(2024) 01 SHI CK 0025

In the High Court Of Himachal Pradesh

Case No : Civil Revision No.46 Of 2017

M/S Ericsson India Private Limited — APPELLANT

Vs

Additional Excise And Taxation Commissioner-Cum-Appellate Authority &Anr — RESPONDENT

Date of Decision : 03-01-2024

Acts Referred:

Himachal Pradesh Value. Added Tax Act, 2005 — Section 34(2), 34(6), 34(7), 48(1)
Central Sales Tax Act, 1956 — Section 3, 3(a), 6, 6(2)

Citation : (2024) 01 SHI CK 0025

Hon'ble Judges : M.S. Ramachandra Rao, CJ;Jyotsna Rewal Dua, J

Bench : Division Bench

Advocate : Amar Pratap Singh, Anup Rattan

Final Decision : Disposed Of

Judgement

M.S. Ramachandra Rao, CJ

1. This Civil Revision is filed by the petitioner herein (appellant before the H.P. Tax Tribunal) under Section 48(1) of the H.P. Value Added Tax Act, 2005 (for short 'the Act') challenging the order dt. 09.09.2016 passed in Appeal no.27/2012 of the H.P. Tax Tribunal (in short "the Tribunal"), Dharamshala, Camp at Shimla.

2) It had been admitted on 15.05.2017 to consider the following substantial questions of law:-

"a. Whether the ETO at the barrier or check post can examine the nature of sale transaction and act beyond the limited jurisdiction of examining the documents accompanying goods by imposing penalty on a transaction not liable to tax under HPVAT Act?

b. Whether the impugned order is illegal and perverse when not considering the fact the Assessing Authority in assessment order dated 04.09.2008 passed for the assessment year 2006-07 has accepted the returns filed by the Appellant and not imposed any tax on the transaction disputed in the impugned order?

c. Whether the genuineness of Form -C & Form-E-1 can be doubted by Excise and Taxation Authorities in Himachal Pradesh and finding of evasion of tax confirmed on this ground?”

The background facts.

3) The petitioner had entered into a “Supply Agreement” on 22.12.2003 with M/s Bharti Cellular Limited, New Delhi for supply of equipment for cellular services in the State of Himachal Pradesh.

4) On 20.11.2006, 22.11.2006 & 24.11.2006, four vehicles carrying goods described as Feeder Cakes, DG Sets, SMPS-48 and SMPS-24 were detained by the Excise & Taxation Officer (in short “the ETO”) at Multi Purpose Barrier (MPB), Parwanoo, under Section 34(6) of the Act.

5) The ETO detained the goods on the ground that they were not accompanied with the proper and genuine documents and that the petitioner had made an attempt to evade tax.

Petitioner’s contentions

6) It was the petitioner’s contention that there were two inter-State sales involved, one from Goa to Gurgaon and another from Gurgaon to Shimla, which had been affected by the petitioner through transfer of documents of title.

7) It was also petitioner’s contention that the Central Sales Tax (for short “CST”) on goods purchased from Goa was exempt and no CST was chargeable on the sale-in-transit as per Section 6(2) of the Central Sales Tax Act,1956 (“the CST Act”); since goods had moved in consequence of an agreement to sell, the ingredient of Section 3(a) of the CST Act were duly fulfilled, and so no VAT was to be paid to the State of Himachal Pradesh; that goods were sold in-transit and no sale had taken place in the State of Himachal Pradesh, and so the question of evasion of VAT did not arise; the petitioner produced the Supply Agreement, Purchase Order, Goods Receipt, C-Forms and E-1 declaration before the ETO (Annexure A-3).

The order dt.20.12.2006of the ETO.

8) The ETO passed an order on 20.12.2006 imposing a penalty of Rs.8,50,000/- on the petitioner under Section 34(7) of the Act, on the ground that the goods were not accompanied with proper and genuine documents and that the petitioner had made an attempt to evade tax.

order dt.15.11.2007 of the Appellate Authority

9) The petitioner filed an appeal against the said order before the Additional Excise & Taxation Commissioner.

10) He passed an order on 15.11.2007 partially accepting the appeal and

remanded the matter back to the ETO for fresh decision.

11) He observed that the Officer-in-Charge of the Barrier had jurisdiction in this case to satisfy himself that there is no evasion of tax; all such cases need not be referred to the Assessing Authority as that will only reduce the ETO In-charge of Barrier to be mere receipt clerks, who have to collect data which is not the job of ETO; as per the petitioner, the sale was a transit sale covered by Section 6(2) of CST Act, 1956 against Form E-1; but as per the Supply Agreement, the sale is to be completed at the site of M/s Bharti Airtel Ltd. at Shimla; therefore, the transaction cannot be a transit sale from Gurgaon; and, therefore, the VAT was liable to be levied and the petitioner has to be held to have tried to evade the tax by preparing improper and not genuine documents to show the sale as a transit sale.

12) He therefore concluded that the Assessing Officer rightly imposed penalty under Section 34(7) of the Act, but directed the Assessing Authority to give credit to the petitioner for those transactions in which VAT had been paid, after hearing the petitioner, and for the said purpose matter was remanded to the Assessing Authority.

The Assessment order dt.4.9.2008

13) In the meantime, an original assessment order was passed by the Assessing Authority for the Year 2006-07 on 04.09.2008 concluding the assessment and allowing the excess amount deposited by the petitioner to the tune of Rs.5,86,430/- to be carried forward to the next quarter for the Assessment Year 2006- 07.

14) In the said order, the Assessing Authority accepted the turnover declared by the petitioner and did not state anything regarding imposition of tax on the transaction disputed at the Barrier.

The order dt.19.8.2009 of the Tribunal in the appeal against the order dt.15.11.2007 of the Appellate Authority

15) The petitioner then challenged the order dt. 15.11.2007 before the H.P. Tax Tribunal, Dharamshala, Camp at Shimla.

16) The Tribunal passed order on 19.8.2009 observing that penalty imposed did not seem to be relevant in the inter-State transaction and so remitted the matter back to the Assistant Excise & Taxation Commissioner, Shimla in whose jurisdiction the machinery and equipment were to be received, and directed both parties to raise all objections available.

17) It held that if it is found that no penalty is to be imposed, the amount of penalty already deposited shall be refunded by the Assistant Excise & Taxation Commissioner (AETC), Shimla, as early as possible.

The order dt.7.4.2011 of the Assessing Authority post remand by the Tribunal

18) After such remand, the Assistant Excise & Taxation Commissioner-cum-Assessing Authority, Shimla passed an order on 07.04.2011 holding that the petitioner had tried to evade tax and imposed a penalty of Rs.8,50,000/-.

19) He held that the petitioner-Company, which is registered at Gurgaon, had procured the material from Eltek S.G.S. Pvt. Ltd. Gurgaon and another consignment was procured from M/s Andrew Telecom India Pvt. Ltd. Goa; M/s Bharti Airtel Ltd. had issued Form-C to M/s Ericson India Pvt. Ltd. Gurgaon with no.1700691 amounting to Rs.1,67,54,332/- which included the essential amount of Rs.36,97,732/-.

20) He held that M/s Ericson India Pvt. Ltd., Gurgaon had issued "C" Forms to M/s Andrew Telecommunication Pvt. Ltd., Eltek S.G.S. Pvt. Ltd. Gurgaon and further "E" Forms were procured by M/s Ericson India Pvt. Ltd. Gurgaon from both parties, i.e. M/s Andrew Telecommunication Pvt. Ltd., Eltek S.G.S. Pvt. Ltd.

21) After referring to these circumstances, he concluded that the petitioner had made an attempt to evade tax under colour of evidence cleansing transit sale against Form E-1 under Section 6(2) of CST Act; that it had prepared invoices and G.Rs. under the goods of transit sale against Form E-1, that the documents used in the transactions above were not proper and genuine as required under Section 34(2) of the Act therefore, the imposition of penalty was proper. Thus, the penalty imposed on the petitioner was restored.

Order dt.29.2.2012 of the Appellate Authority

22) This order dt. 07.04.2011 passed by the Assessing Authority, Shimla was again challenged by the petitioner before the Additional Excise & Taxation Commissioner-cum-Appellate Authority, Himachal Pradesh at Shimla.

23) He dismissed the said appeal by holding as under:-

"…….. Appellant has contended that the sale in question was sale in transit covered by section 6(2) of the CST Act. As per the agreement entered into between the appellant and M/s Bharti Airtel Ltd., Shimla goods were to be supplied at site at Shimla. The sale was thus to be completed at the site of Bharti Airtel Ltd. Shimla from the appellant and VAT was then to be paid to the State of H.P. The Assessing Authority (AETC) in my opinion was thus right in holding that the appellant had made an attempt to evade the tax under HPVAT Act, 2005 in the garb of sale in transit. He is thus right in treating the penalty imposed by the ETO I/c MPB, Parwanoo u/s 34(7) of the Act as genuine. The judgment relied upon by the appellant also does not support his case since the case has been now decided by the AETC, Shimla afresh whereas the judgment pertains to the powers of the check-post officer. The order of the Assessing Authority is thus upheld and the appeal is dismissed….."

The order dt.9.9.2016 of the Tribunal

24) The petitioner then challenged this order before the H.P. Tax Tribunal, which

dismissed the appeal on 09.09.2016.

25) It examined the Supply Agreement and the Purchase Order produced by the petitioner and considered the contention of the petitioner that the goods had been sold in transit as per provisions of 6(2) of the CST Act, 1956, and held that the petitioner could not have sold the same in transit in violation of the terms of the Supply Agreement and the Purchase Order, which required him to supply the same at the site.

26) It therefore rejected the contention of the petitioner that the goods were sold in transit and even gave a finding that Form-C and E-1 declarations produced by the petitioner, amounted to misuse of those Forms by him; and held that it had evaded tax by importing goods into the State without being accompanied with proper and genuine documents. It also held that the petitioner had mens-rea to evade tax.

The instant Revision petition

27) Challenging the same, this Civil Revision is filed by the petitioner- appellant.

Contentions of counsel for petitioner

28) Counsel for the petitioner contended that the impugned order levying penalty on the petitioner is unsustainable.

29) According to him, the petitioner had its Head Office at Gurgaon and a Branch Office at Shimla.

30) It entered into a Supply Agreement with M/s Bharti Cellular Limited, New Delhi.

31) According to the Counsel for petitioner, it’s Gurgaon office had purchased specific goods/equipments for cellular services on an inter-State sale basis from Goa and subsequently, sold these goods during transit to buyer in the State of Himachal Pradesh. He contended that there were two inter-State sales involved in the transaction, one from Goa to Gurgaon and another from Gurgaon to Shimla. He asserted that CST on goods purchased from Goa was exempt and no CST was chargeable on sale-in-transit as per Section 6(2) of the CST Act.

32) He further contended that goods moved in consequence of an agreement to sell and the ingredients of Section 3(a) of the Act were duly fulfilled and, therefore, no VAT was to be paid to the State of Himachal Pradesh.

33) It is the petitioner’s contention that the issue raised by the ETO at the Check Post, necessitates interpretation of Sections 3 & 6 of the CST Act and the said contention cannot be examined at the Check Post and in particular that the ETO cannot examine the nature of the sale transactions and had thus acted beyond its jurisdiction.

Contentions of the State

34) The learned Advocate General appearing for the respondents-State refuted the said contentions and supported the order passed by the Tribunal.

Consideration by the Court

35) The aspect of scope of power of the Officer at the Check Post under the Sales tax Law fell for consideration before a Division Bench of the Punjab & Haryana High Court in Xcell Automation vs. Government of Punjab & Another (2007) 5 VST 308 (P&H).

The Division Bench explained the power of the Officer at the Check Post after considering the provisions of the Punjab General Sales Tax Act, 1948, which contains similar powers for inspection of goods and transit at Check Post.

The Division Bench summed up the legal position in the following terms:-

" The position can be summed up as under:

(1) Exercise of power at the check-post to be valid, should have reasonable nexus with the attempt at evasion.

(2) Straight-jacket approach is not called for and each instance of exercise of power has to be seen in the light of individual facts. Neither exercise of power can be restricted, wherever required for checking attempt at evasion nor can be extended to areas where there was no attempt at evasion.

(3) In an appropriate case, the writ court may examine the exercise of power and interfere if exercise of power is found to be arbitrary, mala fide and without nexus with attempt at evasion on the face of it.

(4) If there are disputed questions and there is reasonable nexus of exercise of power with attempt at evasion, writ petition against imposition of penalty at the check-post cannot be entertained.

(5) Where relevant documents are duly produced but a bona fide plea against taxability is raised and there is neither mis-declaration nor concealment, exercise of power of imposing penalty at the check-post on the ground of attempt at evasion may not be called for.

In the present case, contention raised by the assessee that the "cast iron castings" carried by it were not "cast iron" liable to tax at the first stage, could not be held to be requiring no adjudication or frivolous or mala fide. It is not relevant as to what is the interpretation finally taken on this subject and we do not express any conclusive opinion at this stage but having not concealed any information, having furnished all the information, having placed reliance on the judgments of the honourable Supreme Court and since the matter did require serious consideration, adjudication by the check-post officer was not called for. Invocation of jurisdiction for imposing penalty on the allegation of attempt at tax evasion in such a situation was not permissible."(emphasis supplied)

36) The important principle laid down in the above decision is that where

relevant documents are duly produced by the Assessee's representative at the Check Post, but a bonafide plea against taxability is raised and there is neither mis-declaration nor concealment, exercise of power of imposing penalty at the Check Post on the ground of attempt at evasion may not be called for.

37) In that case too, like in the instant case, the assessee had raised a contention that "cast iron castings" carried by it were not "cast iron" liable to tax at the first stage.

38) The Court held that such a contention cannot be held to be requiring no adjudication or be termed frivolous or malafide.

39) It held that it is not relevant as to what is the interpretation finally taken on the subject, but when the assessee did not conceal any information but furnished all information, the Check Post Officer should not have adjudicated the matter and invoked jurisdiction for imposing penalty.

40) The fact that the petitioner in the instant case too produced all the relevant documents, is not in dispute.

41) The plea of the petitioner that the transaction is not taxable, is a bonafide plea and in the absence of either mis-declaration or concealment, it has to be held that the exercise of power of imposing penalty at Check Post, was not warranted.

42) Moreover, the petitioner had submitted documents of title, i.e. Purchase Order & Form-C procured from buyer in the State and Form E-1 procured from seller in Goa, but the genuineness of the Form-C and Form E-1 had been doubted by the ETO as well as the Assessing Authority subsequently.

43) Undoubtedly, sale against From-C and Form E-1 is exempt from CST under Section 6(2) of the CST Act ; Form-C needs to be furnished by the seller to the prescribed authority of the Seller's State; so the onus is on the State from where the goods are being sold to ensure that the Form against which such sale is being conducted, is legitimate and genuine.

44) Consequently, the Excise Department of the State of Himachal Pradesh, had no right to invalidate and/or question the same, as it had admittedly been furnished and authenticated by the selling States.

45) The finding in the impugned order regarding genuineness of the statutory Forms C and E-1, issued by the Excise & Taxation Department of the other States, is unwarranted , perverse and contrary to law.

46) More importantly, the petitioner had been assessed for the Assessment Year 2006-07 through an assessment order dt. 04.08.2008 and the returns filed by the petitioner had been accepted and the assessment proceedings were cleared with nil demand. It was even allowed to carry forward excess deposit of Rs.5,86,430/- to the next quarter.

47) There was no discussion in the said Assessment Order on inter-State sale of goods and evasion of tax and no demand was raised during this process.

48) So once the Assessing Authority had accepted Returns filed by the petitioner and did not raise any demand of tax, then it is not open to the ETO at the Check Post to allege evasion of tax.

49) Further the question as to when a sale takes place in the course of inter-State trade or commerce, is determined by Section 3 of the CST Act, 1956, which states that a sale shall be deemed to take place, if the sale or purchase occasions the movement of goods from one State to another; and is effected by a transfer of documents of title during their movement.

50) In Onkarlal Nandlal vs. The State of Rajasthan and Another (1985) 60 STC 314 (SC) , the Supreme Court held that there is no antithesis between a sale in the course of inter-State trade or commerce and a sale inside the State. Even an inter-State sale must have situs, and the situs may be in one State or another.

It held that it does not involve any contradiction in saying that an inter-State sale or purchase is inside a State or outside it, and the situs of a sale may fall for consideration from more than one point of view; it may require to be considered for purpose of determining its exigibility to tax as also for other purposes such as the one arising in that case; so the situs of sale is not required to be checked when a sale takes place in the course of inter-State trade or commerce, as determined by Section 3 of the CST Act.

It declared that the place where the goods are sold is not relevant for determining whether the sale is an inter-State sale or local sale. Even if the sale is completed in State of origin and the buyer is under obligation to take the goods to the other State, it still will be an inter-State sale. The determinative factor is inter-State movement of goods pursuant to a completed sale or agreement to sell, as held in M/s DCM Limited vs. Commissioner of Sales Tax, Delhi. (2009) 21 VST 417 (SC).

51) In that case, the Supreme Court held that taking of delivery in Delhi by the purchasing dealers for their assigned territories outside Delhi per se would not take away the transactions in question from the category of inter-State sales; the determinative test to be applied is whether the purchasing dealers were obliged contractually to remove the goods from Delhi where they were bought to the assigned territories and whether in fact the goods actually removed. It was held that situs of sale would not decide the question as to whether the sales in question were “inter-State sales” or “local sales”.

52) Therefore, having regard to the above settled legal position, it was not necessary to se for the authorities under the act to see the situs of the sale in question and they ought to have seen whether there was a movement of goods from one State to the other pursuant to the sale.

53) For the aforesaid reasons, the Revision is allowed; and it is held that the ETO

at the Barrier or the Check Post, in the facts and circumstances of the case, could not have examined the nature of the sale transaction and act beyond the limited jurisdiction of examining the documents, accompanying goods, and impose a penalty on a transaction not otherwise liable to tax under the Act; and that the impugned order is perverse for not considering the fact that the Assessing Authority, in the assessment order dt. 04.09.2008, passed for the Assessment Year 2006-07, had accepted the Returns filed by the petitioner and had not imposed any tax on the transaction disputed in the impugned order. It is also held that the genuineness of the Form-C and Form E-1, cannot be doubted by the Excise & Taxation Authorities in Himachal Pradesh. Consequently, the finding of evasion of tax by the petitioner returned by all the authorities, cannot be sustained.

54) Therefore the respondents are directed to refund the penalty collected with interest at the rate of 6% per annum from the date on which the said amount was taken from the petitioner till the date of repayment.

No costs.

55) Pending miscellaneous application(s), if any, shall also stand disposed of.