
(2013) 02 RAJ CK 0001

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1542 of 2011

Sangam Pole Works

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 18-02-2013

Acts Referred:

Citation : (2013) 4 RLW 3519

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Judgement

Dr. Vineet Kothari, J.—The petitioner, M/s. Sangam Pole Works, has filed this writ petition on 18.2.2011. The controversy arises under the provisions of Rajasthan VAT Act, 2003 (for short, hereinafter referred to as "Act"). The petitioner is the manufacturer and sells P.C.C. poles (Prestress Concrete Cement Poles) and is duly registered under the provisions of the said Act. During the assessment period in question, namely, 1.4.2008 to 31.3.2009, in its return of turnover filed, the petitioner firm sold the said PCC poles to the extent of Rs. 72,98,154/- purportedly to Ajmer Vidyut Vitran Nigam Ltd., a Government company for power generation and distribution and claimed total exemption from the tax on the strength of S. No. V. 33: F.12(63)/FD/Tax. 2005-26 dated 28.4.2006 published on 29.4.2006 issued u/s 4(5) of the Act by which the power generating and distribution companies in the State of Rajasthan were added in the Schedule-II of the said Act, which specifies the person or class of persons exempted from payment of tax. The said Schedule-II, inter-alia, includes at Serial No.1, United Nations Organization and its constituent agencies, and at Serial No. 2 Foreign Diplomatic Missions and their Diplomats etc. and at Serial No. 8, inserted by aforesaid amending notification No. 2005-26 dated 28.4.2006, the Rajasthan Rajya Vidhyut Utpadan Nigam Ltd., and four other power generating and distribution companies including, Ajmer Vidyut Vitaran Nigam Ltd., the purchaser of PCC Poles from the petitioner.

2. On the same date i.e. on 28.4.2006, ad-seriatum, the State Government

issued another notification, namely, S. No. V. 34: F.12 (63)/FF/Tax/2005-27 dated 28.4.2006 published on 29.4.2006, in exercise of powers u/s 8(3) of the Act and while reiterating the exemption from tax with effect from 1.4.2006 to the sale to or purchase by R.R.V.U. Ltd., R.L.V.P.L., A.V.V.N.L., Ju. V.V.L. and Jd. V.V.N.L. of the goods for exclusive use in generation, transmission or distribution of electric power, were partially exempted to the extent rate of tax exceeding 4% on certain conditions, which inter-alia, required that tax on such sales to or purchase by these power generating, transmission and distribution companies, if already collected in excess of 4%, shall be paid to the State Government and if the tax has already been paid on such sales, such tax shall not be refunded; and the authorized officer of these companies, will furnish to the selling dealer a certificate in the prescribed form appended in the said notification.

3. The reason to file the present writ petition appears to have occurred when the Assessing Authority issued the impugned show cause notice vide Annex. 3 dated 7.1.2011 asking the petitioner-firm to appear before it on 30.1.2011 and, inter-alia, explain as to why the tax of 4% be not collected from its sales made by it to one of these power generating companies (shortly described as Vidhyut Vibhagh" or "Electricity Department") in view of later Notification No. 2005-07 dated 28.4.2006 on the turnover of Rs. 42,98,154/- after excluding from the total turnover of Rs. 72,98,154/- the turnover to the extent of Rs. 30 lacs on account of eligibility certificate issued in favour of petitioner-firm on 27.12.2008 by the "Khadi Gramodyog Board" and, therefore, the difference tax of 4% on Rs. 42,98,154/- may not be required to be paid by the assessee, since the petitioner had disclosed its turnover as wholly exempted from the tax in the returns, and why and interest @ 8.5% and penalty also may not be levied against the petitioner/assessee firm. The petitioner, therefore, filed present writ petition in this Court on 18.2.2011, inter-alia, challenging the said show cause notice of respondent-Assessing Authority Annex. 3 dated 7.1.2011 and laid a collateral challenge to the words "to the extent to which rate of tax exceeds 4%" in the second notification No. 2005-27 of 28.4.2006, which challenge as it may be stated at the outset here is wholly uncalled for, is not only bereft of any merit but the same is a tangent challenge just to seek foothold in the writ jurisdiction as would be discussed hereinafter. The petitioner also sought a declaration that no tax can be levied on the sale to or purchase of goods by the specified power generating and distribution companies (specified in Schedule II) and if any such tax is collected during the pendency of this writ petition, the same may be refunded back to the petitioner, though there is a contra indication against any such refund in the Notification No. 2005-27 dated 28.4.2006 and that part of the Notification, the petitioner does not challenge.

4. Mr. Dinesh Mehta, learned counsel for the petitioner/assessee submitted that Section 8 of the Act, which empowers the State Government to exempt the goods, persons or dealers from tax in Section 8(3) of the Act. Section 8(3) of the Act also empowers the State Government to exempt, whether prospectively or retrospectively from the tax, the sale or purchase by any person or class; of

persons as mentioned in Schedule-II, with or without any condition, and therefore, once the State Government put the purchasers, namely, A.V.V.N. Ltd. in Schedule II by Annx. 1 notification No. 2005-26 dated 28.4.2006, there was no power left with the State Government or there was no occasion to issue the subsequent notification No. 2005-07 on the same date or rather in the same breath, only partially exempting such sale to or purchase by these power generating companies over 4% of rate of tax, subject to the conditions stipulated in the said later Notification No. 2005-27. In the alternative, he also urged that prescribing the rate of tax can be done only as per the charging provision in Sections 3 and 4 of the Act under which Schedule-III to Schedule-VI have been enacted by the State Government and not u/s 8(3) of the Act; and while the Schedule-III, which imposes the rate of VAT tax at 1% on the commodities like Bullion, Jewellery, Precious stones, De-oiled cake, Stainless Steel Sheets and Stainless Steel Circles etc. and as many as 197 items have been included in Schedule-IV u/s 4 of the Act prescribing the uniform rate of tax at 5% on the commodities like agriculture implements, all intangible goods like copyright, patent, REP licences etc. and various commodities including the cement concrete mosaic tiles at serial No. 197 in the end of the said Schedule-III.

5. Likewise, various other items have been specified in Part -A of Schedule-IV under Item No. 65, which deals with IT products and Part -B deals with Item 69 specifies the industrial inputs, Schedule-V prescribes the residuary rate of tax at 14% on all the goods not covered in any other Schedule under the said Act, while the Schedule-VI contains the goods taxable at specially higher rates like HSD at 18%, Molasses at 20%, Foreign Liquor, IMFL and Beer at 30% and Pan Masala at 40% etc.

6. Explaining the scheme of the Act, the learned counsel for the petitioner-assessee, Mr. Dinesh Mehta, urged that the power to prescribe the rate of tax cannot be read into Section 8(3) of the Act containing the power to exempt and, therefore, once having put the power generating and distribution companies in Schedule-II of the Act by issuing the Notification No. 2005-26 u/s 8(3) of the Act, which empowers the State Government to specify the class of persons or dealers exempted from the tax, the State Government could not issue another Notification No. 2005-27 on the same day 28.4.2006 only partially exempting such sales or purchase to these specified companies over 4%, since the words "partial exemption" is not even included in Sec. 8(3) of the Act. He, therefore, submitted that the show cause notice issued by the respondent-Assessing Authority, Annex.3 dated 7.1.2011 is based on a misconception of law and is further based merely on Annex.2 Notification No. 2005-27 dated 28.4.2006, hence the same also deserves to be quashed.

7. On the other hand, Mr. Anirudh Purohit, appearing for Mr. V.K. Mathur, learned counsel for the Revenue submitted that, firstly, the power to exempt contained in Section 8(3) of the Act includes the power to exempt wholly or partially, even though the words "wholly or partially" are not mentioned in Sec. 8(3) of the Act

and such power to partially exempt is implied in Sec. 8(3) of the Act and, therefore, second Notification No. 2005-27 dated 28.4.2006 cannot be quashed on that ground. He, however, submitted that sub-Section (3A) inserted later on, by Rajasthan VAT Amendment Act, 2007 (Act No.3 of 2007) with effect from 1.4.2006 further empowered the State Govt. to add, omit, amend or modify the Schedule-II, prospectively or retrospectively. Therefore, the validity of Annex.2 Notification No. 2005-27 dated 28.4.2006 cannot be questioned by the petitioner, as the same is fully within the powers of the State Government. He also submitted that even if Section 4, which empowers the State Government to prescribe the rate of tax is not mentioned in the Notification No. 2005-27 dated 28.4.2006 Annex. 2, if such power to prescribed the rate of tax can be traced the charging provisions of Sections 3 and 4 of the Act, the second notification cannot be called in question.

8. Learned counsel for the Revenue submitted that the challenge to the vires of the notification raised in the present writ petition is not only misconceived and misplaced because it is not only made now in the year 2011 after five years of the existence of the same on the statute book having been enforced against so many other assesseees in the State, but it is only a question of interpretation of the relevant provisions of the Act and conjoint application of both the Notification which arises in the present case, if at all and the levy of tax cannot be allowed to fail, as there is a strong presumption of the validity of the Act and statutory notifications and unless the same is shown to be arbitrary or without any source of legislative powers or discriminatory, established on factual foundations, such a challenge cannot be raised under Article 226 of the Constitution of India before the Court of law.

9. He also urged that Annex. 3, is the only a show cause notice issued to the petitioner-firm and since the petitioner has been only called upon to show cause against the said notice as to why exemption shown in his return of turnover filed be not withdrawn to the extent of rate of tax above 4% as per the Notification No. 2005-27 dated 28.4.2006, subject to the basic limit of Rs. 30 lacs of turnover to which the petitioner may be entitled to exemption as per the Eligibility Certificate issued in his favour by the "Khadi Gramodyog Board" on 27.12.2008. The petitioner should, therefore, certainly show the cause before the Assessing Authority concerned himself, who is not only free to decide the such issues including the question of law raised before this Court but also the questions of facts, which arise in the present matter and thereafter the petitioner has the alternative remedies available to it under the Act by way of appeals and revisions and, therefore, it would be premature for this Court to go into these questions, which have been raised in the present writ petition. Lastly, he prayed for dismissal of the writ petition with costs since the petitioner has filed this writ petition for consideration by Single Bench, but a tangent challenge has been made to small phrase in the Notification No. 2005-27 just to get a foothold in the writ jurisdiction of this Court, which is not otherwise available to him against the show cause notice of the Assessing Authority.

10. I have heard the learned counsel for the parties at length for final disposal of the case by consent of the learned counsels of both the counsels at the admission stage itself, and given my thoughtful consideration to the rival submissions, the relevant provisions of the Act and the aforesaid relevant notifications.

11. Firstly, this Court would like to observe that the challenge laid to the second notification No. 2005-27 dated 28.4.2006, issued on the same date 28.4.2006 when the first Notification No. 2005-26 was issued, in prayer No. 1 of the writ petition, is wholly misconceived and the same cannot be entertained. The said question of validity has been raised just to gain a foothold for maintaining the present writ petition, which otherwise is absolutely premature being directed only against a show cause notice issued by the Assessing Authority which was not even replied by the petitioner. The same raises a mere academic issue, which has no factual foundation.

12. The said writ petition was not only filed by the petitioner on 18.2.2011 for consideration by the Single Bench, but even after the office order of Hon^{ble} the Chief Justice dated 28.2.2011 vide No. RHC/DR(J) 2011 286 dated 10.3.2011 directing that cases challenging the vires of any Act or Statute or any order or rule or regulation made under any act or statute shall be heard by Division Bench, as further clarified vide Order dated 18.3.2011 that the word "any order" in the previous order dated 10.3.2011, would mean "any order of legislative nature", the petitioner or learned counsel for the petitioner never moved any application for transfer of the writ petition for consideration by the Division Bench, either when arguing the matter at admission stage before a coordinate bench on 23.2.2011, nor thereafter when the matter was again dealt with by other coordinate benches on 21.4.2011, 13.5.2011 and 21.10.2011 or thereafter nor any such prayer was made even before this Court during the course of the arguments. On the other hand, learned counsel fully argued the case on merits and submitted that the petitioner was wholly exempted from payment of tax on a conjoint reading of the two Notifications in question. Therefore, in fact the petitioner was never serious in pressing the challenge to the validity of the Notification and the prayer to that effect has been included merely to get the foothold in the writ jurisdiction, which otherwise would be treated as premature, as being directed only against a show cause notice of the Assessing Authority. The petitioner has thus avoided not only examination of question of facts by the Assessing Authority but at the same time not laid any foundation for such a challenge to the validity of a phrase in the Notification. This Court, therefore, would deal with the questions of interpretation of these two Notifications only, as argued by the learned counsel for the petitioner.

13. The question of interpretation of Section 8(3) of the Act read with the Scheme levying the tax under Sections 3 and 4 of the said Act and the relevant Schedules framed in pursuance of these powers of the State Government has a clear answer and stands concluded by various decisions of the Hon^{ble} Supreme

Court and this Court.

14. Admittedly, the two notifications were issued by the State Government on the same date 28.4.2006. The first notification was issued in exercise of powers conferred u/s 4(5) of the Act and not u/s 8(3) of the Act and the said first notification is reproduced hereunder for ready reference:-

"S. No. V. 33: F. 12 (63)/FD/Tax/2005-26 dated 28.4.2006, Pub. 29.4.2006.

S.O. 64.-In exercise of the powers conferred by S. 4(5), Raj. VAT Act, 2003, the State Govt., hereby makes the following amendment in Schedule-II appended to the said Act; namely:-

Amendment- In schedule II appended to the said Act, after the existing Item No. 7, the following new item No. 8 and entries thereto in columns 2 and 3 shall be inserted, namely,-

"8. Rajasthan Rajya Vidyut Utpadan Ltd,

Rajasthan Rajya Vidyut Prasaran Ltd.

Ajmer Vidyut Vitaran Nigam Ltd.

Jaipur Vidyut Vitaran Nigam Ltd.

Jodhpur Vidyut Vitaran Nigam Ltd.

The notfn shall be deemed to have come into force with effect from 1.4.2006."

15. The second notification issued on the same date i.e. on 28.4.2006 is also reproduced hereunder for ready reference:

"S. No. V 34; F. 12(63)/FD/Tax/2005-27 dated 28.4.2006, Pub. 29.4.2006. S.O. 65.- In exercise of the powers conferred by S. 8(3), Raj. VAT Act, 203, the State Govt. hereby exempts from tax, with effect from 1.4.2006, the sale to or purchase by Rajasthan Rajya Vidyut Utpadan Ltd., Rajasthan Rajya Vidyut Prasaran Ltd., Ajmer Vidyut Vitaran Nigam Ltd., Jaipur Vidyut Vitaran Nigam Ltd. and Jodhpur Vidyut Vitaran Nigam Ltd., for exclusive use in the generation, transmission or distribution of electric power to the extent to which the rate of tax exceeds 4% on the following conditions, namely:-

1. That the tax collected on such sales to the Rajasthan Rajya Vidyut Utpadan Ltd., Rajasthan Rajya Vidyut Prasaran Ltd., Ajmer Vidyut Vitaran Nigam Ltd., Jaipur Vidyut Vitaran Nigam Ltd. and Jodhpur Vidyut Vitaran Nigam Ltd., if any, shall be paid to the State Govt.

2. That the tax already paid on such purchases by Rajasthan Rajya Vidyut Utpadan Ltd. Rajasthan Rajya Vidyut Prasaran Ltd., Ajmer Vidyut Vitaran Nigam Ltd., Jaipur Vidyut Vitaran Nigam Ltd. and Jodhpur Vidyut Vitaran Nigam Ltd., if any, shall not be refunded; and

3. That the officer, duly authorized to make such purchase on behalf of any of

these purchasing companies, furnishes to the selling dealer, a certificate in the form appended hereto."

Certificate

I..... (name)..... (designation)..... (name of the company) do certify that the goods purchased from Sri/M/s..... having registration No. (TIN).... amounting to Rs.....(in words also).....vide VAT invoice No..... date.....have been purchased by Mr.....(name of the purchasing company) for the purpose of exclusive use by it in the generation, transmission or distribution of electric power. (Seal of the duly authorised officer of the company)

Place:....

Dated:.....

Signature.....

Designation of the authorized

Officer of the company."

16. It will also be of relevance to reproduce the relevant provisions of the Act, namely, Section 3 providing for Incidence of the tax and Section 4 providing for levy of tax and its rates, Section 8 deals with Exemption of tax. The said provisions are also quoted below for ready reference.-

"Section 3. Incidence of tax.-

(1) Subject to the provisions of this Act, every dealer-

(a) who is an importer of goods; or

(b) who is a manufacturer of goods and whose annual turnover exceeds rupees two lacs; or

(c) whose annual turnover exceeds (rupees ten lacs), shall be liable to pay tax under this Act.

(2) [Notwithstanding anything contained in sub-section (1), a dealer, other than that enumerated in clause (a) or clause (b) of sub-section (i), [or the dealer or class of dealers as may be notified by the State Government] who purchases goods from a registered dealer of the State and sells such goods within the State, may opt for payment of tax on his turnover excluding the turnover of the goods specified in Schedule 1, at the rate as may be notified that such annual turnover does not exceed (rupees sixty lacs) in a year. (3) Notwithstanding anything contained in sub-sections (1) and (2) every casual trader shall be liable to pay tax under this Act.

(4) Notwithstanding anything contained in sub-sections (1) and (2) every person other than a casual trader or a registered dealer, who carries on business temporarily for a period not exceeding one hundred twenty days in a year, shall

be liable to pay tax under this Act in the manner as may be prescribed.

(5) A dealer registered under the Central Sales Tax Act, 1956 (Central Act No. 74 of 1956) who is not liable to pay tax under sub-sections (1) to (4), shall nevertheless be liable to pay tax in accordance with the provisions of this Act.

(6) Notwithstanding anything contained in this Act, a dealer registered under this Act shall long as his certificate of registration remains in force, be liable to pay tax, irrespective of his turnover."

Section 4. Levy of tax and its rate.-

(1) Subject to the other provisions of this Act and the provisions of the Central Sales Tax Act, 1956 (Central Act No. 74 of 1956), the tax payable by a dealer under this Act, shall be at such point or points, as may be prescribed under this Act, shall be successive dealers and shall be levied on the taxable turnover of sale of goods specified in Schedule III to Schedule VI at the rate mentioned against each of such goods in the said Schedules.

(2) Every dealer who in the course of his business purchases any good other than exempted goods in the circumstances in which no tax under sub-section (1) is payable on the sale price of such goods and the goods are disposed off for the purpose other than those specified in clause (1) to (g) of sub-section (1) of section 18, shall be liable to pay tax on the purchase of such goods at the rate mentioned against each of such goods in Schedule III to Schedule VI of the Act.

(3) Notwithstanding anything contained in sub-section (1), the tax payable by the dealer covered by sub-section (2) of Section 3, shall be levied at the rate not exceeding two percent on the turnover, as may be notified by the State Government.

(4) Where any goods are sold packed in some material, whether charged for separately or not, notwithstanding anything contained in sub-section (1), the tax liability of and the rate of tax on the packing material shall be according to the tax liability of and the rate of tax on the goods packed therein.

(5) Subject to such conditions as it may impose, the State Government may, if it considers necessary so to do in the public interest, by notification in the official Gazette, add to or omit from, or otherwise amend or modify the Schedules, prospectively or retrospectively, or reduce the rate of tax payable in respect of any goods and thereupon the Schedule shall be deemed to have been amended accordingly.

(6) Every notification issued under sub-sec. (5) shall be laid, as soon as may be after it is so issued, before the House of the State Legislature, while it is in session for period of not less than thirty days which may comprised in one session or in two successive sessions [and if before the expiry of the sessions] in which it is so laid or of the session modification in such notification or resolves that any such notification should not be issued, such notification thereafter have

effect only in such modified form or be of no effect, as the case may be, so however, that any such modification or annulment shall be without prejudice to the validity of any thing previously done thereunder.

(7) Notwithstanding anything contained in this Act, any registered dealer, who imports into, or manufacturers in, the State such goods as may be notified by the State Government, may, at his option, pay, in lieu of the tax payable by him on sale price of such goods under this Act, a tax at full rate on the maximum retail price of such goods in the manner as may be prescribed.

[Provided further that a dealer who opts payment of tax under this sub-section shall not allow any trade discount or incentive in terms of quantity of goods in relation to any sale of goods covered under this sub-section, effected by him, for the purpose of calculating his tax liability.

(a) from aforesaid importer or manufacturer upon payment of tax on the maximum retail price of such goods; or

(b) from another registered dealer where tax on the maximum retail price of such goods was paid in the State on an earlier occasion, the purchasing dealer, irrespective of whether he is registered or not, while making resale of such goods in the State, shall, notwithstanding anything contained elsewhere in the Act, be entitled to recovered from the buyer the amount of tax paid by him at the time of purchase of such goods under such conditions and restrictions and in such manner, and within such time, as may be prescribed.]

Section 8. Exemption of tax.-

(1) The goods specified in the schedule-I shall be exempt from tax, subject to such conditions as may be specified therein.

(2) Subject to such conditions as it may impose, the State Government may, if it considers necessary so to do in the public interest, by notification in the Official Gazette, add to or omit from, or otherwise amend or modify the Schedule-I, prospectively or retrospectively, and thereupon the Schedule shall be deemed to have been amended accordingly.

(3) The State Government in the public interest, by notification in the Official Gazette, may exempt whether prospectively or retrospectively from tax the sale or purchase by any person or class of persons as mentioned in Schedule-II, without any condition or with such condition as may be specified in the notification.

[(3A) Subject to such conditions as it may impose, the State Government may, if it considers necessary so to do in the public interest by notification in the Official Gazette, add to or omit from, or otherwise amend or modify the Schedule-II, prospectively or retrospectively, and thereupon the Schedule shall be deemed to have been amended accordingly.

(4) The State Government may, if it considers necessary in the public interest so

to do, notify grant of exemption from payment of whose of tax payable under this Act in respect of any class of sales or purchases for the purpose of prompting the scheme of Special Economic Zones or promoting exports, subject to such conditions as may be laid down in the notification.

(5) Every notification issued [under this section] shall be laid, as soon as may be after it is so issued, before the House of the State Legislature, while it is in session for a period of not less than 30 days, which may comprised in one session or in two successive sessions [and if before the expiry of the sessions] in which it is so laid or of the session immediately following the House of the State Legislature makes any modification in such notification or resolves that any such notification should not be issued, such notification thereafter have effect only in such modified form or be of no effect, as the case may be, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder."

17. Coming the contentions raised by the learned counsel for the petitioner/ assessee, Mr. Mehta that once the State Government issued the notification putting the power generating, transmission and distribution companies in Schedule-II, the State Government cannot issue notification Annex. 2 on the same date only partially exempting the sales to purchase by these two companies, it may be stated herein that the words "may exempt" in Section 8(3) of the Act would necessarily include the power to exempt wholly or partially. The inclusion of these purchasing companies in Schedule-II, does not mean ipso-facto total exemption from the tax u/s 8(3) of the Act. The prescription of rate of tax is, of course, envisaged u/s 4 of the Act. It may be noted that Annex. 1 Notification No. 2005-26 was issued by the State Government in exercise of powers conferred u/s 4(5) of the Act and not u/s 8(3) of the Act. Both Sections 4(5) and Section 8(3A) are akin and authorize the State Government to modify the Schedules to the Act. The Schedules, therefore, do not create any watertight compartments. The powers of charging sections 3 and 4 and Section 8 containing power to exempt have to be read harmoniously in conjunction as per the plain reading of the provisions, which is the golden rule of interpretation. The prescription of rate of tax is, of course, envisaged u/s 4 of the Act. It may be noted that Annex. 1 Notification No. 2005-26 issued by the State Government in exercise of powers conferred u/s 4(5) of the Act and not u/s 8(3) of the Act. The sub-Section (5) of Section 4 of the Act also empowers the State Government to add or omit or otherwise amend or modify the Schedules prospectively or retrospectively or reduce the rate of tax payable in respect of any goods and thereupon the Schedule shall be deemed to have been amended accordingly.

18. Secondly, while issuing the first Notification No. 2005-26 u/s 4(5) of the Act, the words "wholly exempting" these power generating companies" have not been used in the said notification, but it merely shows that item No. 8, comprising five names of these power generating companies would be inserted in the Schedule-II of the Act; and for that purpose, the said Notification No. 2005-26 was issued.

The Schedule-II, accordingly, stood amended by inclusion of these five companies at Serial No. 8 in the said Schedule-II. The said inclusion could not mean that such inclusion cannot attract partial exemption by another notification or even the withdrawal of the exemption by another Notification providing for a rate of tax on the sale or purchase of goods by such companies. The exemption to the goods sold to the power generating companies, is to the extent of rate of tax over 4%, Meaning thereby, that if PCC Poles manufactured and sold by the petitioner is not covered by the items specified in Schedule-IV of the Act containing 197 items, taxable @ 5%, it would be taxable in Residuary entry of Schedule-V @ 14%, but on account of present Notification No. 2005-27 dated 28.4.2006, it would be exempt from tax to the extent of 10% of the sale price of goods.

19. It is true that Section 8(3) of the Act empowers the State Government to exempt any person or class of persons mentioned in Schedule-II, but it does not talk of exemption, wholly or partially and rightly so, because when the State Government is exempting any particular person or class of persons by including such persons in the list of exemption category and thus identifying such class of persons or dealers, the question of prescribing the rate of tax or giving partial or whole exemption in that very Notification does not simply arise. Once such person or class of persons is put in Schedule-II, with reference to powers u/s 4(5) of the Act, the issuance of second Notification No. 2005-27 (Annex. 2) on the same date with reference to Section 8(3) of the Act is not prohibited as the earlier notification does not take away the power of the State Government u/s 4(5) of the Act and even the powers u/s 8(3) of the Act to prescribe the rate of tax of give partial exemption only to such person included in Schedule II of the Act. Since, advertently the word "exemption wholly or partially" has not been included in Section 8(3) of the Act, the exemption from tax over 4% as specified in Annex. 2 Notification No. 2005-27 dated 28.4.2006, will have to be read and traced to the powers u/s 4(5) of the Act as well. It is well settled that if the power to legislate can be traced to any power in the provisions in the enactment itself, the levy cannot be allowed to fall, even if the subordinate legislation does not refer to that parent or such main provision of the Act. The harmonious interpretation to save and uphold the levy will take precedence and prevail. The second Notification No. 2005-27 Annex. 2 dated 28.4.2006 gives the in exemption over 4% of the rate of tax, still remains an exemption notification only and, therefore, the powers u/s 8(3) of the Act have been rightly referred by the subordinate legislation in the said notification. There is no question of raising a challenge to the vires of said notification particularly the words "to the extent to which the rate of tax exceeds 4%" merely because the said notification does not refer to Section 4 of the Act, but refers to Section 8(3) of the Act.

20. As stated above, the power to exempt will include the power to exempt wholly or partially and, therefore, identifying the class of persons or dealers from Schedule-II and then partially exempting the same by Annex. 2 Notification dated 28.4.2006 does not militate in any manner against the ambit and scope of

power to exempt u/s 8(3) of the Act. The petitioner/assessee before this Court is the seller of PCC poles manufactured by it, sold to these power generating and distribution companies and is fully covered by the scope and operation of both the aforesaid notifications.

21. The controversy involved in the present case actually is no longer *res integra* in view of the decision of the Hon'ble Supreme Court in the case of Commissioner, Sales Tax, U.P. Vs. Agra Belting Works, Agra, in which the Hon'ble Apex Court interpreting such a situation of a notification prescribing the rate of tax as impliedly withdrawing the general exemption of certain commodity from the tax, held so on the principle of interpretation of "*Generalia specialibus non derogant*". The factual matrix of the said case before the Hon'ble Supreme Court and the ratio of the judgment given in the SCC reports, are reproduced hereunder for ready reference:-

"The State Government issued notifications dated December 14, 1957 and November 25, 1958 u/s 4 of the U.P. Sales Tax Act exempting "cotton fabrics of all kinds" from sales tax. Belting material fell within these exemption notifications. While the exemption notifications were in operation the State Government issued a notification dated December 1, 1993 u/s 3-A of the Act introducing in item 8 of the Schedule to the Act "beltings of all kinds" for imposition of sales tax. The question for decision was whether patta which is a kind of belting would be exigible to sales tax by virtue of the 1973 notification even in absence of withdrawal of the earlier notifications under which the belting materials were exempted from sales tax. Answering in the affirmative by a 2:1 majority the Supreme Court: Held:

Sections 3, 3-A and 4 of the U.P. Sales Tax Act are parts of the taxing scheme incorporated in the Act. When after a notification u/s 4 granting exemption from liability, a subsequent notification u/s 3-A prescribes the rate of tax, the intention is to withdraw the exemption and make the sale liable to tax at the rate prescribed in the notification. As the power both for the grant of exemption and the variation of the rate of tax vests in the State Government and the intention to levy the tax was clear, there was no justification for not giving effect to the 1973 notification. Under the Act a notification of recall of exemption is not a condition precedent to imposing tax at any prescribed rate by a valid notification u/s 3-A. The 1973 notification could be treated as a combined notification both the withdrawal of exemption and also for providing higher tax. The exemption was in regard to a class of goods and while the exemption continued, a specific item had been notified u/s 3-A of the Act."

22. The said decision of the Hon'ble Supreme Court has been consistently followed by another Bench of the Hon'ble Supreme Court itself and in one of the case even the review petition was filed by the department and the same came to be allowed by the Apex Court in the case of Sales Tax Officer, Sector IX, Kanpur Vs. Dealing Dairy Products and another, The relevant paras 1, 4 and 5 of the said short order of the Hon'ble Apex Court are reproduced hereunder for ready

reference:-

"1. Heard the counsel for the parties. This review petition has to be allowed following the ratio of the decision of this Court in CST vs. Agra Belting Work.

4. In CST vs. Agra Belting Works a Bench of this Court comprising R.S. Pathak, C.J. Ranganath Misra and B.C. Ray, JJ. held, by a majority, that Sections 3, 3-A and 4 of the U.P. Sales Tax Act are parts of the taxing scheme incorporated in the Act, and therefore, where a notification is issued u/s 3-A prescribing a rate of tax for goods, which may have been exempted from tax by an earlier notification u/s 4, it must be held that the intention was to withdraw the exemption and make the sale leviable to tax at the rate prescribed in the notification. It was held that it is not necessary in such a case that a specific or separate notification withdrawing or revoking the exemption is issued. Following the said decision it must be held that the exemption granted to ice-cream by notification dated 21.5.1974 was undone by the notification dated 4.11.1974 as well as by the notification 30.5.1975.

5. For the above reason the review petition is allowed and order of High Court dated 12.12.1986 (which was the subject-matter of SLP No. 14648 of 1988) is set aside. For the same reasons, the order dated 9.1.1989 in the aforesaid SLP No. 14648 of 1988 is also set aside and the order of the assessing authority holding the turnover relating to ice-cream as taxable is restored. Consequently, the SLP (C) No. 14648 of 1988 shall be deemed to have been granted and the civil appeal registered on that basis shall be deemed to have been allowed in the above terms."

23. It was indeed rare that a summary dismissal order of SLP was recalled by Apex Court and upon review the order of assessing authority was restored upon a review petition filed by the Department, to give effect to the decision of Supreme Court in Agra Belting Works case. Thus in view of this binding precedent, there is no escape for anyone to take a different view of the matter and that is why the present writ petition is wholly misconceived and deserves a dismissal.

24. Thereafter, in the case of State of Bihar & Ors. vs. Krishna Kumar Kabra & Anr. reported in (1997) 9 SCC 763, again the Hon"ble Supreme Court following the aforesaid two earlier decisions of the Apex Court and reiterating the aforesaid legal position held that Section 3(A) of U.P. Sales Act were the part of taxing scheme incorporated in that Act and, therefore, where a notification was issued u/s 3-A prescribing the rate of tax on goods which had been exempted from tax by an earlier notification u/s 4, it had to be held that the intention was to withdraw the exemption and make the sale leviable to tax at the rate prescribed in the later notification. The paras 4, 5 and 6 of the said judgment are quoted below for ready reference:-

"4. It is not in dispute that bran is covered by the broad description "Atta, Maida and Suji". The question is whether, by reason of the Notification No. 3320 dated

9.3.1978, amending the entry relating to the rate of tax in the earlier notification in that behalf by including "bran" therein, has the effect of bringing to an end the exemption from the levy of sales tax that bran enjoyed under Notification No. 14547 dated 26.12.1977.

5. Our attention has been drawn to two judgments of this Court that squarely cover the issue in favour of the appellant State. They are the judgments in CST vs. Agra Belting Works and in STO vs. Dealing Dairy Products. In the earlier case it was held that Sections 3-A and 4 of the U.P. Sales Tax Act were parts of the taxing scheme incorporated in that Act and, therefore, where a notification was issued u/s 4-A prescribing the rate of tax on goods which had been exempted from tax by an earlier notification u/s 4, it had to be held that the intention was to withdraw the exemption and make the sale leviable to tax at the rate prescribed in the late notification. It was not necessary that a specific or separate notification withdrawing or revoking the notification should be issued. The latter judgment of this Court, on similar facts, followed the earlier judgment.

6. The facts being similar, we must hold that the Notification No. 3320 imposing tax at the rate of 3% specifically on bran intended, by necessary implication, to bring to an end the exemption that bran had theretofore enjoyed."

25. Following the same landmark decision of the Hon"ble Supreme Court in the case of Agra Belting Works (supra), even this Court in the case of CTO, Anti Evasion, Udaipur vs. M/s. LNT Case Equipment Ltd., Udaipur reported in 2011 (1) WLC (Raj.) 262 held that even the partial exemption granted vide notification dated 30.2.2000 will be deemed to have been withdrawn by the rate notification for 8% rate issued by the State Government on 19.6.2000 in respect of Hydraulics Excavators; and the later notification will prevail and there would be an implied supersession of the general partial exemption notification dated 30.3.2000. The relevant paras 7 and 8 of the said judgment are quoted below for ready reference:-

7. The question involved in the present case is as to whether by the third Notification of 19th June, 2000, the second Notification namely SO No. 356 dated 30.3.2000 stood impliedly superseded or not? It is true that the second Notification SO No. 356 dated 30.3.2000 provided for a partial exemption of rate of tax exceeding 2% on Hydraulic Excavators vide Entry No. 1 upto the period ending on 31.3.2001 and the said Notification was issued on the same date when the Notification SO No. 355 prescribing rate of tax on various commodities, as many as 193 and Entry No. 194 being residuary entry and, therefore, even though Entry No. 28 in the first Notification SO No. 355" dated 30.3.2000 provided rate of tax at 4% on Hydraulic Excavators, the same was partially exempted by second Notification SO No. 356 and rate over 2% was exempted by second Notification upto 31.3.2001. Further the third Notification came to be issued by the State Government on 19.6.2000 after about 2-1/2 months and again rate of tax on Hydraulic Excavator was provided at 8% by deleting relevant Entry No. 28 relating to Hydraulic Excavator and inserting fresh Entry No. 106 C

relating to Hydraulic Excavators in the said First Rate Notification dated 30.3.2000. It is not in dispute before this Court that the commodity in question is Hydraulic Excavator and covered by the said Entries in the aforesaid Notifications and it is also not in dispute that the State Government has power to grant exemption and also to revoke the said exemption. What has been contended by the learned counsel for the assessee is that the second Notification SO No. 356 was for a specific period upto 31.3.2001 and, therefore, the subsequent amendment in SO No. 355 by third Notification dated 19.6.2000 will not impliedly supersede or eclipse or overrule the second Notification before 31.3.2001 and rate of tax at 2% will continue to be applicable on the sale of Hydraulic Excavators. This contention of learned counsel for the assessee is misconceived and runs contrary to the decision of Apex Court in the Case of Agra Belting Works (supra), wherein, the Apex Court clearly laid down that once the rate of tax is prescribed by the State by a valid Notification, there is no requirement that a Notification of recall of exemption is a condition precedent to imposing tax at any prescribed rate and infact such second Notification providing for rate of tax on a particular commodity should be construed as a combined Notification-both for withdrawal of exemption and also for providing higher tax. Thus, it is the point of time for issuing Rate Notification which is important. Admittedly, Third Notification dated 19.6.2000 was issued after First & Second Notification were issued on 30.3.2000. While Second Notification SO. No. 356 gave partial exemption over 2% rate of tax on sale of Excavators in view of rate of tax of 4% prescribed by First Notification SO No. 355 of even date, but same could not hold the field even after fresh Rate Notification for 8% rate was issued on 19.6.2000 by Third Notification. The partial exemption granted on 30.3.2000 should be deemed to have been withdrawn on 19.6.2000. The relevant extract of the decision of Apex Court in the case of Agra Belting Works is reproduced hereunder for ready reference:-

"As has been pointed out above, section 3 is the charging provisions; section 3A authorises variation of the rate of tax and section 4 provides for exemption from tax. All the three sections are parts of the taxing scheme incorporated in the Act and the power both u/s 3A as also u/s 4 is exercisable by the State Government only. When after a notification u/s 4 granting exemption from liability, a subsequent notification u/s 3A prescribes the rate of tax, it is beyond doubt that the intention is to withdraw the exemption and make the sale liable to tax at the rate prescribed in the notification. As the power both for the grant of exemption and the variation of the rate of tax vests in the State Government and it is not the requirement of the statute that a notification of recall of exemption is a condition precedent to imposing tax at any prescribed rate by a valid notification u/s 3A, we see no force in the contention of the assessee which has been upheld by the High Court. In fact, the second notification can easily be treated as a combined notification both for withdrawal of exemption and also for providing higher tax. When power for both the operations vests in the State and the intention to levy the tax is clear we were no justification for not giving effect to

the 2nd notification. We would like to point out that the exemption was in regard to a class of goods and while the exemption continues a specific item has now been notified u/s 3A of the Act."

8. In view of the aforesaid binding precedent of Apex Court, the Division Bench decision of Allahabad High Court cannot hold the field and is of no avail to the counsel for the assessee. As far as decision of this Court in the case of Asstt. Commissioner, M/s. Jyoti Cotton Industries (supra) is concerned, the same is clearly distinguishable because in that case the Court found that specific Notification covering the specific commodity will override the general Notification covering all commodities and, therefore, on the basis of principle that special law will prevail over general law, this Court rejected the Revenue's revision petition. The said judgment does not touch the controversy involved in the present case. Therefore, this Court is of the clear opinion that with the issuance of Notification dated 19.6.2000, the second Notification SO No. 356 dated 30.3.2000 stood impliedly superseded as far as Entry No. 1 relating to Hydraulic Excavators was concerned and same stood substituted by Entry No. 106C of the said Notification dated 19.6.2000 and rate of tax applicable on sale of Hydraulic Excavators etc. from 19.6.2000 would be 8%. It is immaterial that under the CST Act by a subsequent fourth Notification dated 30.9.2000, the State Government again chose to levy the rate of sales tax on inter state sales of Hydraulic Excavators at 2%. This Notification cannot said to be providing for rate of tax applicable on local sales within the State of Rajasthan nor has the effect of undoing the Notification issued by the State Government on 19.6.2000. Therefore, the contention of assessee that partial exemption over 2% rate of tax on Hydraulic Excavators would continue upto 31.3.2001 despite issuance of third Notification on 19.6.2000 is liable to be rejected and is, therefore, rejected."

26. In view of aforesaid clinching legal position, the present writ petition filed by the petitioner/assessee deserves to be dismissed. The prayer made in the writ petition to strike off the part phase of later notification No. 2005-27 dated 28.4.2006 (Annex. 2) cannot be sustained, as no foundation for such a challenge to the notification has been laid by the petitioner in the writ petition and it is essentially only a question of applicability and interpretation of the two notifications prescribing the rate of tax @ 4% by partially exempting the levy of tax over and above 4% which will be read with the preceding notification of the same date, namely, Notification No. 2005-26 putting the power generating companies in Schedule-II of the Act, and the question is required to be squarely answered against the petitioner and in favour of respondent-Revenue. The same is, therefore, answered accordingly.

27. In fact, the petitioner approached this Court prematurely even without filing his reply to the show cause notice, which involved determination of several questions of facts also. The question whether all sales were made to A.V.V.N. Ltd., a power general company subject to fulfillment of the conditions specified in the Notification No. 2005-27 dated 28.4.2006 or not, are the questions which

require enquiry at the end of the Assessing Authority of all the relevant transactions of sale or purchase. Obviously, such an exercise cannot be done in the present writ petition. Normally, against the show cause notice, a writ petition cannot be entertained under Article 226 of the Constitution of India, unless there is a patent lack of jurisdiction in the authority concerned who has issued the said show cause notice. There is not even an allegation of whisper of the petitioner in the present case that the respondent-Assistant Commissioner did not have the jurisdiction to issue such a notice.

28. As far as the question of applicability of two notifications is concerned, the issue already stands determined as above, and in fact there was/is no occasion for the petitioner to lay a challenge to the impugned words in the notification and the said challenge is merely an academic or tangent challenge just to maintain the writ petition in the High Court in its extraordinary jurisdiction on the plea that the challenge to the notification obviously would not be determinable by the Assessing Authority created under the Act itself; whereas no such foundation has been laid in the writ petition for laying down such challenge. It is nothing more than intelligent drafting of the counsel to give foothold to the writ petition in this Court without any foundation. The writ petition was filed for consideration by Single Bench even though, as narrated above, such a writ petition if at all the challenge to the validity of Notification was intended to be pressed, was required to be filed before the Division Bench only. The petitioner, therefore, wrongly and presumably deliberately chose a dubious way of seeking a relief in extraordinary jurisdiction.

29. The question of law of applicability of the two notifications to the petitioner and effect thereof on assessee's case, on a conjoint reading of both the Notifications, if at all could be said to be arising, stands answered above in view of aforesaid legal position laid down by the judgments of this Court as well as Apex Court, referred to supra. In view of the above, the present writ petition filed by the petitioner being devoid of any merit fails and the same is, accordingly, dismissed. No costs.