
(2012) 01 P&H CK 0023
In the Punjab And Haryana At Chandigarh
Case No : GSTR No. 7 of 1998

Jagatjit Industries Ltd.

APPELLANT

Vs

State of Punjab

RESPONDENT

Date of Decision : 25-01-2012

Acts Referred:

Income Tax Act, 1961 — Section 66, 66(1)
Punjab Excise Act, 1914 — Section 21
Punjab General Sales Tax Act, 1948 — Section 11(2), 22(1)

Citation : (2012) 53 VST 338

Hon'ble Judges : M.M. Kumar, J;Ajay Kumar Mittal, J

Bench : Division Bench

Advocate : G.R. Sethi, for the Appellant; Piyush Kant Jain, Additional Advocate-General, Punjab, for the Respondent

Judgement

Ajay Kumar Mittal, J.—This court vide order dated July 14, 1997 passed in STC No. 15 of 1990, had directed the Tribunal to refer the following questions of law for the opinion of this court: (1) Whether, in the facts and circumstances of the case, after upholding the quashing of purchase tax assessment u/s 4B of the Punjab General Sales Tax Act, the Tribunal was right in law in directing the Assessing Authority to levy sales tax in place of purchase tax limited to the amount of purchase tax liability already determined in the assessment order dated December 4, 1978?

(2) Whether, in the facts and circumstances of the case, the Tribunal was right in law in holding that the export duty recoverable in respect of spirit exported to other States or Union Territories in India, forms part of turnover and is liable to sales tax having regard to the provisions of the Punjab Excise Act, Punjab Excise Fiscal Orders, 1932, Punjab Liquor Permit and Pass Rules and Punjab Distillery Rules?

(3) Whether, in the facts and circumstances of the case, the Tribunal is right in law in holding that notice issued u/s 11(2) of the Punjab General Sales Tax Act

was valid in law and covered the period of assessment?

(4) Whether, in the facts and circumstances of the case, the Tribunal was right in law in framing assessment at the rate of four percent having regard to the notification dated April 6, 1973, December 20, 1973 and July 3, 1975 issued u/s 4B of the Punjab General Sales Tax Act?

Briefly stated the facts necessary for adjudication of the present reference are that the petitioner-Jagatjit Industries Ltd. is engaged in manufacture and sale of country liquor, Indian-made Foreign liquor, Malt and Beverages, etc., and is holding requisite licences. The company is registered as dealer under the Punjab General Sales Tax Act, 1948 (in short "the Act") and had branches in other States of India outside the State of Punjab. The company filed its quarterly return for the assessment year April 1, 1975 to March 31, 1976 in form S.T. VIII and paid tax according to such returns but no purchase tax returns were filed in form S.T. VIIIA. The assessing authority vide order dated December 4, 1978, framed assessment for 1975-76 and the demand of Rs. 4,31,242 was raised. The petitioner filed an appeal before the Deputy Excise and Taxation Commissioner (Appeals), Jalandhar Division, Jalandhar (in short "DETC(A)") who vide order dated October 12, 1987 quashed the tax assessed u/s 4B of the Act in respect of bottles and packing material and remanded the matter to the limited extent to the assessing authority to ascertain and assess afresh sale price of bottles and packing material sold with the country liquor. Against the order dated October 12, 1987, the petitioner-company took the matter before the Sales Tax Tribunal (in short, "the Tribunal"). The Tribunal vide order dated February 28, 1989 modified the said order to the extent that the fresh determination by the assessing authority shall be limited to the amount of tax liability already determined in the earlier assessment order. Thereafter, the petitioner-company filed an application dated July 19, 1989 u/s 22(1) of the Act before the Tribunal for referring the questions of law to the High Court. The Tribunal vide order dated March 26, 1990 dismissed the said application. Feeling aggrieved, the petitioner filed a petition bearing STC No. 15 of 1990 (Jagjit Industries v. State of Punjab) in this court for a direction to the Tribunal to refer the questions of law. This court vide order dated July 14, 1997 directed the Tribunal to refer the questions of law, as reproduced above. Hence, the present reference.

2. We have heard learned counsel for the parties.

3. At the outset, learned counsel for the petitioner-dealer stated that he does not wish, to press question No. 3. Accordingly, the same is returned unanswered.

4. Regarding question No. 1, learned counsel for the petitioner submitted that the petitioner was manufacturing country liquor which was exempt under entry 37 of Schedule B of the Act and, therefore, no purchase tax was leviable thereon. On the strength of judgment of the apex court in Premier Breweries Vs. State of Kerala,) and of this court in Punjab Breweries Limited Vs. State of Punjab and others, , it was argued that the bottles which were purchased by the petitioner

being packing material they had to be charged at the same rate as the contents thereof and since the country liquor itself was exempt, no purchase tax was leviable on the bottles as well. It was also argued that the appellate authority was not competent to set aside order of the assessing authority on an issue against which no appeal or revision had been filed by the Department and remand the matter for decision afresh. He relied upon the judgment of this court in State of Haryana Vs. Frick India Ltd., the Allahabad High Court in Sabharwal Brothers Vs. Commissioner, Sales Tax, and of the apex court in National Aluminium Co. Ltd. Vs. The State of A.P. and Others, and STATE OF KERALA Vs. VIJAYA STORES., According to the learned counsel, the remand by the DETC(A) and as modified by the Tribunal was unwarranted.

5. Urging question No. 2, learned counsel for the petitioner submitted that the export duty on the country liquor manufactured by the petitioner was primarily the liability of the buyer. It was, thus, contended that once the liability was of the buyer, no amount of export duty which was recoverable by the petitioner from them could be included in the taxable turnover of the petitioner. Reference was made to rule 11(a) and (b) of the Punjab Liquor Permit and Pass Rules, 1932 (in short, "1932 Rules"), Para 1B of the Punjab Excise Fiscal Orders, 1932 (for brevity "1932 Orders") and Rule 120 of the Punjab Distillery Rules, 1932 (hereinafter referred to as, "Distillery Rules") to establish that the export duty on the country liquor manufactured by the petitioner was the primary liability of the purchaser. Further reliance was placed on the judgment of the apex court in State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another, and Allahabad High Court in Hindustan Sugar Mills Ltd. v. Commissioner, Commercial Taxes, U.P., Lucknow [2009] 34 PHT 514 (All). Support was also drawn from the judgment of the apex court in State of Kerala and Others Vs. Maharashtra Distilleries Ltd. and Others,

6. Adverting to question No. 4, learned counsel for the petitioner submitted that the notification dated April 6, 1973 was superseded by subsequent notification dated December 20, 1973 and the State vide notification dated July 3, 1975 had sought to retrospectively impose tax at four percent which was not permissible. Reference was made to judgments in Lakhi Ram Surinder Singh v. State of Haryana [1996] 8 PHT 527 and Agarwal Metal Suppliers Vs. Commissioner of Trade Tax,

7. On the other hand controverting the aforesaid submissions, learned State counsel submitted that the matter has been remanded to the assessing authority as the liability to tax is shown to exist but the assessing authority is required to mention the correct provision of law. The authorities relied upon by the learned counsel for the petitioner, thus, had no applicability.

8. Replying on question No. 2, reliance was placed on the Constitution Bench judgment of the honourable apex court in McDowell and Co. Ltd. Vs. Commercial Tax Officer, to contend that the duty in question was not export duty simpliciter but a "manufacture and export duty" which was the primary liability of the

manufacturer and, therefore, formed part of taxable turnover.

9. As regards question No. 4, it was submitted that the respondent-State vide notification dated April 6, 1973 had provided that purchase of goods by dealers liable to pay tax under the Act shall be at the rate which the tax is payable on the sale thereof and the rate of tax on the purchase of such goods shall be three paise in a rupee on the purchase value thereof. Thereafter, the said notification was superseded by notification dated December 20, 1973. The State issued notification dated July 3, 1975 wherein under the proviso it was provided that for the words "three paise", the words "four paise" had been substituted in notification dated April 6, 1973. However, later on realising its mistake that notification dated April 6, 1973 had already been superseded by notification dated December 20, 1973, a corrigendum notification dated June 19, 1979 was issued providing that in notification dated July 3, 1975, FOR "S.o.19/T.A.46/48/S.4-B/73, dated the April 6, 1973" READ "S.O.89/P.A.46/48/S.4-B/73, dated the December 20, 1973". According to the learned State counsel, the validity of the notification cannot be challenged before the authorities under the statute and in the light of the aforesaid notification, charging of tax at the rate of four percent could not be said to be bad in law.

10. After giving our thoughtful consideration to the respective submissions of learned counsel for the parties, we answer the questions against the petitioner.

Question No. 1

11. In order to answer this question, it would be apposite to refer to the facts involved in the controversy. The assessing authority while adjudicating the matter had held the petitioner liable to purchase tax on the purchases of empty bottles and packing material u/s 4B of the Act. On appeal, the DETC(A) reversed the same with a rider that though section 4B of the Act was not attracted to the transaction but the sale price thereof was exigible to sales tax. However, on further appeal, the Tribunal while upholding the order of the DETC(A) restricted that the fresh determination by the assessing authority under the relevant provision shall be limited to the amount of tax liability already determined in the earlier assessment order which was subject of appeal to DETC(A) as no order adverse to the assessee could be passed by him. The transaction of purchase of empty bottles and packing material had two facets. Under the first facet, it was whether purchase tax u/s 4B of the Act was or was not leviable on empty bottles and packing material and secondly if no purchase tax was leviable whether it was exigible to sales tax at the time of sale thereof along with the manufactured goods. The appellate authority after examining both the facets has remanded the matter to the assessing authority to assess the sales tax on the sale of empty bottles and packing material to which the petitioner is liable and the liability has been restricted to the liability already assessed in the original assessment order.

12. Adverting to the judgments on which reliance has been placed by the petitioner, no support can be gathered by him as facts involved therein are

substantially different. In *State of Haryana Vs. Frick India Ltd.*, , the assessing authority while framing the assessment had declined to adjust Rs. 95,729.38 on account of credit notes; rejected C form involving tax of Rs. 32,333.25 and also added Rs. 3,495.18 on account of insurance charges. The dealer had filed an appeal before the appellate authority challenging the additions made by the assessing authority. The appellate authority did not agree with the contentions of the assessee and consequently held that there was no force in the appeal and rejected the same. The appellate authority went further and held that transfer of goods allowed for Delhi by the assessing authority was not in order and claim regarding exports out of territory of India to the tune of Rs. 4,70,997.30 had been erroneously allowed and remanded the case to the assessing authority to have fresh examination of each item of deduction claimed and allowed. The High Court in those facts examining the scope of powers of appellate authority had held that on an appeal by the assessee, the appellate authority did not have jurisdiction to go into matters not raised in the appeal.

13. The Allahabad High Court in *Sabharwal Brothers Vs. Commissioner, Sales Tax*, was considering a case where the penalty proceedings initiated by the Sales Tax Officer u/s 15A(1)(h) of the U.P. Sales Tax Act was held to be not leviable, but could the case of the assessee be placed under some other clauses to impose penalty. Under the circumstances, it was concluded that the Appellate Tribunal was not justified to remand the case to the assessing authority with the direction that fresh notice under proper clause under which penalty could be levied be issued.

14. The honourable apex court in *National Aluminium Co. Ltd. Vs. The State of A.P. and Others*, was examining the question in relation to a matter where the Tribunal decided the issue in favour of the assessee holding that the sales did not take place in Andhra Pradesh but also recorded a finding that sales took place in the State of Orissa. The apex court held that the Tribunal was not required to go into any other question particularly when the relevant factors were not before it.

15. In *STATE OF KERALA Vs. VIJAYA STORES.*, , the honourable Supreme Court was dealing with a case under the Kerala General Sales Tax Act, 1963 and while assigning meaning to the term "enhance" held that where no appeal or revision is filed by the Department, the appellate authority or the Tribunal had no jurisdiction or power to enhance the assessment.

16. As noticed hereinabove, in the present case, the transaction of purchase of empty bottles and packing material has been held to be not exigible to purchase tax u/s 4B of the Act, but at the same time, it is liable to sales tax at the time of sale thereof along with manufactured product which liability of the assessee is shown to exist. The Tribunal has only directed the assessing authority to levy sales tax on the bottles and packing material to the extent of quantum of tax which had been imposed by the assessing authority in the original assessment order. No fault could be found with the aforesaid reasoning of the Tribunal. Accordingly, question No. 1 is answered against the dealer.

Question No. 2

17. To answer question No. 2, it would be expedient to quote below rule 11(a) and (b) of the 1932 Rules, para 1B of 1932 Orders and rule 120 of the Distillery Rules on which reliance has been placed by learned counsel for the petitioner which are as under:

Rule 11(a) and (b) of 1932 Rules

11. The following procedure shall be observed as regards the export-in-bond of country spirit, Indian-made foreign spirit or rectified spirit from any licensed distillery in the Punjab to any State or Union Territory in India:

(a) Whenever the manager of any distillery licensed in the Punjab u/s 21 of the Punjab Excise Act receive a requisition for the export-in-bond in spirit to any other State or Union Territory in India, the person importing the spirit shall obtain and send to the manager an import-in-bond permit signed by the Collector or Chief Excise Authority of the District, State or Union Territory of destination, respectively, for supply of such spirit.

(b) The manager of the distillery shall act as an agent for the supply of such spirit, to any other State or Union Territory in India.

(c) and

(d)

Para 1B of 1932 Orders

1B. A manufacture and export duty at the rate of one rupee and twenty paise per proof litre, shall be levied on export of all duty paid or under bond issues of country liquor, and Indian-made Foreign Liquor other than rectified spirit, denatured spirit or industrial alcohol to any other State or Union Territory in India from any distillery, wholesale vend or warehouse in the State of Punjab:

Provided that the manufacture and export duty on rectified spirit shall be at the rate of two rupees per proof litre:

Provided further that the manufacture and export on Indian-made beer shall be at the rate of thirty paise per bottle of 650 ml.

Rule 120 of the Distillery Rules

If, in removing spirit from the distillery as an agent for a licensed vendor; the licensee prefers not to pay duty at the time, he may remove the spirit subject to the adjustment of such duty against an advance payment made by him into the Government treasury on account of the duty recoverable on such removals. Such an advance payment shall be not less than Rs. 2,000 and each time an advance is replenished, it must be by a sum that will bring it up to at least Rs. 2,000. The treasury officer will keep the inspector informed of all payments credits to an advance, and the inspector shall maintain a state-balance this statement on

every day on which the distillery is open for the issue of spirit, and on every such day shall inform the licensee of the balance standing to his credit, and he shall permit the removal of spirit of which the duty is debitable against the advance only so long as the balance is not exhausted.

18. A combined reading of aforesaid nowhere suggests that "manufacture and export duty" is the liability of the buyer. Once that is so, the contention of the learned counsel for the petitioner loses its weight.

19. The Constitution Bench of the honourable apex court in McDowell and Co. Ltd. Vs. Commercial Tax Officer, while considering whether the excise duty which was payable by the buyer could form part of the total turnover held that it was primarily a burden which the manufacturer had to bear. It observed as under (pages 289 and 290 in 59 STC):

Thus, the incidence of excise duty is directly relatable to manufacture but its collection can be deferred to a later stage as a measure of convenience or expediency.

On an examination of the provisions of the Excise Act, the Rules framed thereunder and the pronouncements referred to above, we are of the view that the conclusion of this court at page 921 of the reports (at page 158 of McDowell and Company Ltd. Vs. Commercial Tax Officer VII Circle, Hyderabad, that intending purchasers of the Indian liquors who seek to obtain distillery passes are also legally responsible for payment of the excise duty is too broadly stated. The "duty" was primarily a burden which the manufacturer had to bear and even if the purchasers paid the same under the Distillery Rules, the provisions were merely enabling and did not give rise to any legal responsibility or obligation for meeting the burden. We do not propose, however, to examine this aspect any further for the change in rule 76 of the Distillery Rules has clearly affirmed the position that liability for payment of excise duty is of the manufacturer. The provisions of rules 80, 81, 82, 83 and 84 do not militate against the conclusion that the payment of excise duty is a liability exclusively of the manufacturer. In these rules detailed provisions have been made regarding obtaining of distillery pass, correct calculation and full payment of excise duty, the manner of depositing such duty and ultimately issue of the spirit under the pass from the distillery. These rules, therefore, do not detract from the position that payment of excise duty is the primary and exclusive obligation of the manufacturer and if payment be made under a contract or arrangement by any other person it would amount to meeting of the obligation of the manufacturer and nothing more.

20. In the light of the aforesaid pronouncement, learned counsel for the petitioner cannot derive any benefit from the judgments cited by him. Consequently, the answer to question No. 2 is against the dealer.

Question No. 4:

21. The primary question that would require an answer while adjudicating

question No. 4 would be relating to the jurisdiction of the authorities under the statute to pronounce upon the vires of the provision or notification or an order thereunder.

22. The Constitution Bench of the honourable Supreme Court in K.S. Venkataraman and Co. Vs. State of Madras, examining the power of the authorities under a statute to declare a provision to be ultra vires had observed as under (pages 436 and 437 in 17 STC):

Up to this stage all the three authorities are the creatures of the Act and they function thereunder. They cannot ignore any sources of income on the ground that the relevant provisions offend the fundamental rights or are bad for want of legislative competence. The Act does not confer any such right on them. Their jurisdiction is confined to the assessment of the income and the tax under the provisions of the Act. Whether the provisions are good or bad is not their concern. But, it is said that section 66 of the Act makes all the difference. Section 66 is in two parts. u/s 66(1), within the prescribed time on an application made by an assessee or the Commissioner, the Appellate Tribunal shall refer to the High Court any question of law arising out of such order; if the Appellate Tribunal refuses to state a case, on an application filed by either of them, the High Court may require the Appellate Tribunal to state the case and to refer the same to it accordingly. On a reference made by the Appellate Tribunal to the High Court, the High Court shall decide the questions of law raised thereby and pass its judgment thereon and thereafter the Appellate Tribunal may pass such orders as are necessary to dispose of the case conformably to such judgment. It has been held by this court that the jurisdiction conferred upon the High Court by section 66 of the income tax Act is a special advisory jurisdiction and its scope is strictly limited by the section conferring the jurisdiction. It can only decide questions of law that arise out of the order of the Tribunal and that are referred to it. Can it be said that a question whether a provision of the Act is ultra vires of the Legislature arises out of the Tribunal's order? As the Tribunal is a creature of the statute, it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As no such question can be raised or can arise on the Tribunal's order, the High Court cannot possibly give any decision on the question of the ultra vires of a provision. At the most the only question that it may be called upon to decide is whether the Tribunal has jurisdiction to decide the said question. On the express provisions of the Act it can only hold that it has no such jurisdiction. The appeal u/s 66A(2) to the Supreme Court does not enlarge the scope of the said jurisdiction. This court can only do what the High Court can.

23. The aforesaid pronouncement was applied by the apex court in Commissioner of Income Tax, Madhya Pradesh etc. Vs. Straw Products Ltd., Bhopal, where it

was held that the vires of Taxation Laws (Merged States) (Removal of Difficulties) (Amendment) Order, 1962 could not be challenged in proceedings under the statute. Further, the apex court reiterated the same view in C.T. Senthilnathan Chettiar Vs. State of Madras, The notification dated July 3, 1975 had enhanced the rate of purchase tax from three percent to four percent by incorporating it in the notification dated April 6, 1973. Thereafter by corrigendum dated June 19, 1979 the same was incorporated in notification dated December 20, 1973 which had superseded notification dated April 6, 1973. The validity of notification cannot be challenged before the authorities under the statute and, thus, the petitioner cannot escape from its liability thereunder. Therefore, question No. 4 is also answered against the dealer and the reference stands disposed of accordingly.