(2013) 08 P&H CK 0093

In the Punjab And Haryana At Chandigarh

Case No : VAT Appeal No. 105 of 2012

Zimidara Agro Mills	APPELLANT
Vs	
State of Haryana	RESPONDENT

Date of Decision : 26-08-2013

Acts Referred:

Citation : (2014) 67 VST 126

Hon'ble Judges : Rajive Bhalla, J;Bharat Bhushan Parsoon, J

Bench : Division Bench

Judgement

Dr. Bharat Bhushan Parsoon, J.—The appellant a rice mill, exempted (annexure A2) under rule 28A of the Haryana General Sales Tax Rules, 1975 (hereinafter mentioned as, "the HGST Rules") is, however, subject to the Haryana Rice Procurement Levy Order, 1985 (hereinafter mentioned as the 1985 Order). A notification dated April 21, 1999 (annexure A3), for the crop year 1998-99, was issued by the Haryana Government amending the 1985 Order, whereby procurement price of rice was made inclusive of purchase tax. The Assessment Authority, while framing assessment for the assessment year 1998-99 (annexure A4) assessed the appellant to purchase tax on the ground that purchase tax is part of the sale price determined and paid by the DFSC to the appellant. The component of purchase tax received in levy price from the Department of Food and Supplies, Haryana, to the tune of Rs. 4,28,738 was directed to be recovered u/s 49 of the Haryana General Sales Tax Act, 1973 (hereinafter mentioned as "the HGST Act") from the appellant as being an exempted unit, it was not entitled to charge tax. This assessment order (annexure A4) was unsuccessfully challenged before the first appellate authority. The second appeal filed before the Haryana Tax Tribunal (hereinafter mentioned as the Tribunal) was allowed and the matter was remitted to the Assessing Authority for adjudication. It also requires mention that the appellant invoked the writ jurisdiction of this court as similar petitions were also pending. The petitions were dismissed on January 14, 2009, vide judgment (annexure A7). Undeterred, the petitioner filed an appeal before the honourable Supreme Court of India. A bunch of appeals including the appeal filed by the petitioner were dismissed by holding that purchase tax charged on sale of levy rice, made to the DFSC is part of the sale price, and, therefore, recoverable from the petitioner. However, the issue with regard to levy of purchase tax in case of exempted units was left open. The Assessing Authority passed another assessment order raising a demand for payment of purchase tax on the purchase of paddy made by appellant.

2. The assessment order dated July 16, 2010 (annexure A8) which is the genesis of the second round of litigation was upheld by the first appellate authority, i.e., Joint Excise and Taxation Officer (A), Ambala on February 28, 2011 (annexure A10). In this order, confirming the finding of the assessing officer, exigibility of the appellant to payment of purchase tax was confirmed. Repelling the contention of the appellant that he is not liable to pay purchase tax and that the same should be adjusted towards notional sales tax liability, was held to be devoid of any merit. When the appellant took the matter further in second appeal, the Tribunal in its order dated July 29, 2011 (annexure All) affirmed leviability of purchase tax on the appellant unit notwithstanding that it was exempted from payment of sales tax. However, taking into consideration facts and circumstances of the case, instead of making its own adjudication, the Tribunal accepting plea of the Revenue taking shelter in earlier decision of the Tribunal and of this court in the light of observations of the honourable Supreme Court of India, decided the matter against the appellant by holding as under:

We tend to agree with the contention of the respondent-Department, because the orders of the Tribunal, confirmed by the honourable High Court regarding the general purchase tax under the HGST Act in case of exempted units like the appellant are still valid as the same have not been reversed or upset by the honourable Supreme Court in their judgment (supra). The authorities are bound by these orders till the appellants approach the honourable High Court or Supreme Court and get the findings reversed in their favour. With regard to the doctrine of merger as enunciated by the honourable apex court and as relied by the appellant in his arguments, it is seen that it would have been relevant, had the honourable apex court decided the second issue of the general purchase tax also. The honourable court restricted itself to the first issue of the purchase tax in the sales to the DFSC under the Levy Scheme and kept the other issue open to be decided in some other appropriate case. Hence, unless the findings of the High Court is considered and decided by the honourable apex court as appropriate, the taxation authorities cannot ignore that. It is open for the appellant to approach the honourable High Court or the apex court to seek relief in accordance with law.

3. The stand of the appellant is that being an exempted unit, it is not liable to pay purchase tax as the exemption was for sales tax as also for purchase tax. It is urged that when the matter of levy of purchase tax on purchase of paddy in case of exempted units has been left open, i.e., without decision by the honourable apex court, second assessment order (annexure A8) could not be

legally enforced against the appellant unless the issue of exemption is considered and authoritatively decided by a competent court of jurisdiction. Continuing with this plea, it is further claimed by the appellant that it cannot be burdened with payment of general purchase tax on the assumption that earlier order (annexure A6) of the Tribunal and of this court (annexure A7) had survived even after the judgment of the honourable Supreme Court. It is claimed that this assumption of the Tribunal that the appellant would have to seek clarification from the High Court or the honourable Supreme Court, is misconceived.

4. Countering these arguments, the stand of the Revenue is that even if matter of levy of general purchase tax on exempted units was left open to be decided later by the honourable apex court, the distance already travelled by the Tribunal (annexure A6) as also by this court (annexure A7) is to hold the field till the matter is finally decided by the apex court.

5. When rival contentions of the parties are examined in the interface of facts and attending circumstances, it transpires that the Tribunal has wrongly decided the issue relating to purchase tax by holding that the doctrine of merger requires the appellant to approach the High Court or the honourable Supreme Court.

6. There were two questions, one was directly in issue whereas second had come up only collaterally. The main issue was whether in the light of facts and circumstances of the case and upon true and correct interpretation and construction of Note (i) of Schedule III under clause 2(i) of the 1985 Order, the appellant-dealer having collected "purchase tax" on paddy from the DFSC or its agencies along with procurement price of the levy fixed under the 1985 Order, was liable to refund the same to the Government?

7. The collateral issue was as to whether the State is empowered to levy purchase tax in the light of the scheme envisaged under the HGST Act and that too in view of the fact that no sales tax was payable or paid as it had specifically been exempted.

8. So far as the first question is concerned, it was specifically answered by the honourable apex court in Civil Appeal No. 8236 of 2010 on September 23, 2010 Jay Vee Rice and General Mills Vs. State of Haryana and Others, to the following effect (page 583 in 35 VST):

....In the present instance, it is beyond doubt and clear from the appellants'' own admission that the procurement price included the element of purchase tax. That there may be an issue relating to the levy of purchase tax does not in any way, affect the conclusion that the appellants, who have been unjustly enriched, must deposit the purchase tax element with the State.

9. The second question was left undecided by the honourable Supreme Court in the following words (page 584 in 35 VST):

Therefore, in the facts and circumstances of the present case, we are not required to go into the other issue as to whether or not there could have been levy of purchase tax on the purchase of paddy in case of exempted units. We keep that question open to be decided in an appropriate case.

10. Notwithstanding the fact that the matter of levy of purchase tax on the purchase of paddy in case of exempted units was not decided and rather was left open to be decided in an appropriate case later by the honourable Supreme Court, no part of earlier judgments of the Tribunal (annexure A6) or of this court (annexure A7) would survive to be used as a precedent. Rather, after judgment of the honourable Supreme Court (annexure A9) neither judgment of the Tribunal (annexure A6) nor of this court (annexure A7) could be used as a precedent in the face of pronouncement of the honourable Supreme Court in Civil Appeal No. 8242 of 2010 Jay Vee Rice and General Mills Vs. State of Haryana and Others, (annexure A9), leaving the matter to be decided in appellate proceedings.

11. In short, with regard to matter of leviability of general purchase tax under the HGST Act in case of exempted units as is the appellant, the matter requires to be adjudicated independently and uninfluenced by the earlier order of the Tribunal (annexure A6) and judgment of this court (annexure A7).

12. When the impugned order of the Tribunal is glanced through, it transpires that path of making an independent adjudication remained unchartered. Rather, the Tribunal fell into an error in interpretation of the doctrine of merger and faltered consequently. Sequelly, the impugned order of the Tribunal not only lacks legal probity required of it, but also suffers from a factually non-existent and legally unacceptable interpretation of the doctrine of merger.

13. Leaving the real controversy untouched and undebated, as noticed earlier, the Tribunal tell prey to rendering an untenable explanation qua the doctrine of merger in turn rendering the impugned order to be no order in the eyes of law. Sequelly, since the impugned order suffers from inherent incurable defect, the same is set aside. Consequently, the appeal is allowed and the matter is remitted to the Tribunal for fresh adjudication in accordance with law.

