
(2010) 03 P&H CK 0344
In the Punjab And Haryana At Chandigarh

Polar Industries Ltd.

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 31-03-2010

Acts Referred:

Constitution of India, 1950 — Article 265, 286, 366

Citation : (2010) 159 PLR 245 : (2011) 37 VST 329

Hon'ble Judges : Alok Singh, J;A.K. Goel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Alok Singh, J.—In all the above writ petitions, identical questions are involved, hence we propose to hear and dispose of all the above writ petitions together. For the purposes of deciding the lis, we take-up the facts of CWP No. 2545 of 1997.

2. The petitioner - company was granted eligibility certificate on 23.6.1994 and was granted Sales Tax Exemption Certificate on prescribed form ST-73 on 28.1.1994. Exemption granted by the Sales Tax Department was for the period from 20.4.1991 to 19.4.1996. Show cause notice dated 30.12.1996 was issued to the petitioner to show cause as to why full tax amount benefit availed by the petitioner during the period of exemption along with payment of interest be not charged; ground to revoke/cancel exemption certificate was that the petitioner - company was found to make sale outside the State of Haryana for first five years by way of transfer or consignment of goods manufactured by the petitioner-company. Ultimately, order dated 31.1.1997 was passed against the petitioner-company directing the petitioner-company to pay Rs. 3,23,66,683/- i.e. total tax exemption availed by the petitioner during the period of exemption. The petitioner by way of present petition is challenging vires of Explanation to Rule 28A (2)(n)(i) and Explanation to Rule 28A(2)(n)(ii) and Rule 28 A(ii)(b) of the Haryana General Sales Tax Rules, 1975 (hereinafter referred to as the 1975 Rules. Further challenge in the writ petition is the order of assessment dated

31.1.1997 (Annexure P-10) on the ground that no tax can be imposed on the goods transferred by the petitioner - company to its godown outside the State of Haryana, taking shelter of Explanation to Rule 28A(2)(n)(i) and Rule 28A(2)(n)(i) and Rule 28A(ii)(h) of the 1975 Rules.

3. Respondents have refuted the contention of the petitioner. According to the State, as per the turnover submitted by the petitioner, goods manufactured by the petitioner were transferred outside the State of Haryana in violation of condition No. 7 of the exemption certificate, hence total tax exemption availed by the petitioner is recoverable from the petitioner. Condition No. 7 of the exemption certificate reads as under:

(7) The eligibility certificate can be cancelled contravention of any condition mentioned hereinabove or in Rule 28A after affording an opportunity to the party of being heard.

4. Main contention of the State is that as per Explanation to Rule 28A(2)(n)(ii) of the 1975 Rules, branch transfer or consignment sale outside the State of Haryana amounts to sale, hence taking the figure from the turnover filed by the petitioner, notional sales taxability is included in the total turnover which admittedly is above the maximum limit of exemption i.e. 220.50 lacs, hence exemption certificate was correctly cancelled/revoked under the deeming fiction of exemption certificate and total tax exemption is liable to be recovered from the petitioner.

5. We have heard learned Counsel for the parties and perused the record.

6. Learned Counsel for all the petitioners contended that they are confining their arguments on the point as to whether Revenue can impose any tax on the transaction, taking the shelter of one of the conditions of exemption, on which in the normal course of business, no tax can be imposed? They further argued, if answer of first question is yes, then vires of Explanation to Rule 28A is also required to be seen.

7. In the present petition, following questions arise for consideration by this Court:

(i) As to whether the State government is competent to impose tax on the transfer of goods by the petitioner-company to its godown outside the State of Haryana taking recourse to Explanation to Rule 28A (2)(n)(i) and 28A(ii)(h) of the 1975 Rules. If yes, as to whether Explanation to Rule 28A(2)(n)(i), (ii) and 28A

(ii) (h) is ultra vires being violation of Entry 92B, List-1 7th Schedule read with Article of the Constitution of India?

8. Learned Counsel for the petitioner argued that definition of sale given in Rule 28 of the 1975 Rules is for the purpose of grant of exemption. He further submitted that once the State government is not competent to impose tax on

inter-state transaction or transfer of the consignment from one place to another place of the dealer, then the State government cannot impose tax on the same by taking recourse to the definition of sale given in Explanation to Rule 28.

9. Learned Counsel for the State vehemently argued that once the definition of sale is given in the Explanation to Rule 28 of the 1975 Rules, plaintiff having availed the benefit of exemption as per the provisions of Section 13 of the 1973 Act read with Rule 28A of the 1975 Rules, are estopped to challenge the imposition of tax by invoking definition of sale as per condition of exemption certificate. Tax can be imposed on the goods on the basis of notional turnover submitted by the petitioner to the State.

To examine respective contentions of the parties, we have to take help from the definition and provisions given in the Haryana General Sales Tax Act, 1973 (hereinafter referred to as the "1973 Act").

10. Section 2-L of the 1973 Act defines sale as under:

(1) "sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration and includes:

(i) transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) transfer of property in goods (whether is goods or in some other form) involved in the execution of a works contract entered into on or after the 18th day of April, 1984.

(iii) delivery of goods on hire purchase or any (system of payment by installments;

(iv) transfer of the right to use any goods except tents, kanats, chholdari, crockery, utensils, furniture and all other goods dealt with by the tent dealers as also other allied dealers for decoration and lighting purposes for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) supply, by way of or as part of any service) or in any other manner whatsoever, of goods, being food or any other article for" human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration; and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply to a person to whom such transfer, delivery or supply is made but does not include a mortgage, hypothecation, charge or pledge.

Note 1- Sub-clauses (i) and (v) shall be deemed to have come into force on the 2nd day of Feb., 1983.

Note 2- Sub-clause (ii), and Sub-clause (iv) so far as it relates to the goods,

namely, shuttering material (used in construction of buildings), tents, kanats, chholdari, crockery, utensils, furniture, and all other goods dealt with by the tent dealer as also other allied dealers for decoration and lighting purposes, electricity meters and water meters, shall come into force with effect from the 1st day of April, 1987.

Provided that a dealer, who has charged tax or has made use of authority of his registration certificates under this Act or the Central Sales Tax Act, 1956, during the period from 18th day of April, 1984 to 31st day of March, 1987, shall be liable to pay tax to the extent of charging of tax or tax on the goods purchased on the authority of his registration certificates and used in the execution of the works contract, as the case may be, and for this purpose Sub-clause (ii) and Sub-clause (iv) shall be deemed to have come into force with effect from the 18th day of April, 1984.

Note 3- A sale falling under Sub-clause (ii) shall be deemed to have taken place within the State if the goods involved in the execution of a works contract are within the State at the time of their use in the execution of the works contract.

Note 4- A sale falling under Sub-clause (iv) shall be deemed to have taken place within the State if the goods in respect of which right to use has been transferred are within the State at the time of their use.

11. Gross turnover is defined in. Section 2(gg) of the 1973 Act as under:

(gg) "gross turnover" means the aggregate of the amounts of sales and purchases and parts of sales and purchases made by any dealer whether as principal, agent or in any other capacity during the given period less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof.

Explanation:-(1) The gross turnover of any dealer in respect of transaction of forward contracts, in which goods are actually not delivered shall not be included in the gross turnover.

Explanation:-(2) Any amount collected by a dealer by way of tax under this Act shall not be included in the gross turnover.

Explanation:-(3) In respect of transactions covered under Sub-clause (iii) of Clause (j) and Sub-clause (iii) of Clause (1), the amount to be included in the gross turnover shall be the total sum payable by the hirer under a hire purchase agreement in order to complete the purchase of, or the acquisition of property in, the goods to which the agreement relates; and includes any sum so payable by the hirer under the hire purchase agreement by way of a deposit or other initial payment, or credited or to be credited to him under such agreement on account of any such deposit or payment, whether that sum is to be or has been paid to the owner or to any person or is to be or has been discharged by payment of money or by transfer or delivery of goods or by any other means; but does not

include any sum payable as a penalty or as compensation or damages for breach of the agreement.

Explanation:-(4) In case of a works contract, the gross turnover shall include the cost, freight and all other expenses in relation to the goods before the property in goods, whether as such or in any other form, passes to the contractee;

12. Taxable turnover is defined u/s 2(p) of the 1973 Act as under:

(p) "taxable turnover" means that part of a dealer's gross turnover which remains after allowing deductions u/s 27 of the Act.

13. Incidence of taxation is defined in Section 6 of the 1973 Act, which reads as under:

6. Incidence of Taxation - (1) Subject to the provisions of Section 15 and 27 of this Act, every dealer whose gross turnover during the year immediately preceding the 27th day of May, 1971, exceeded the taxable quantum, shall from the 27th day of May, 1971 and every other dealer shall, on the expiry of thirty days after the date on which his gross turnover first exceeds the taxable quantum, be liable to pay tax under this Act on the sale or purchase of goods by him in the State at the stage hereinafter provided,-

(a) on declared goods at the stage specified u/s 17;

(b) on goods notified u/s 18 at the stage specified therein;";

(ba) on goods specified in Schedule C at the stage and subject to the conditions indicated therein;.

(c) on all other goods at the stage of,-

(i) last sale when the goods are sold to any person other than a registered dealer who furnishes declaration as specified u/s 27 or as notified u/s 13 or as prescribed u/s 13B of this Act;

(ii) last purchase in all other cases except when the purchase is made on payment of tax.

Provided that this sub-section shall not apply to a dealer who deals exclusively in goods specified in Schedule B or who executes a sub-contract with a contractor who is liable to pay tax in respect of the works contract of which the sub-contract is a part:

Provided further that in the case of a dealer,-

(a) who imports any goods for sale or for use in manufacturing or processing any goods for sale, the liability to pay tax shall commence from the date on which he imports such goods;

(b) who manufactures or processes any goods for sale, the liability to pay tax shall commence, from the date on which his gross turnover, during any year, first

exceeds the taxable quantum;

(c) who exports any goods purchased within the State, the liability to pay tax shall commence from the date on which he purchases such goods;

(d) who deals in declared goods, the liability to pay tax shall commence from the date on which his gross turnover of such goods exceeds the taxable quantum;

(e) who deals in foreign liquor (Indian made foreign liquor and foreign liquor), the liability to pay tax shall commence from the date on which he deals in such goods;

(f) who deals in textiles exclusively, the liability to pay tax shall commence from the date on which the sales of goods other than those specified in Schedule B exceeds rupees one lac in year;

(g) who is a contractor doing the work of construction, fitting, improvement or repair of any building, road, wall, bridge, embankment, dam or other immovable property and has not charged tax or has not made use of the authority of his registration certificate under this Act or the Central Sales Tax Act, 1956, during the period from first day of April, 1987 to 31st day of March, 1989, shall not be liable to pay tax under this Act during aforesaid period on the goods involved in the execution of works contract.

(h) who transfer the right to use tents, kanats, chholdari, crockery, utensils, furniture and all other goods for decoration and lighting purposes, and has not charged tax or has not made use of the authority of his registration certificate under this Act or the Central Sales Tax Act, 1956, during the period from 1st day of April, 1987 to 31st day of March, 1989 and opts for the payment of lump sum as may be prescribed, in lieu of sales tax; shall not be liable to pay tax under this Act during the aforesaid period and his liability to pay tax under this Act on the transfer of right to use any goods for cash, deferred payment or other valuable consideration shall commence from 1st day of April, 1989 and remain in force upto 31st March, 1995.

(3) Every dealer who has become liable to pay tax under this Act, shall continue to be so liable until the expiry of three consecutive years during each of which his gross turnover has failed to exceed the taxable quantum and such further period after the date of such expiry, as may be prescribed, and on the expiry of this latter period his liability to pay tax shall cease.

(4) Every dealer, whose liability to pay tax has ceased under the provisions of Sub-section (3), shall again be liable to pay tax under this Act in accordance with the provisions of Sub-section (1);

(5) Notwithstanding anything to the contrary contained in this Act or any other law or judgement or order of any court or authority in respect of cases relating to assessments for the period from the 7th September, 1955 upto the commencement of this Act, every dealer who was assessed under the Punjab

General Sales Tax, 1948 shall be deemed to have been assessed under this Act as if this Act was in force during the said period.

14. Section 12 of the 1973 Act reads as under:

12. No tax payable in case of Inter state trade, etc.- Notwithstanding anything contained in this Act, a tax on the sale or purchase of goods shall not be imposed under this Act,-

(i) where such sale or purchase takes place outside the State;

(ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India; or

(iii) where such sale or purchase takes place in the course of inter State trade or commerce.

15. Section 13 of the 1973 Act reads as under:

13. Power to exempt - (1) The State Government, if satisfied that it is necessary or expedient so to do in the interest of cottage industries or rural tiny industries, may, by notification, exempt any class of co-operative societies, rural tiny industrial units or persons from the payment of tax under this Act, on the purchase or sale of any goods subject to such conditions as may be specified in such notification.

(2) Where a notification under Sub-section (1) has been issued by the State Government, -

(a) a registered dealer shall not be entitled to charge tax on the sale made to such societies, industrial units or persons;

(b) such sales shall not be included in the taxable turnover of such registered dealer notwithstanding anything to the contrary contained in Section 27;

(c) a registered dealer shall be entitled to deduct from his taxable turnover the purchase value of goods specified in Schedule C to the extent such goods are sold by him to such societies, industrial units or persons notwithstanding anything contained in Section 27.

Explanation.- For the purposes of this section, "rural tiny industrial unit" means an industrial unit set up in a rural area, after coming into force of the Haryana General Sales Tax (Amendment) Act, 1979, whose capital investment on machinery and equipment does not exceed one lakh rupees.

16. Rule 28A of the 1975 Rules reads as under:

Class of Industries, period and other conditions for exemption/deferment from payment of tax (Sections 13B and 25A) : (1) The industries covered under this rule shall be entitled to any deferment or exemption from payment of tax under any other provisions of these rules.

(2) xx xx xx

(n) "Notional sales tax liability" means-

(i) amount of tax payable on the sales of finished products of the eligible industrial unit under the Local Sales Tax Law but for an exemption computed at the maximum rates specified under the Local Sales Tax Law as applicable from time to time; and

Explanation:- The sales made on consignment basis within the State of Haryana or branch transfer within the State of Haryana shall also be deemed to be sales made within the State and liable to tax;

(ii) amount of tax payable under the Central Sales Tax Act, 1956, on the sales of finished products of the eligible industrial unit made in the course of inter-State trade or commerce computed at the rate of tax applicable to such sales as if these were made against certificate in form C on the basis that the sales are eligible to tax under the said Act.

Explanation : The branch transfer or consignment sales outside the State of Haryana shall be deemed to be the sale in the course of inter-State trade or commerce.

Note : The expression terms, if any appearing in this rule not defined above shall unless the context otherwise requires carry the same meaning as assigned to them under the Act and rules made thereunder.

17. From the perusal of the definitions given under the 1973 Act and the provisions of Section 12 thereof, it can very well be said that transfer of goods from one place to another place must be for a cash or deferred payment or other valuable consideration to constitute the sale as defined under the 1973 Act. The branch transfer of consignment outside the State in the course of inter-state transfer, does not amount to sale. From the provisions of Section 12 of the 1973 Act, it can very well be said that even the State government is not competent to impose tax on the sale or purchase of goods, which have taken place in the course of inter-state trade or commerce.

18. Entry 92A and 92B of List-1, 7th Schedule read as under:

92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

92B. Taxes on the consignments of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

19. Object of Explanation to Rules 28 of the 1975 Rules is different from the authority to impose tax. Articles 265 and 286 of the Constitution of India read as under:

265. Taxes not to be imposed save by authority of law : No tax shall be levied or

collected except by authority of law.

286. Restrictions as to imposition of tax on the sale or purchase of goods:

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place:

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in Clause (1).

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,-

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in Sub-clause (b), Sub-clause (c) or Sub-clause (d) of Clause (29A) of article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

20. No tax can be imposed or collected except by the authority of law and no law of a State shall impose or authorise the imposition of tax on the sale or purchase of goods where such sale or purchase takes place outside the State or in the course of the import or export of the goods.

21. From the combined reading of Entry 92A and 92B and Articles 265 and 286 and Section 12 of the 1973 Act, it is clear that no tax can be imposed on inter-state transaction or sale by the State since it is within the competence of the Central government only. Moreover, if inter-state transaction or transfer does not amount to sale as per the definition of sale, no tax can be imposed thereon.

22. Now the question arises, if in the normal course, tax cannot be imposed on interstate transaction or transfer by the State government, as to whether the State government is competent to impose tax thereon by saying that inter-state transaction or transfer amounts to sale as per the Explanation given to Rule 28 of the 1975 Rules.

23. We are of the firm view that revocation or cancellation of exemption or deferment would mean, as if there was/is no exemption or deferment and the dealer is liable to pay tax as per the provisions of the statute.

24. If the statute does not provide for imposition of tax by the State government on the inter-state transaction or consignment transfer not amounting to sale, then the State government is not authorised to impose tax on such transaction or consignment transfer merely because it amounts to sale as per the

Explanation added to Rule 28 of the 1975 Rules.

25. Object of Rule 28 of the 1975 Rules, is on what terms and conditions exemption can be availed. Terms and conditions to avail exemption does not mean, giving authority to the State government to recover tax, which the State government is otherwise not competent to do so. In view of the above, we find the vires of Explanation to Rule 28 of the 1975 Rules is not in question and Explanation to Rule 28 does not give power to the State to impose tax, which the State government otherwise is not competent to impose in the normal course.

26. Undisputedly, the assessing authority has assessed tax considering all the transactions as sale, including the inter-state transfer of the consignment, which is not legal as per the observations made hereinabove. Tax can be only on transactions, which amount to sale, hence assessment orders require reconsideration in the light of observations made hereinabove. The impugned assessment orders are, therefore, quashed. The assessing authorities are directed to pass assessment orders afresh, in accordance with law.

27. Writ petitions are allowed in the aforesaid terms. No order as to costs.

28. A photocopy of the order be placed on the file of each connected case.