Section 13-B of the Haryana Sales Tax Act read with Rule 28-A of the Haryana General Sales Tax Rules, 1975 for a period of seven

years from 04.04.1996 to 03.04.2003 for an amount of Rs. 283.76 lacs.

4. The appellant''s case is that it subsequently made an additional fixed capital investment of Rs. 1.57 crores which increased its production capacity.

The appellant applied for the grant of a further exemption from payment of tax in relation to the expansion unit. The appellant contends that it had obtained the separate registration in respect of the expanded unit bearing Registration Certificate No. 18200737 only for the limited purpose of becoming eligible to avail the exemption and started filing separate returns for its two units referred to as Unit No. 1 and Unit No. 2. On taking instructions, Mr. Piyush Kant Jain, learned counsel appearing on behalf of the appellant states that the second unit/ expanded unit was a separate independent unit, although in the same area/ vicinity/plot.

5. The appellant admits that while the application for the second unit was under process, its manufacturing activities had to be suspended allegedly due to unavoidable circumstances. The exemption for Unit No. 2 was not allowed by the authorities. Although the exemption for the original/first unit was also withdrawn, it was restored by the Appellate Authority by an order dated 11.12.2002. The appellant contends that upon rejection of the application for exemption with respect to the Unit No. 2/expansion unit, both the units formed but a single entity and the tax returns filed for the expansion unit could only be assessed jointly with the returns of the original unit and the production capacity and the actual production of both the units ought to be considered while determining whether the requirements of Rule 28-A and in particular sub Rule (11) thereof were complied with or not.

6. The appellant contends that respondent No. 2/Excise and Taxation Officer-cum-Assessing Authority wrongly framed separate ex-parte assessments for Unit No. 2/the expanded unit by an order dated 27.01.1999 in respect of assessment years 1997-1998 under the Haryana Sales Tax Act and raised an additional demand of Rs. 2,05,176/-.

The appellant filed an appeal against the assessment order before the Joint Excise and Taxation Commissioner (Appeals), Faridabad which was disposed of by an order dated 25.08.2009.

The appellant thereafter filed a further appeal before the Haryana Tax Tribunal which was rejected by the impugned order dated 22.10.2013.

7. The appellant contends that this appeal raises the following substantial questions of law:-

"(i) Whether the dealer is bound to be assessed to tax separately after the rejection of claim for further exemption qua expansion of the existing unit for which a separate registration was taken for limited purpose of becoming eligible for applying for further exemption?

(ii) Whether Rule 28A of the Sales Tax Rules prohibits extending benefits of exemption from payment of tax on sale of products of expanded capacity within the overall limit of exemption granted to the original unit?"

8. Section 13-B of the Haryana Sales Tax Act reads as under:-

"13B- Powers to exempt certain class of industries - The State Government may, if satisfied that it is necessary or expedient so to do in the interest of industrial development of the State, exempt such class of industries from the payment of tax, for such period either prospectively or retrospectively and subject to such conditions as may be prescribed." 9. Rule 28A of the Haryana General Sales Tax Rules, 1975 reads as under:-

"28A (2) For the purpose of this Chapter, unless the context otherwise requires.

(c) "New Industrial Unit" means a unit which is or has been set up in the State of Haryana and comes or has come into commercial production for the result of purpose or transfer of old machinery except when purchased in the course of import into the territory of India or when the cost of old machinery does not exceed 25% of the total cost of machinery re-establishment, amalgamation, change of lease, change of ownership, change in constitution, transfer of business, reconstruction or revival of existing unit;

(d) "expansion/diversification of industrial unit" means a capacity set up or installed during the operative period which creates additional productions/ manufacturing facilities for manufacture of the same product/products as of the existing unit (expansion) or different products (diversification) at the same or new location, and

(i) in which the additional fixed capital investment made during the operative period exceeds 25% of the fixed capital investment of the existing unit, and

(ii) which results into increase in annual production by 25% of the installed capacity of the existing unit in case of expansion.

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(f) ''eligible industrial unit'' means :-

(i) a New Industrial Unit or expansion or diversification of the existing unit, which-

(I) has obtained certificate of registration under the Act.

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(j) "eligibility certificate" means a certificate granted in form S.T.72 by the appropriate Screening Committee to an eligible industrial unit for the purpose of grant of exemption deferment;

(k) "exemption certificate" means a certificate granted in form S.T.73 by the Deputy Excise and Taxation Commissioner of the District to the eligible industrial unit holding eligibility certificate which entitles the unit to avail of exemption, from the payment of sales or purchase tax or both, as the case may be.

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(11)(a) The benefit of tax-exemption/deferment under this rule shall be subject to the condition that the beneficiary/industrial unit after having availed of the benefit:-

(i) shall continue its production at least for the next five years not below the level of average production for the preceding five years; and

(ii) shall not make sales outside the State for next five years by way of transfer of consignment of goods manufactured by it.

(b) In case the unit violates any of the conditions laid down in clause (a), it shall be liable to make, in addition to the full amount of tax-benefit availed of by it during the period of exemption/deferment, payment of interest chargeable under the Act as if no tax exemption/deferment was ever available to it;

Provided that the provisions of this clause shall not come into play if the loss in production is explained to the satisfaction of the Deputy Excise and Taxation Commissioner concerned as being due to the reasons beyond the control of the unit.

Provided further that a unit shall not be called upon to pay any sum under this clause without having been given reasonable opportunity of being heard."

10. As we mentioned earlier, on 07.11.1996, the appellant had applied for exemption under Rule 28-A. In accordance with Rule 28-A, the appellant made an application on behalf of the expansion unit for the grant of eligibility certificate for tax exemption/deferment for a period of seven years from the date of exemption. 19.02.1996 was stated to be the date of going into commercial production.

11. On 09.09.1998, the appellant was granted registration certificate No. 18200737 in respect of Unit No. 2/the expansion unit, whereas for the first unit registration certificate No. 1815049 had been granted.

12. On account of the manufacturing activities of the original unit having been suspended and the appellant having been unable to meet the requirements of Rule 28-A the application for exemption of Unit No. 2/expansion unit was rejected by a communication dated 05.08.1999. The Joint Director in the said communication noted that the Higher Level Screening Committee had observed that the appellant had not appeared before the Committee; that the report of the DETC noted that the unit had not yet completed the documents; that the unit was lying closed and that the DETC had even cancelled the exemption certificate of the existing unit as the existing unit and the expansion unit were lying closed. The committee decided not to grant benefit of sales tax exemption to the expansion unit and decided to reject the application. On 11.12.2002, the appeal

was allowed and the exemption in respect of the original unit continued.

13. Admittedly, the appellant''s application for exemption with respect to Unit No. 2 had been rejected and the appellant did not challenge the same. The appellant had only succeeded in getting the exemption of the original unit/Unit No. 1 restored. Admittedly, the appellant had not filed any return for Unit No. 2 on the basis that it was a separate unit and instead sought to take the benefit of exemption granted to the first unit. Mr. Jain, the learned counsel appearing on behalf of the appellant, contended that on account of the rejection of the exemption in respect of the Unit No. 2/expansion unit, it remained a part of the appellant-company and, therefore, its production must be taken into account while ascertaining whether the condition of exemption in respect of the first/ original unit was complied with or not as required by Rule 28-A (11).

14. The submission is liable to be rejected in view of the judgement of the Supreme Court in State of Haryana and Others Vs. Bharti Teletech Ltd., .

It was contended before the Supreme Court, as it was before us that as the assessee had established another unit as an expansion unit which had come into commercial production with effect from 27.03.1998 and for the purpose of determining the level of production after 12.12.1998 the production figures of the expansion unit were also required to be taken into account. The Supreme Court held as under:-

"16. The said decision in R.K. Mittal Mills case, as we perceive, was rendered in a totally different context. In the present case, we are not concerned with the withdrawal of eligibility certificate. We are concerned with the consequences that have been enumerated in clause (b) of sub-rule (11) of Rule 28-A which clearly stipulates that in case of violation of clause 11 (a) (i) of sub-rule (11), the assessee shall be liable for making, in addition to the full amount of tax-benefit availed of by it during the period of exemption/deferment, with interest chargeable under the Act. Thus, reliance placed by the High Court on the said decision is misconceived and inappropriate.

17. The nub of the matter is whether production of two different units can be combined together to meet the requirement of the postulate enshrined under the Rule. The production of the beneficiary unit had failed to fulfil the stipulation incorporated in sub-rule (11)(a)(i) of Rule 28-A of the Rules. It is also the undisputed position that the production of the expanded unit has been computed and clubbed with the first unit to reflect the meeting of the criterion. The competent authority has come to a definite conclusion that the expanded capacity had been created to show that the rate of production is maintained but it is fundamentally a subterfuge. The authority has also taken into consideration the different items produced and how there has been loss of production of EPBT in the first unit. The High Court has failed to appreciate the relevant facts and, without noticing that the respondent assessee had clubbed the production of the units, lancinated the orders passed by the forums below.

19. Mr. Jain has laid immense emphasis on the term "expansion" of the existing unit. The term "expansion" has been defined in clause (d) of sub-rule (2) of Rule 28-A which reads thus:-

"28-A. (2)(d) ''expansion/diversification of industrial unit'' means a capacity set up or installed during the operative period which creates additional productions/ manufacturing facilities for manufacture of the same product/products as of the existing unit (expansion) or different products (diversification) at the same or new location -

(i) in which the additional fixed capital investment made during the operative period exceeds 25% of the fixed capital investment of the existing unit; and

(ii) which results into increase in annual production by 25% of the installed capacity of the existing unit in case of expansion."

20. On a careful reading of the aforesaid provisions, it is quite clear as day that they deal with the eligibility to get the benefit of exemption/deferment from the payment of tax. On a studied scrutiny of clause (f)(i)(I), it is manifest that it is incumbent on the unit to obtain certificate of registration under the Act. The submission of Mr. Jain is that the second unit has obtained the registration certificate under the Act and, hence, the production of the said unit, being eligible, is permitted to be included. Needless to say, obtainment of registration certificate is a condition precedent to become eligible but that does not mean that the production of the said unit will be taken into account for sustaining the benefit of the first unit. They are independent of each other as far as sub-rule (11) of Rule 28-A is concerned. We are disposed to think so as the grant of exemption has a sacrosanct purpose.

21. The concept of exemption has been introduced for the development of industrial activity and it is granted for a certain purpose to a unit for certain types of goods. Exemption can be granted under the Rules or under a notification with certain conditions and also ensure payment of taxes post the exemption period. The concept of exemption is required to be tested on a different anvil, for it grants freedom from liability. In the case at hand, as we understand, it is "unit" specific. The term "unit" has not been defined. The grant of exemption unit wise can be best understood by way of example. An entrepreneur can get an exemption of a unit and thereafter establish number of units and try to club together the production of all of them to get the benefit for all. It would be well-nigh unacceptable, for what is required is that each unit must meet the condition to avail the benefit.

27. In the case at hand, as we have already held that clubbing is not permissible. It amounts to a violation of the conditions stipulated under subrule (11)(a)(i) of Rule 28-A and, therefore, the consequences have to follow and as a result, the assessee has to pay the full amount of tax benefit and interest. The approach of the High Court is absolutely erroneous and it really cannot withstand close scrutiny."

15. Mr. Jain contended that in the case before the Supreme Court, the original unit which had been granted exemption had ceased to exist and, therefore, the ratio of the judgement is inapplicable to the case before us.

The submission is not well founded. The ratio of the judgement would equally apply to a unit which, though not closed, does not meet the requirements of sub Rule (11) of Rule 28-A. The question whether the requirements of sub Rule (11) have been met or not does not depend on whether the unit is closed or not. The question is whether the requirements of sub Rule (11) have been met or not. If they have not been met, the reasons for not meeting the requirements are totally irrelevant.

16. The exemption is to be sought by and in respect of a unit, inter alia, of a company and is granted to the unit. The distinction between the juristic entity, namely, the company and a unit thereof has been drawn throughout the Rules. The Rules we quoted earlier are only a few illustrations of this. The exemption is given to the unit and not to the company. The refusal of the exemption to the second unit makes no difference in determining whether the provisions of sub Rule (11) of Rule 28-A had been met by the unit to which the exemption was granted. For this reason, it is irrelevant whether the registration certificate in respect of the second unit is granted or not and if granted whether it is subsisting or not. Even if it is not subsisting or not granted, it would be irrelevant while determining whether the unit in respect of which exemption is granted has achieved the production figures and has met the other requirements.

17. The appeals are, therefore, dismissed.

