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**(2008) 08 P&H CK 0111**  
**In the Punjab And Haryana At Chandigarh**

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| Nand Kishore and Company    | Vs | APPELLANT  |
| State of Punjab and Another |    | RESPONDENT |

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**Date of Decision :** 13-08-2008

**Acts Referred:**

Constitution of India, 1950 — Article 246, 301, 302, 303, 304

**Citation :** (2008) 17 VST 108

**Hon'ble Judges :** Rajesh Bindal, J; Hemant Gupta, J

**Bench :** Division Bench

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## Judgement

Rajesh Bindal, J.—This order will dispose of the bunch of 37 writ petitions bearing Nos. 46, 53, 54, 55, 59, 67, 68, 69, 70, 85, 88, 124, 125, 126, 127, 128, 135, 139, 140, 142, 146, 153, 155, 159, 160, 161, 165, 184, 215, 219, 220, 555, 602, 603, 1130, 1457 and 1458 of 2008.

2 The facts are extracted from C.W.P. No. 46 of 2008.

3. The challenge in the bunch of petitions is to Notification No. S.O. 52/P.A. 8/2005/S. 8/2007 dated November 5, 2007 (annexure P-1), issued by the Department of Excise and Taxation, Punjab carrying out amendment in Schedule "A", whereby entry "49" has been substituted and Notification No. S.O. 53/P.A. 8/2005/S.8/2007 dated November 5, 2007 (annexure P-2), whereby new entry "152" has been added in Schedule "B" to the Punjab Value Added Tax Act, 2005 (for short, "the VAT Act").

4. Briefly, the facts are that the petitioner is a proprietary concern carrying on the business of purchase and sale of sugar and allied goods. He is registered under the provisions of the VAT Act. The controversy giving rise to the cause of action to the petitioner to file the present petition arose with the issuance of the impugned notification by the respondents on November 5, 2007, whereby entry 49 in Schedule "A" was substituted and new entry 152 in Schedule "B" was added. In sum and substance, the effect of the entries was that the sugar which was imported from outside the State of Punjab except levy sugar was liable to

tax under the Act, whereas the sugar manufactured in the State of Punjab was exempted from taxation.

5. The learned Counsel for the petitioner submitted that Article 301 of the Constitution provides that trade, commerce and intercourse throughout the territory of India shall be free. It is only the Parliament which has been authorised in law to impose restrictions on the freedom of trade, commerce or intercourse between one State and another, as may be required in public interest, in terms of Article 302 of the Constitution of India. Article 303 of the Constitution provides that neither the Parliament nor the Legislature of a State shall have any power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. Notwithstanding anything contained in Article 301 or 303 of the Constitution of India, the State Legislature is authorised to impose on goods imported from other States or the Union Territory any tax to which similar goods manufactured or produced in that State are subject. However, there cannot be any discrimination regarding taxation between the goods so imported and goods so manufactured or so produced. The submission is that effect of impugned notifications is that tax at the rate of four per cent has been levied only on the sugar imported from outside the State of Punjab, whereas the sugar which is manufactured in the State of Punjab is not subjected to any tax, as the same has been put in Schedule "A" containing tax-free goods. Concluding the arguments, learned Counsel submitted that the impugned notifications are clearly violative of the Constitutional mandate contained in Part XIII of the Constitution of India and are liable to be set aside. Reliance has been placed upon *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, *A. Hajee Abdul Shakoor and Company Vs. State of Madras*, *West Bengal Hosiery Association and Others Vs. State of Bihar and Another*, *Weston Electronics and Anr Vs. State of Gujarat and Ors*, *State of Uttar Pradesh and another Vs. M/s. Laxmi Paper Mart and others*, and *Shree Mahavir Oil Mills and Another Vs. State of Jammu & Kashmir and Others*, .

6. Defending the impugned notifications issued by the State, learned Additional Advocate-General submitted that the impugned notifications are in no way unreasonable or illegal. The discrimination in taxation on the imported sugar, as is sought to be pointed out by the petitioner, is not there as in the case of sugar manufactured in the State of Punjab, the sugarcane used in the manufacture thereof is already taxed. As the State of Punjab gets tax on the sugarcane, the sugar was made tax-free, whereas in the case of imported sugar, the State would get tax on the sale of sugar in the State. The action on the part of the State will not hamper free-flow of trade and commerce at the boundaries of the State or at any other points inside the State and is not hit by Article 301 of the Constitution of India. It is further submitted that a similar tax has been levied under the Punjab Tax on Entry of Goods into Local Areas Act, 2000 (for short, "the Entry

Tax Act") vide notification dated November 15, 2007 and as the petitioner is not aggrieved against the notification issued under the Entry Tax Act, it cannot possibly have any grievance against the notifications issued under the VAT Act.

7. In response to the contention of learned Counsel for the State regarding non-challenge to the notification issued under the Entry Tax Act, learned Counsel for the petitioner submitted that the Entry Tax Act itself is under challenge in a number of petitions filed by various parties before this Court and in any case, non-challenge to a notification under a different statute cannot be considered as a bar on the right of the petitioner to challenge a notification issued under the VAT Act.

8. Heard learned Counsel for the parties and perused the paper book.

9. To appreciate the contentions raised by learned Counsel for the parties, it would be necessary to extract relevant provisions of the Constitution of India and also the VAT Act. The same are extracted below:

Articles 301 and 304 of the Constitution of India:

301. Freedom of trade, commerce and intercourse.--Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

...

304. Restrictions on trade, commerce and intercourse among States.--Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law--

(a) impose on goods imported from other States (or the Union Territories) any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced ; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

10. Section 16 of the VAT Act:

16. Tax-free goods

No tax shall be payable on the sale of goods specified in Schedule A and no person including a taxable person or a registered person shall charge tax on the sale of goods which are declared tax-free goods under this section.

11. The entry in Schedule "A", as existing up to November 5, 2007, is

reproduced below:

SCHEDULE "A" (up to November 5, 2007)

S. No. Name of commodities 49. Sugar and khandsari

12. After the amendment, vide notification dated November 5, 2007, entry 49 in Schedule "A" is reproduced below:

SCHEDULE "A" S. No. Name of commodities 49. Sugar manufactured in the State of Punjab, levy sugar and khandsari.

13. On the same date, entry 152 was added in Schedule "B" providing for levy of tax at the rate of four per cent, which is as under:

SCHEDULE "A" SCHEDULE "B" S. No. Name of commodities 152. Sugar imported from outside the State of Punjab except levy sugar.

14. Article 301 of the Constitution of India provides that trade, commerce and intercourse throughout India shall be free. However, the same is subject to other provisions of Part XIII of the Constitution of India. The honourable Supreme Court considered the import of Article 301 of the Constitution of India in a Constitution Bench judgment in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, . In *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , the honourable Supreme Court opined as under:

...Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free-flow or movement of trade. Taxes may and do amount to restrictions ; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301.... We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be:

Does the impugned restriction operate directly or immediately on trade or its movement?....

...Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII....

15. Considering an issue where Rule 16 of the Madras General Sales Tax

(Turnover and Assessment) Rules, 1939 providing for levy of discriminatory tax on tanned hides or skins imported from outside the State as against those manufactured within the State, a Constitution Bench of honourable the Supreme Court in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, opined as under (pages 360 and 362 of STC):

It is therefore now well-settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free-flow of trade and it will then offend against Article 301 and will be valid only if it comes within the terms of Article 304(a).

Article 304(a) enables the Legislature of a State to make laws affecting trade, commerce and intercourse. It enables the imposition of taxes on goods from other States if similar goods in the State are subjected to similar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States. This means that if the effect of the sales tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the proviso to Sub-rule (2) of Rule 16 of the Rules, then the tax is discriminatory and unconstitutional and must be struck down.

We do not agree with the contentions for the respondents. The contention that Article 304(a) is attracted only when the impost is at the border, i.e., when the goods enter the State on crossing the border of the State, is not sound. Article 304(a) allows the Legislature of a State to impose taxes on goods imported from other States and does not support the contention that the imposition must be at the point of entry only.

...

It is urged for the respondent-State that to consider discrimination between the imported goods and goods produced or manufactured in the State, circumstances and situations at the taxable point must be similar and that the circumstance of hides or skins tanned within the State and on which tax had been paid earlier at the time of their purchase in the raw condition is sufficient to consider such hides or skins to be different from the hides or skins which had been tanned outside the State. We do not consider that the mere circumstance of a tax having been paid on the sale of such hides or skins in their raw condition justifies their forming goods of a different kind from the tanned hides or skins which had been imported from outside. At the time of sale of those hides or skins in the tanned state, there was no difference between them as goods and the hides or skins tanned outside the State as goods. The similarity contemplated by Article 304(a) is in the nature of the quality and kind of the goods and not with respect to

whether they were subject of a tax already or not.

We are therefore of opinion that the provisions of Rule 16(2) discriminate against the imported hides or skins which had been purchased or tanned outside the State and that therefore they contravene the provisions of Article 304(a) of the Constitution.

16. Another Constitution Bench of the honourable Supreme Court in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, considered the issue, whereby discriminatory tax was imposed on tobacco imported from outside the State as against the tobacco grown within the State. Relevant paragraph thereof is extracted below: (page 457 of STC)

There can therefore be no escape from the conclusion that similar goods manufactured or produced in the State of Madhya Bharat have not been subjected to the tax which tobacco leaves, manufactured tobacco and tobacco used for bidi manufacturing, imported from other States have to pay on sale by the importer. This tax is therefore not within the saving provisions of Article 304(a). As already pointed out it contravenes the provisions of Article 301 of the Constitution. The tax has therefore been rightly held by the High Court to be invalid. It is clear that the assessment of tax under these notifications was thus invalid in law.

17. To the similar effect is another Constitution Bench judgment in *A. Hajee Abdul Shakoor and Company Vs. State of Madras*, .

18. In *Weston Electronics and Anr Vs. State of Gujarat and Ors*, , again the issue for consideration before the honourable Supreme Court was regarding levy of discriminatory tax on electronic goods which were imported from outside the State as against the goods manufactured within the State. The discriminatory tax was sought to be defended by the State on the plea that the same was meant to provide incentive for encouraging local manufacturing unit. However, such a plea was not accepted by the honourable Supreme Court. While accepting the plea set up by the appellant before the Supreme Court, the notification providing for lower rate of tax on the sale of goods manufactured within the State was struck down.

19. In *Indian Cement and Others Vs. State of Andhra Pradesh and Others*, , the honourable Supreme Court observed as under (page 319 of STC):

Variation of the rate of inter-State sales tax does affect free trade and commerce and creates a local preference which is contrary to the Scheme of Part XIII of the Constitution....

20. The issue again came up for consideration before the honourable Supreme Court in *M.K. Salpekar Vs. Sunil Kumar Shamsunder Chaudhari and Others*, , where the goods manufactured outside the State of Bihar and sold in the State of Bihar were subjected to levy of sales tax at the rate of five per cent, whereas the sale of similar goods manufactured in the State of Bihar were exempted from

tax. Considering the law on the subject, the honourable Supreme Court opined that from a commercial or normal point of view, such a discriminatory levy of sales tax is bound to affect free-flow of hosiery goods from outside States into the State of Bihar and would, therefore, amount to hampering the free-flow of trade and commerce, and hence, violative of Article 301 of the Constitution of India.

21. In *Shree Mahavir Oil Mills*" case [1997] 104 STC 148, the honourable Supreme Court considering a similar issue, opined that though Clause (a) of Article 304 of the Constitution of India is worded in a positive language, it has a negative aspect. It is, in truth, a provision prohibiting discrimination against the imported goods. It provides that levy of tax on both imported as well as locally manufactured goods ought to be at the same rate so that artificial fiscal barriers are not created. Relevant passage therefrom is extracted below (page 153):

...Article 304 contains two clauses. Clause (a) states that "the Legislature of a State may by law--(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced". The wording of this clause is of crucial significance. The first half of the clause would make it appear at first flush that it merely states the obvious; one may indeed say that the power to levy tax on goods imported from other States or Union territories flows from Article 246 read with Lists II and III in the Seventh Schedule and not from this clause. That is of course so, but then there is a meaning and a very significant principle underlying the clause, if one reads it in its entirety. The idea was not really to empower the State Legislatures to levy tax on goods imported from other States and Union territories--that they are already empowered by other provisions in the Constitution--but to declare that that power shall not be so exercised as to discriminate against the imported goods vis-a-vis locally manufactured goods. The clause, though worded in positive language has a negative aspect. It is, in truth, a provision prohibiting discrimination against the imported goods. In the matter of levy of tax--and this is important to bear in mind--the clause tells the State Legislatures--"tax you may the goods imported from other States/ Union Territories but do not, in that process, discriminate against them vis-a-vis goods manufactured locally". In short, the clause says: levy of tax on both ought to be at the same rate. This was and is a ringing declaration against the State creating what may be called "tax barriers"--or "fiscal barriers", as they may be called--at or along their boundaries in the interest of freedom of trade, commerce and intercourse throughout the territory of India, guaranteed by Article 301. As we shall presently point out, this clause does not prevent in any manner the State from encouraging or promoting the local industries in such manner as they think fit so long as they do not use the weapon of taxation to discriminate against the imported goods vis-a-vis the locally manufactured goods. To repeat, the clause bars the State from creating tax barriers--or fiscal barriers, as they can be called--around themselves and/or insulate themselves from the remaining territories of

India by erecting such "tariff walls". Part XIII is premised upon the assumption that so long as a State taxes its residents and the residents of other States uniformly, there is no infringement of the freedom guaranteed by Article 301; no State would tax its people at a higher level merely with a view to tax the people of other States at that level. And it is this clause which has a crucial bearing on this case.... The freedom guaranteed, it is worthy of notice, is "throughout the territory of India" and not merely between the States as such; the emphasis is upon the oneness of the territory of India. Part XIII starts with this concept of oneness but then it provides exceptions to that rule, as stated above, to meet certain emerging situations. As a matter of fact, it can well be said that Clause (a) of Article 304 is not really an exception to Article 301, notwithstanding the non obstante clause in Article 304 and that it is but a re-statement of a facet of the very freedom guaranteed by Article 301, viz., power of taxation by the States....

22. Summing up the enunciation of law on the subject, in the above referred case, the honourable Supreme Court while declaring the impugned notification to be violative of the provisions of Articles 301 and 304-A of the Constitution of India, directed that the appellant therein shall not be entitled to claim any refund of the amount already paid.

23. In *State of Uttar Pradesh and another Vs. M/s. Laxmi Paper Mart and others*, , the honourable Supreme Court, while following its earlier judgment in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, , struck down levy of discriminatory tax on the exercise books prepared from the paper purchased within the State and exercise books imported from outside the State.

24. In a recent decision, a Constitution Bench of the honourable Supreme Court in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, , while considering the concept of "compensatory tax" vis-a-vis Part XIII of the Constitution of India, examined the scope of Articles 301, 302 and 304 of the Constitution of India. The relevant paragraphs thereof are extracted below (page 568):

Article 301 states that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout India shall be free. It is not freedom from all laws but freedom from such laws which restrict or affect activities of trade and commerce amongst the States. Although Article 301 is positively worded, in effect, it is negative as freedom correspondingly creates general limitation on all legislative power to ensure that trade, commerce and intercourse throughout India shall be free. Article 301, therefore, refers to freedom from laws which go beyond regulations which burdens, restricts or prevents the trade movement between States and also within the State. Since "freedom" correspondingly imposes limitation", we have the doctrine of "direct and immediate effect" of the operation of the impugned law on the freedom of trade and commerce in Article 301 as enunciated in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, .



Article 301 is, therefore, not only an authorisation to enact laws for the protection and encouragement of trade and commerce amongst the States but by its own force creates an area of trade free from interference by the State and, therefore, Article 301 per se constitutes limitation on the power of the State. Article 301 is, however, subject to the other provisions of Articles 302, 303 and 304. It states that subject to other provisions of Part XIII, trade, commerce and intercourse throughout India shall be free.

Article 301 is binding upon the Union Legislature and the State Legislatures, but Parliament can get rid of the limitation imposed by Article 301 by enacting a law under Article 302. Similarly, a law made by the State Legislature in compliance with the conditions imposed by Article 304 shall not be hit by Article 301. Article 301 thus provides for freedom of inter-State as well as intra-State trade and commerce subject to other provisions of Part XIII and correspondingly it imposes a general limitation on the legislative powers, which limitation is relaxed under the following circumstances:

(a) Limitation is relaxed in favour of Parliament under Article 302, in which case Parliament can impose restrictions in public interest. Although the fetter is limited enabling the Parliament to impose by law restrictions on the freedom of trade in public interest under Article 302, nonetheless, it is clarified in Clause (1) of Article 303 that notwithstanding anything contained in Article 302, the Parliament is not authorised even in public interest, in the making of any law, to give preference to one State over another. However, the said clarification is subject to one exemption and that too only in favour of the Parliament, where discrimination or preference is admissible to the Parliament in making of laws in case of scarcity. This is provided in Clause (2) of Article 303.

(b) As regard the State Legislature, apart from the limitation imposed by Article 301, Clause (1) of Article 303 imposes additional limitation, namely, that it must not give preference or make discrimination between one State or another in exercise of its powers relating to trade and commerce under entry 26 of List II or List III. However this limitation on the State Legislatures is lifted in two cases, namely, it may impose on goods imported from sister State(s) or Union Territories any tax to which similar goods manufactured in its own State are subjected but not so as to discriminate between the imported goods and the goods manufactured in the State [see Clause (a) of Article 304]. In other words, Clause (a) of Article 304 authorises a State Legislature to impose a non-discriminatory tax on goods imported from sister State (s), even though it interferes with the freedom of trade and commerce guaranteed by Article 301. Secondly, the ban under Article 303(1) shall stand lifted even if discriminatory restrictions are imposed by the State Legislature provided they fulfil the following three conditions, namely, that such restrictions shall be in public interest : they shall be reasonable ; and lastly, they shall be subject to the procurement of prior sanction of the President before introduction of the Bill.

25. What has been held in the abovenoted judgments of the honourable

Supreme Court is that Article 304 of the Constitution of India authorises the State Legislature to levy tax on goods imported from other State or Union Territories, but levy of such tax should not discriminate between the goods so imported and similar goods manufactured or produced within the State. Clause (a) of Article 304 of the Constitution of India though worded in a positive language has a negative aspect. It is, in truth, a provision prohibiting discrimination against the imported goods vis-a-vis the goods manufactured or produced within the State. The basic object of the provision is to check the State from creating what may be called "tax barriers" or "fiscal barriers" with the object to ensure enjoyment of right guaranteed under Article 301 of the Constitution of India to the freedom of trade, commerce and intercourse throughout the territory of India. The object is to emphasise upon oneness of the territory of India.

26. If the facts of the present case are considered in the light of the enunciation of law consistently laid down by the honourable Supreme Court, the inescapable conclusion is that the action on the part of the respondents in levying sales tax on sale of sugar imported from outside the State of Punjab except levy sugar is clearly violative of Articles 301 and 304(a) of the Constitution of India. In fact, up to November 5, 2007 there was no discrimination as such in the levy of tax on the sugar manufactured in the State of Punjab or imported from outside the State of Punjab as single entry No. 49 existed in Schedule "A" to the VAT Act providing for tax-free goods. The levy of discriminatory tax came into force with the issuance of impugned notifications, whereby entry 49 in Schedule "A" was substituted, thereby providing for no tax on the sale of sugar manufactured in the State of Punjab and entry 152 was added in Schedule "B" providing for tax on the sale of sugar imported from outside the State of Punjab. From a plain reading of the two notifications, it is clearly made out that discriminatory tax was imposed on the imported sugar as against the sugar manufactured in the State of Punjab, which cannot stand scrutiny in the light of the provisions contained in Articles 301 and 304(a) of the Constitution of India.

27. Accordingly, we have no hesitation in striking down Notification No. S.O. 53/P.A. 8/2005/S.8/2007 dated November 5, 2007 (annexure P-2) adding entry 152 in Schedule "B" to the VAT Act, whereby tax is sought to be levied on sale of sugar imported from outside the State of Punjab. As a necessary consequence and to correct the mischief created with the issuance of Notification No. S.O. 52/P.A. 8/2005/S.8/2007 dated November 5, 2007 (annexure P-I), we further hold that the words "manufactured in the State of Punjab" used in entry 49 in Schedule "A" as substituted vide notification (annexure P-I), to be violative of Articles 301 and 304(a) of the Constitution of India, as the same create discrimination in the levy of tax on the sale of sugar brought from outside the State as against manufactured within the State of Punjab.

28. The writ petitions are disposed of in the manner indicated above.