

(2015) 09 GUJ CK 0025

In the Gujarat High Court

Case No : Tax Appeal No. 455 of 2015, Civil Application (OJ) No. 504 of 2015,
Tax Appeal No. 458 of 2015 and Civil Application (OJ) No. 507 of 2015

State of Gujarat

APPELLANT

Vs

Ultratech Cement Ltd.

RESPONDENT

Date of Decision : 04-09-2015

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 15B, 45(6), 47(4A), 49, 49(2)

Citation : (2016) 88 VST 61

Hon'ble Judges : Harsha Devani and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : Maithili Mehta, Assistant Government Pleader, for the Appellant;
Parth Contractor, Advocate for Singhi and Co., for the Respondent

Judgement

Harsha Devani, J.—Since common facts are involved in these two appeals, the same were taken up for hearing together and are disposed of by this common judgment.

2. The appellant-State of Gujarat has called in question the order dated 17th October, 2014 passed by the Gujarat Value Added Tax Tribunal (hereinafter referred to as "the Tribunal") in Second Appeals No. 32 and 33 of 2008 respectively, by proposing the following four questions stated to be substantial questions of law:

"[1] Whether the Hon'ble Tribunal has erred in holding that the supply/ transmission of electricity to the sister concern is wholly from the power plant operated from steam?

[2] Whether the Hon'ble Tribunal has erred in holding that the Naptha purchased by the respondent is used by the respondent only and accordingly the respondent has not breached any condition of entry No. 69 or 255 of notification issued under section 49(2) of the Sales Tax Act?

[3] Whether the Hon'ble Tribunal has erred in holding that "Naptha" was not

"taxable goods" and so purchase tax cannot be levied under section 15B of the Sales Tax Act?

[4] Whether the Hon"ble Tribunal has erred in deleting levy of interest u/s. 47(4A) and penalty u/s. 45(6) of the Sales Tax Act?"

3. The facts stated briefly are that pursuant to the Sales Tax Incentive Schemes declared by the Government of Gujarat to the new industries in the backward area, the respondent-assessee has established a unit for manufacturing cement at Kuvaya. The assessee was granted tax incentive of Rs. 424.80 crores for Unit No. I by final eligibility certificate dated 18th November 2000 and tax incentive of Rs. 468.83 crores in respect of its unit No. II for the period from 1st April, 1998 to 31st March, 2005. Under the incentive scheme, the assessee could purchase the goods to be used as raw or processing materials or consumable stores used in the manufacture of taxable goods without payment of tax on one hand and was permitted to sell the goods manufactured by it without payment of the tax on the other hand. In respect of purchases of the raw processing materials or consumable stores of taxable goods made by it, the assessee was required to be issued Form No. 26 or 40, as the case maybe, wherein it was required to give a declaration to the effect that whatever purchase of the raw material, processing material or consumable stores made by it, shall be used in the industrial unit for which eligibility certificate was obtained by it. According to the appellant, the assessee did not use the entire material purchased by it against Form No. 26 or 40 for the purpose of manufacture in its unit and that part of the purchases were utilised for the benefit of others and that thereby the assessee had committed breach of the declaration contained in Form No. 26 or 40.

4. The above controversy arises in the backdrop of the following facts:

4.1. The assessee had established a captive power plant, running on gas turbine in the year 1999-2000 and naptha was used to operate the said plant. The naptha, which was used, was purchased by the assessee by issuing Form No. 26 or 40. During the process of power generation, certain amount of steam was produced, which was released in the air. With a view to utilise such steam, the assessee installed another power plant, which was run on steam turbine. Till such steam operated power plant was established, the steam generated by the naptha plant was released into air as a waste product. Thus, the assessee was producing electricity from two plants:

(i) the power plant run on naptha, that is, gas turbine, and (ii) the power plant run on steam, that is, steam turbine. There is no dispute between the parties that the electricity generated through the gas turbine (naptha run) was entirely utilised by the assessee; whereas the electricity generated in the steam turbine, though was mostly used by the assessee itself, a small percentage thereof to the tune of 2.5% of the electricity was wheeled to Narmada Cement Company Limited, which is a sister concern, which, according to the appellant, amounted to breach of Form No. 26 or 40. On the other hand, it was the case of the

assessee that there was no breach as the naptha issued under Form No. 26 or 40 was entirely used for the purpose of generating the electricity, which was used by the assessee alone.

4.2. The assessing authority as well as the first appellate authority held that there was a breach of Form No. 26 or 40 and accordingly levied purchase tax under section 50 of the Gujarat Sales Tax Act (hereinafter referred to as "the Act"). Since the tax incentives were extended to the assessee under entry No. 255 and 69 of the notifications issued under sub-section (2) of section 49 of the Act, if any condition of such incentive, as narrated in Form No. 26 or 40 as the case may be, was breached, the dealer concerned would be liable to pay purchase tax under section 50 of the Act, which it otherwise was not liable to pay. The assessing authority as well as first appellate authority also levied purchase tax under section 15B on the sales made by the assessee. The assessee contended that both the purchase taxes under sections 50 and 15B were wrongly and illegally imposed and it was not liable to pay any such taxes. The Tribunal, after appreciating the evidence on record, recorded a finding of fact to the effect that the only raw or processing material, which was purchased against Form No. 26 or 40, namely, naptha was to be used by the assessee itself. The dispute involved in the present case is about purchase of naptha and its use in the manufacture. According to the Tribunal, when the assessee had used the entire naptha in the gas turbine for its purpose, there was no question of any breach having been committed by the assessee. The Tribunal was of the view that the wheeling of a small amount of the electricity, which was generated through steam turbine, and not gas turbine, would not amount to a breach of Form No. 26 or 40. After appreciating the material on record, the tribunal also recorded a finding of fact to the effect that the average consumption of naptha was the same whether or not the steam turbine was functional and therefore, the consumption of naptha was static and was not affected whether or not the steam turbine was in operation. In the light of the findings of fact recorded by it to the effect that there was no breach of Form No. 26/40, the Tribunal further held that the levy of purchase tax under section 50 and/or 15B of the Act was not justified and accordingly set aside the levy of purchase tax as well as interest imposed upon the assessee.

5. Ms. Maithili Mehta, learned Assistant Government Pleader for the appellant assailed the impugned order passed by the Tribunal by submitting that the steam generated by naptha turbine being a byproduct of the naptha and having been used for the purpose of generating the electricity, part of which was wheeled out to the sister concern, there is an apparent breach of Form No. 26/40 on the part of the assessee and, therefore, the assessing authority as well as lower appellate authority have rightly levied the purchase tax on the assessee and corresponding interest and penalty and that the Tribunal was not justified in reversing the same. It was submitted that the appeal does give rise to the substantial question of laws as proposed or as may be formulated by the court.

6. On the other hand, Mr. Parth Contractor, learned advocate for M/s. Singhi & Company, learned advocates for the respondent supported the impugned order by submitting that the Tribunal, after considering the evidence on record, has recorded findings of fact to the effect that the naptha which was purchased by issuing form No. 26/40 had been wholly used for generating electricity and no part thereof was used for generating the electricity wheeled out to the sister concern. Under the circumstances, there is no breach of Form No. 26 or 40 on the part of the assessee. It was submitted that the conclusions arrived at by the Tribunal are based upon the findings of fact recorded by it upon appreciation of the material on record and in the absence of any perversity in such findings, the impugned order does not give rise to any question of law and hence the appeal deserves to be dismissed.

7. This court has considered submissions of the learned advocate for the respective parties and perused the impugned order passed by the Tribunal. As is evident from the facts delineated hereinabove, it is evident that the entire naptha purchased by the assessee for running the gas turbine was used for generating electricity used for the purposes of manufacture in its own unit. However, the steam, which was generated in the gas turbine by way of waste material was utilised by the assessee in a steam turbine which also generated the electricity. Such electricity generated in the steam turbine was mostly used by the assessee itself; however, a minuscule quantity thereof, was wheeled out to its sister concern. It is this wheeling of the electricity to the sister concern, which according to the appellant amounts to a breach of Form No. 26 or 40 on the part of the assessee. From the findings recorded by the Tribunal as well as from the facts as appearing from the record, it is evident that the entire material which was purchased against Form No. 26 or 40, namely, naptha, was used by the assessee for generating electricity through the gas turbine and such electricity was used solely for the purpose of manufacture in its own unit. The small amount of electricity wheeled out to the sister concern was generated by the steam turbine which was run on the steam which emerged as a waste product when using naptha for the purpose of generating electricity through gas turbine. Therefore, on facts, it cannot be said that any material purchased by the assessee by issuing Form No. 26 or 40 has been used by the assessee for any other purpose than for manufacturing in its own unit. In the opinion of this court, the wheeling out of a minuscule amount of electricity generated out of the steam turbine, to its sister concern cannot in any manner be said to be a breach of Form No. 26 or 40 as is sought to be contended by the appellant. It is also not the case of the appellant that any part of the naptha had been used solely for the purpose of generating steam for operating the steam turbine. Under the circumstances, it is not possible to state that the impugned order of the Tribunal suffers from any legal infirmity warranting interference. The impugned order of the Tribunal, therefore, does not give rise to any question of law, much less, a substantial question of law so as to warrant interference. The appeals, therefore, fail and are accordingly dismissed.

Civil Application No. 504 & 507 of 2015:

In light of the orders of even date passed in the main appeals these applications do not survive and are disposed of accordingly.