(2014) 09 P&H CK 0126

In the Punjab And Haryana At Chandigarh

Case No : VATAP Nos. 39, 60, 61, 73, 79 and 107 of 2013

Ipjahhaa Traders APPELLANT

Vs

State of Haryana RESPONDENT

Date of Decision : 15-09-2014

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

Citation : (2015) 77 VST 104

Hon'ble Judges : Fateh Deep Singh, J;Ajay Kumar Mittal, J

Bench : Division Bench

Advocate : Sandeep Goyal and Avneesh Jhingan, Advocates for the Appellant; Tanisha Peshawaria, Deputy Advocate-General, Advocates for the Respondent

Judgement

Ajay Kumar Mittal, J.—This order shall dispose of a bunch of six appeals bearing VATAP Nos. 39, 60, 61, 73, 79 and 107 of 2013 as according to learned counsel for the parties, the identical issues on facts and law arise in all the appeals. It was also agreed that factual matrix in all the appeals is similar and may be disposed of by one common order. For brevity, the facts are being extracted from VATAP No. 60 of 2013. VATAP No. 60 of 2013 has been preferred by the assessee under section 36 of the Haryana Value Added Tax Act, 2003 (in short, "the Act") against the order dated November 11, 2011 (annexure A6) passed by the Haryana Tax Tribunal, Chandigarh (hereinafter referred to as "the Tribunal") in STA No. 42 of 2007-08 for the assessment year 2001-02. The appeal was admitted on March 18, 2014 for determination of the following substantial questions of law:

"(i) Whether, on the facts and circumstances of the case, the learned Tribunal was justified in upholding the order of revisional authority even though the order passed by the revisional authority was barred by limitation in terms of amended law under the Haryana VAT Act, 1973?

(ii) Whether, on the facts and circumstances of the case, the learned Tribunal was justified in upholding the order of learned revisional authority wherein he has raised the demand on account of undue enrichment despite the fact that the appellant did not charge any tax from its customers in the invoices?

(iii) Whether, on the facts and circumstances of the case, the learned Tribunal was justified in upholding the order of the learned revisional authority even though he had no jurisdiction after the repeal of the Haryana General Sales Tax Act, 1973?"

2. Put shortly, the facts necessary for adjudication of the instant appeal as narrated therein are that the appellant was engaged in the business of wholesale and retail purchases and sale of the Indian Made Foreign Liquor (IMFL) and was holding L-1 and L-2 licence. As per entry 24A of Schedule B appended to the Haryana General Sales Tax Act, 1973, now repealed, the sale of IMFL by L-1 and L-2 licencees was tax-free. Since the appellant was not liable to pay tax in terms of the said entry, it could not get registration. Thereafter, entry 24A was omitted from Schedule B with effect from June 26, 2001 and a new entry was inserted in Schedule C providing that IMFL would be taxable at the stage of sale made for the fist time in the State of Haryana by an excise licensee. In terms thereof, the appellant got itself registered with the assessing authority, Faridabad. However, there was a dispute with regard to the levy of tax on the existing stock on June 25, 2001 as the first sale had already taken place within the State of Haryana and as such the L-1 and L-2 licensees were not liable to pay tax on the same in terms of entry in Schedule C. The said dispute came up for consideration of this court in CWP No. 19748 of 2001 wherein this court vide order dated March 7, 2002 held that no tax was leviable on the sale of stock of liquor available with the dealer as closing stock on June 25, 2001. Since the appellant had already paid the tax amounting to Rs. 76,38,177 on the pending stock, it claimed refund of tax. The assessment proceedings for the year 2001-02 were initiated by the assessing authority. The assessing authority vide assessment order dated December 9, 2002 (annexure A1) held the appellant entitled to refund of Rs. 76,36,377. Since the refund amount exceeded Rs. 10 lacs, the case was sent to the Excise and Taxation Commissioner for approval. After his approval, the amount was refunded to the appellant. However, after the expiry of more than four years, the Deputy Excise and Taxation Commissioner, Faridabad (East) issued a notice to the appellant to show cause as to why the assessment order be not revised and the refund made to the appellant be not recovered. The said show-cause notice was duly replied by the appellant. The revisional authority vide order dated May 1, 2007 (annexure A2) revised the order by raising demand of Rs. 84,77,746. Feeling aggrieved, the appellant filed an appeal (annexure A3) before the Tribunal. A Division Bench of the Tribunal passed a split decision on July 12, 2010 (annexure A4), whereupon, the matter was referred to larger Bench. The larger Bench of the Tribunal, vide order dated November 11, 2011 (annexure A6) adjudicated the issue against the assessee. Review petition filed against it, was also dismissed by the Tribunal on October 17, 2012 (annexure A8). Hence, the present appeals.

3. The learned counsel for the appellant submitted that the stock of liquor (IMFL) which was available with the appellant on June 25, 2001 was in Schedule B being tax-free item. However, with effect from June 25, 2001, it was included in Schedule C whereupon tax was payable at the stage of sale made for the first time in the State of Haryana by an excise licencee. Again on October 15, 2001, it was made tax-free. It was urged that the dispute only relates to the period from June 26, 2001 up to October 14, 2001 and since the dealer had sold the liquor without charging any tax on the stock held as on June 25, 2001, there was no question of unjust enrichment and the assessee was entitled for the refund as claimed by it. Learned counsel for the appellant had relied upon opinion of Shri Yudhavir Singh, Member of the Tribunal, wherein, it was expressed that the dealer had not collected any tax from the customers. The applicability of judgment in CWP No. 13652 of 2005 (Jatinder Singh & Co. v. State of Haryana), decided on April 1, 2010 was also disputed.

4. On the other hand, learned State counsel supported the order passed by the Tribunal and urged that it could not be said that the appellant had sold the liquor without charging the tax on the stock of IMFL on June 25, 2001 and, thus, the Tribunal was right in deciding the issue against the appellant.

5. The issue which arises for consideration in these appeals is whether there was unjust enrichment on the part of the appellant whereby it could be said that the appellant had collected the tax on sale of closing stock of liquor which was available on June 25, 2001 but was sold subsequently till October 14, 2001.

6. We find force in submissions of learned counsel for the appellant. The MFL was tax-free before June 26, 2001 and if the dealer had realized the same price for the sale of MFL immediately before and after June 26, 2001, then it could not be said that he had charged any tax from the customers but if he had realized higher sale price on or after June 26, 2001, then the higher realization could be attributed to the tax charged from the customers. The Assessing Authority in the assessment order dated December 9, 2002 had observed as under:

"In response to this notice Sh. K.K. Gupta, advocate appeared and submitted that he has not charged any tax during the period in which the MFL has become taxable. As per policy of the dealer, the dealer has charged flat rates from the very beginning and not charged any tax from the purchaser. He produced copies of bills and sales statement which shows that equal price has been charged even in taxable as well as tax-free periods. He also submitted that he has not charged any tax from the customers and also cited judgment of honourable Supreme Court in Commissioner of Sales Tax, U.P., Lucknow Vs. Mool Chand Shyam Lal, Belanganj, Agra, , wherein it has been held that a dealer charged from purchaser from money by itself would not attract the charge of excess collection. Collection of excess amount is not impermissible but what was not permissible was realization of excess amount as tax. He also produced various documents which shows that the dealer has not charged any amount by way of tax and only charged sale price. Since the dealer has not collected any tax the judgment of the honourable Supreme Court in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, is not applicable."

7. Further, some sale invoices dated June 21, 2001, July 13, 2001, August 11, 2001 and September 12, 2001 in respect of IMFL sold to Gymkhana Club L-12C, Faridabad, were examined by the Tribunal as has been noticed in the opinion of Sh. Yudhvir Singh, Member of the Tribunal. On June 21, 2001, only Peter Scot Whisky and Sandipiper Beer had been sold whose comparison of sale price and comparable brands when sold on subsequent dates was as under:

8. A perusal of the above shows that the dealer had not charged anything extra on sale of IMFL after the levy of tax thereon. Thus, on appreciation of evidence, it could not be concluded that the dealer had charged any tax from the customers. The finding recorded by the majority Members of the Tribunal is based on conjectures and surmises without there being any material on record to arrive at the conclusion that the assessee-appellant had charged tax on sale of IMFL in respect of stock as on June 25, 2001, which was sold during the period June 26, 2001 to October 14, 2001. Moreover, no cogent reasons have been given therein to record a finding different from the one noticed hereinbefore.

9. Still, further, a Division Bench of this court in State of Punjab and Another Vs. Kalsi Pipes Private Ltd., had recorded as under (page 494 in 29 VST):

"We repeatedly asked the learned State counsel as to how the finding of fact would be vitiated when the rate of Rs. 48.50 has been charged even in respect of the period for which refund amount has been claimed. We also asked the learned counsel to substantiate how it would amount to undue enrichment when the dealer-respondent has not collected tax from the third party. There has not been any satisfactory explanation. The Assessing Officer as well as the appellate authority are presumed to have gone through the books of account and the entry of Rs. 48.50 must have been duly reflected. There is no whisper in the grounds of appeal alleging anything to the contrary which lead to the conclusion that the findings recorded by the Tribunal are pure findings of fact which would not give rise to a substantive question of law. Therefore, the appeal does not warrant admission."

10. The Tribunal had relied upon decision of this court in Jatinder Singh & Co.''s case (CWP No. 13652 of 2005 decided on April 1, 2010) to adjudicate the issue against the appellant. It would be relevant to reproduce the findings of fact recorded therein on the basis of which the writ petition was dismissed. It reads thus:

"7. Respondent No. 2, i.e., the Excise and Taxation Commissioner, Haryana, in its impugned order dated June 13, 2005 has recorded finding of fact that the petitioners have sold IMFL to its customers at an enhanced rate. It was further observed in the impugned order that tax-paid stock was sold by L-1 licensee through its retail counters of L-2 licence along with the opening stock of IMFL available in the morning of June 26, 2001 at a higher rate. It is further observed in the impugned order that though tax was not leviable on the stock found on June 26, 2001, however since IMFL, which was stocked on June 26, 2001, was sold by the petitioners at a higher rate, including tax thereon, hence the petitioners are not entitled to any refund."

11. It was further held as under:

"9. We do not agree with the submission made by the learned counsel for the petitioners. Even if refund was directed to be made in favour of two other licensees, the petitioners is not entitled to the refund because in the petitioner''s case, it has been found that the petitioner has charged tax on the stock, which was available with him on June 26, 2001. The petitioner having been found collected tax, cannot take refund thereof simply because imposition of tax was found to be illegal."

12. The factual matrix being different from present appeals, the reliance on the said pronouncement was misplaced. In view of the above, we are unable to subscribe to the opinion of the majority. The finding recorded by the Tribunal is thus, legally unsustainable. In the light of the discussion made above, substantial question (ii) is decided in favour of the assessee-appellant. Consequently, issues (i) and (iii) are rendered academic. The appeals stand disposed of accordingly.