SGA LAW OFFICES

Issue 3

1st February 2017

"Taxation is the price we pay for failing to build a civilized society. The Higher the tax level, the greater the failure. A centrally planned totalitarian state represents a complete defeat for the civilized world, while a totally voluntary society represents its ultimate success."

— Mark Skousen

NOMINAL INDEX

NOTIFICATION

HARYANA

HARYANA

NEWS OF YOUR INTEREST

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News From Court Rooms

BOMBAY HC : Central Excise : Where after passing original order corrigendum was issued for correcting mistake in order, limitation for filing appeal before Commissioner (Appeals) would be counted from date of corrigendum. (***Arihan Telecommunications – November 28, 2016***).

CESTAT, HYDERABAD : CENVAT Credit : Where assessee, a manufacturer, was availing CENVAT credit on inputs and subsequently accounted as extra ordinary income by writing off of dues to suppliers, since assessee had neither paid value of goods to suppliers nor duty on goods, it was bound to reverse credit availed on inputs. (***Sampre Nutritions Ltd – October 19, 2016***).

GUJARAT HC : Central Sales Tax : In terms of Entry No. 69 of exemption notification issued by State of Gujarat under section 5(2) of Gujarat VAT Act, which reads as : Sales of Liquified Petroleum Gas (LPG) for domestic use by consumers of State. Hence inter-State sales of LPG for domestic use from State of Gujarat would invite nil rate of tax under section 8(1) of CST Act. Revenue's appeal dismissed. (***Reliance Industries Ltd. – October 19, 2016***).

CESTAT, MUMBAI : Service Tax: Where assessee was engaged in service of renting of immovable property and during period 2007-08 to 2009-10 it paid service tax under section 73 from CENVAT credit available on 31-1-2011 along with interest and Adjudicating Authority held that as per Rule 3(4) of CENVAT Credit Rules, CENVAT credit available on 31-1-2011 could not have been utilised by assessee for payment of tax pertaining to period 2007-08 to 2009-10, in view of Board Circular dated 28-3-2012, there was no restriction to utilise CENVAT credit even at later date at time of payment of service tax. (***Bombay Well Print Inks (P.) Ltd.***)

KARNATAKA HC : Sales Tax : Levy of sales tax / VAT on brand franchisee fees. The manufacturers do not get effective control of the brand name for full commercial exploitation. As such it cannot be considered as sale of intangible goods by the assessee which would be subject to Sales Tax. Revenue's appeal dismissed. (***United Breweries Ltd. - December 14, 2016***).

SC : Delhi VAT : Where assessee purchased goods after payment of VAT and received discount from selling dealer subsequent to sales and further claimed ITC on such purchases and entire amount of VAT collected by selling dealer from assessee was deposited to department and HC setting aside orders of lower authorities allowed assessee's claim for ITC, SLP filed against judgment of HC was liable to be dismissed. (***Challenger Computer Ltd. – November 21, 2016***).

PATNA HC : Bihar VAT : Where Assessing Officer framed original assessment of assessee dealing in mobile phones under section 31 or section 33 and subsequently he on basis of a judgment of SC issued on assessee a notice under section 31 seeking to reopen his assessment, issuance of notice would amount to change of opinion. AO cannot reopen VAT cases merely on basis of subsequent decision of Apex Court. (***Samsung India Electronics (P.) Ltd. - December 14, 2016***)

HIGH COURT OF GUJARAT: CST & VAT: 'Purified water' sold by assessee under brand name in a capsuled jar falls under Entry 154 of Schedule IIA of Sales Tax Act and not under section 93 of Schedule I to Sales Tax Act ***Shital Beverages v. State of Gujarat [2017] 77 taxmann.com 200 (Gujarat)***

CESTAT, MUMBAI : Service Tax: Where assessee, a sugar factory, paid charges for transportation of sugarcane from fields to its factory and deducted same from sale bills of farmers, it was not liable to pay service tax on amount of transportation charges. (***Shreenath Mhaskoba Sakhar Karkhana Ltd – November 18, 2016***).

KERALA HC : VAT: Where assessee had only effected sale of goods by providing quantity discounts, Assessing Officer could not have included quantity discount given to dealers as part of turnover. (***Gulf Oil Lubricants India Ltd. – November 25, 2016***).

SC : Central Excise : Activity of filing gases from tanker to individual cylinders mixing more than one gases in specified proportion, labelling or relabelling is not amounting to manufacture within the meaning of Note 10 of Chapter 28 of the Central Excise Tariff Act 1985. Revenue's appeal dismissed. (***Vadilal Gases Ltd. & Others – January 12, 2017***).

CESTAT, AHMEDABAD : Central Excise : Value of the chassis supplied by customers to the manufacturer appellant are not be included to determine the aggregate value of Vehicle clearances for home consumption. (***Maniar & Company – January 24, 2017***).

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SGA
LAW OFFICES

Issue 2

16th January 2017

SUBJECT INDEX

AGAINST THE APPELLANT WITHOUT JURISDICTION – APPEALS ALLOWED – PENALTY QUASHED. - *SECTION 51 OF PUNJAB VAT ACT 2005* - **UNIQUE CHAINS VS STATE OF PUNJAB AND ANOTHER** 49

PENALTY – CHECK POST/ ROAD SIDE CHECKING – ATTEMPT TO EVADE TAX – GOODS IN TRANSIT CHASED AND BROUGHT BACK - NO DOCUMENTS PRODUCED EXCEPT A LETTER HEAD OF APPELLANT COMPANY WITHOUT NUMBER AND DATE – PENALTY IMPOSED U/S 51(7) AND 51(12) OF THE ACT – APPEAL FILED CONTENDING GOODS TO BE CAPITAL GOODS NOT MEANT FOR TRADE AS THE APPELLANT HAD BROUGHT THESE GOODS FROM HARYANA FOR IMPLEMENTING OF BHARAT SWASTHYA BIMA SHCEME – GOOD ALLEGED TO HAVE BEEN TAKEN BACK TO GURGAON FROM JALANDHAR AFTER COMPLETING WORK – HELD: CERTIFICATE OF INVENTORY PRODUCED NOT IN CONSONANCE WITH RULE 57 OF RULES – NO CERTIFICATE OF DATE AND COMPLETION OF WORK IN JALANDHAR PRODUCED TO CO RELATE WITH THE INVOICE PRODUCED – ABSENCE OF INVOICE OF OTHER GOODS SHOWN IN THE LETTER – NON REPORTING AT ICC AND NON PRODUCTION OF DOCUMENTS TAKEN INTO ACCOUNT –CONTRADICTORILY, GOODS TAKEN TO JALANDHAR FROM GURGAON (AS PER THE LETTER) INSTEAD OF APPELLANT CLAIM OTHERWISE -REPORTING OF GOODS BEING TAKEN OUT OF PUNJAB IS MANDATORY – PENALTY RIGHTLY IMPOSED U/S 51 (7) BUT DELTED U/S 51(12) FINDING IT WITHOUT ANY REASONS – APPEAL DISMISSED WITH MODIFICATION- *S. 51 OF PUNJAB VAT ACT, 2005* - **E-MEDITEK T.P.A. SERVICES LTD. VS STATE OF PUNJAB** 60

RECTIFICATION APPLICATION– MAINTAINABILITY OF – ASSESSMENT YEAR 1999-2000 - NOTIFICATION ISSUED IN 2002 HELD TO OPERATE RETROSPECTIVELY BY TRIBUNAL CONSIDERING IT TO BE CLARIFICATORY IN NATURE – RECTIFICATION APPLICATION FILED BY REVENUE ON GROUNDS THAT ASSESSMENT YEAR BEING MUCH LATER , NOTIFICATION ISSUED PRIOR TO IT CANNOT BE APPLIED RETROSPECTIVELY TO THE ADVANTAGE OF APPELLANT – ARGUMENT ACCEPTED HOLDING THAT PRIOR ORDER PASSED BY DIFFERENT OFFICER STOOD PATENTLY WRONG RENDERING MAINTAINABILITY OF RECTIFICATION – WRIT FILED QUESTIONING POWER TO RECTIFY – HELD RECTIFICATION IS POSSIBLE ONLY WHEN MISTAKE IS APPARENT ON FACE OF IT – PRESENT CASE PERMITS TWO OPINIONS –PREVIOUS ORDER CANNOT BE CONSTRUED TO BE A MISTAKE APPARENT OF FACE OF RECORD – NO RECTIFICATION IS POSSIBLE U/S 21 –A EVEN IF THE ORDER IN QUESTION IS ERRONEOUS – WRIT ALLOWED - *SECTION 21-A OF PUNJAB GENERAL SALES TAX ACT, 1948* - **SINGHI OIL AND GENERAL MILLS VS STATE OF PUNJAB AND OTHERS** 44

SERVICE TAX – RETREADING OF TYRES – MANAGEMENT, MAINTENANCE OR REPAIR SERVICE – VALUATION – TAX CAN BE IMPOSED ONLY ON SERVICE COMPONENT – VIEW TAKEN BY THE TRIBUNAL TO THE CONTRARY SET ASIDE – APPEAL ALLOWED. - *SECTIONS 65(64), 65(105)(zzg), 67 OF FINANCE ACT, 1994; NOTIFICATION NO. 12/2013-ST DATED 20.06.2013* - **SAFETY RETREADING COMPANY (P) LTD. VS COMMISSIONER OF CENTRAL EXCISE, SALEM** 23

TURNOVER – DISCOUNT –INVOICES – CREDIT/DEBIT NOTES – DISCOUNTS GIVEN POST SALES FOR ISSUANCE OF CREDIT/DEBIT NOTES – WHETHER ENTITLED FOR DEDUCTION FROM TAXABLE TURNOVER – REQUIREMENT OF SHOWING DISCOUNT IN THE INVOICE – TAX IN EXCESS OF ACTUAL SALE PARTICULARS CANNOT BE COLLECTED – PURPOSE OF RULE IS TO CALCULATE THE TURNOVER FOR LEVY OF TAX – DISCOUNT GIVEN POST SALE ALSO LIABLE TO BE DEDUCTED – SCHEME OF THE ACT – PROVISION READ DOWN TO MEAN THAT POST SALES DISCOUNT BY WAY OF CREDIT AND DEBIT NOTES ALSO LIABLE FOR DEDUCTION FROM TURNOVER – APPEALS ALLOWED. - *SECTION 30 OF KARNATAKA VAT ACT 2003 AND RULE 3(2)(c) AND 31 OF KARNATAKA VAT RULES 2005* - **SOUTHERN MOTORS VS STATE OF KARNATAKA AND OTHERS** 5

Issue 3

1st February 2017

SUPREME COURT OF INDIA

CIVIL APPEAL NOS. 10955-10971 OF 2016

Go to Index Page

SOUTHERN MOTORS

Vs

STATE OF KARNATAKA AND OTHERS

DIPAK MISRA AND AMITAVA ROY, JJ.

18th January, 2017

HF ▶ Assessee

Discount given after sales would not be exigible to tax even if it is not reflected in the Invoices

TURNOVER – DISCOUNT –INVOICES – CREDIT/DEBIT NOTES – DISCOUNTS GIVEN POST SALES FOR ISSUANCE OF CREDIT/DEBIT NOTES – WHETHER ENTITLED FOR DEDUCTION FROM TAXABLE TURNOVER – REQUIREMENT OF SHOWING DISCOUNT IN THE INVOICE – TAX IN EXCESS OF ACTUAL SALE PARTICULARS CANNOT BE COLLECTED – PURPOSE OF RULE IS TO CALCULATE THE TURNOVER FOR LEVY OF TAX – DISCOUNT GIVEN POST SALE ALSO LIABLE TO BE DEDUCTED – SCHEME OF THE ACT – PROVISION READ DOWN TO MEAN THAT POST SALES DISCOUNT BY WAY OF CREDIT AND DEBIT NOTES ALSO LIABLE FOR DEDUCTION FROM TURNOVER – APPEALS ALLOWED. - *SECTION 30 OF KARNATAKA VAT ACT 2003 AND RULE 3(2)(c) AND 31 OF KARNATAKA VAT RULES 2005*

The Appellant is a registered dealer in Motor Vehicles under the Karnataka VAT Act. During the years in question, it raised tax invoices on the purchasers as per Policy of manufacturers of vehicles to maintain unity in the price thereof. After the sales were completed, Credit Notes were issued to the customers granting discounts. Consequently, it received only the net amount i.e. the amount shown in the invoices less the sum of discount disclosed in the Credit Note. The net amount so received was reflected in the books of accounts.

The assessment of the assessee was framed after allowing the deductions claimed by it towards discount accorded by the Credit Notes from the total turnover to quantify the taxable turnover.

Subsequently, the rectification of order was made by the Assessing Authority disallowing the deduction of post-sale discounts in terms of non-availability of deduction from total turnover in terms of Rule 3(2)(c) of the Rules. Having failed before the High Court, the assessee approached Supreme Court. Supreme Court, on appraisal of various case laws,

Held:

The taxable turnover is the summation of the actual sale/purchase price exigible to tax under the Act and the Rules. Depending upon the eventualities as comprehended in Section 30, Credit and Debit Notes are issued, as a consequence whereof the tax liability is reduced or enhanced *correspondingly and the same is determined on the basis of the declarations made by the assessee in the Returns. Section 30 dilates on the contingencies witnessing reduction/enhancement of tax liability subsequent to the sale/purchase of the goods. The tax liability would be contingent on the sale/purchase price in the eventual sale/purchase price to be essentially reflected in the Returns of the assessee. Allowance of discount is one of the several other permissible deductions contingent on the melange of determination referred to in Rule 3(2). These deductions, however, contribute to the reduction of total turnover to quantify the taxable turnover and thus, the tax liability. It is too trite to state that neither an assessee is liable to pay tax in excess of what is due in law nor is the revenue authorised to exact the same. Any interpretation of Rule 3(2)(c) though an integrant fiscal statute, has to be in accord, is in our estimate unite this fundamental mandatory postulation.*

On the overall review of the scheme of the Act and the Rules and the underlying objectives in particular of Sections 29 and 30 of the Act, and Rule 3 of the Rules, we are of the considered opinion that the requirement of reference of the discount in the tax invoice or bill of sale to qualify it for deduction has to be construed in relation to the transaction resulting in final sale/purchase price and not limited to the original sale sans the trade discount. The first proviso of Rule 3(2)(c) is thus to be so read down, as above, to be in consonance with the true intendment of the Legislature and to achieve as well the avowed objective of correct determination of the taxable turnover, the appeals thus allowed in the above terms.

Cases referred:

- *State of Karnataka vs. M/s Kitchen Appliances India Ltd., 2011 (71) Karnataka Law Journal 234*
- *M/s Southern Motors vs. State of Karnataka and Ors. rendered in Writ Appeal Nos. 5769-5785 of 2012*
- *Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam vs. M/s. Advani Oorlikon (P) Ltd.(1980) 1 SCC 360.*
- *IFB Industries Ltd. vs. State of Kerala (2012) 4 SCC 618.*
- *Commissioner of Central Excise, Madras vs. M/s. Addison & Co. Ltd. (2016) 10 SCC 56.*
- *Union of India and others vs. Bombay Tyres International (P) Ltd. (2005) 3 SCC 787.*
- *A.V. Fernandez vs. The State of Kerala 1957 SCR 837*
- *IFB Industries Ltd. vs. State of Kerala (2012) 4 SCC 618*
- *Jayam & Co. vs. Assistant Commissioner and Another (2016) 8 SCALE 70*
- *Inland Revenue Commissioner vs. Duke of Westminister (1936) AC 1 24*
- *Partington vs. Attorney General (1869)4 HL 100, 122*
- *Union of India and others vs. Bombay Tyres International (P) Ltd. (2005) 3 SCC 787*
- *Union of India and others vs. Bombay Tyre International Ltd. and others (1984) 1 SCC 467*
- *K.P. Varghese vs. Income Tax Officer, Ernakulam and Anr. AIR 1981 SC 1922*
- *Commissioner of Income Tax, Bangalore Vs. J.H. Gotla Yadagiri AIR 1985 SC 1698*
- *State of Jharkhand and others vs. Tata Steel Ltd. and Ors. (2016) 11 SCC 147*
- *Court in Hansraj Gordhandas vs. H.H. Dave, Assistant Collector of Central Excise & Customs, Surat and others (1969) 2 SCR 252*
- *Doypack Systems Pvt. Ltd. vs. Union of India and Ors. (1988) 2 SCC 299*
- *Seaford Court Estates Ltd. vs. Asker [1949] 2 All ER 155*

Present: *For Petitioner(s):* *Mr. Dhruv Mehta,Sr.Advocate*

Other Advocates: *Mr. Shanth Kumar V.Mahale, Mr. G.K.V.Murthy, Mr. Jamal, Mr. Pathak, Mr. Rajesh Mahale, Mr. Tarun Gulati, Mr. Sparsh Bhargava, Mr. Shashi Mathews, Mr. Kishore Kunal, Mr. Rony O.John, Mr. Vinayak Mathur, Ms. Rachna Yadav*

For Respondent(s):. *Mr. K.N. Bhat,Sr.Advocate*
Other Advocates: *Mr. V. N. Raghupathy, Mr. Parikshit P.Angadi*

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AMITAVA ROY, J.

1. The instant adjudicative pursuit is to disinter the statutory intendment lodged in Rule 3(2)(c) in particular of the Karnataka Value Added Tax Rules, 2005 (for short, hereinafter to be referred to as "the Rules") so as to facilitate the determination of taxable turnover as defined in Section 2(34) of the Karnataka Value Added Tax Act, 2003 (for short, hereinafter to be referred to as "the Act") in interface with Section 30 of the Act and Rule 31 of the Rules.

2. We have heard Mr. Dhruv Mehta, learned senior counsel for the appellant in Civil Appeal Nos. 10955-10971 of 2016, Mr. Tarun Gulati, learned counsel for the appellant in Civil Appeal Nos. 10972-10978 of 2016 and Mr. K.N. Bhat, learned senior counsel for the respondent-State.

3.The foundational facts, albeit not in dispute present the required preface. The appellant is a dealer in the motor vehicles and registered under the Act. Its version is that during the years in question i.e. 2007- 2008 and 2008-2009, it raised tax invoices on the purchasers as per the policy of manufacturers of vehicles to maintain uniformity in the price thereof. After the sales were completed, credit notes were issued to the customers granting discounts, in order to meet the competition in the market and for allied reasons. Consequentially, it received/retained only the net amount, that is the amount shown in the invoice less the sum of discount disclosed in the credit note. Accordingly, the net amount, so received was reflected in his books of account and returns were filed under Income Tax Act, 1961 et al.

4. The Assistant Commissioner of Commercial Taxes, (Audit-1.6), VAT Division No.1-1, Gandhi Nagar, Bangalore i.e. the respondent No.3, as the Assessing Authority by his reassessment orders dated 21.06.2010 allowed deductions claimed by the appellant towards discount accorded by the credit notes from the total turnover to quantify the taxable turnover. Subsequent thereto, in the face of the decision of the High Court in ***State of Karnataka vs. M/s Kitchen Appliances India Ltd.,*** 2011 (71) Karnataka Law Journal 234, recognizing only discounts mentioned in the tax invoices as eligible for deduction from the total turnover in terms of Rule 3(2)(c) of the Rules, the Assessing Authority passed the rectification orders dated 21.05.2012 under Section 41(1) of the Act, disallowing the deduction of post sale discounts earlier awarded by the corresponding credit notes. The appellant having unsuccessfully challenged these rectification orders before the High Court, in both the tiers, has invoked this Court's jurisdiction under Article 136 of the Constitution of India for redress. The above facts pertain to the Civil Appeal Nos. 10955-10971 of 2016.

5. The Civil Appeal 10971-10978 of 2016, with Samsung India Electronics Ltd. as the appellant, also present the same debate. The appellant, the assessee is as well a registered dealer under the Act and engaged in the business of electronic goods and I.T. products. Though the assessment for the tax period April, 2006 to October, 2006 was concluded by the Deputy Commissioner of Commercial Taxes (Audit-4) LDU, Bangalore on 29.01.2007, the Assessing Authority disallowed the claim of deduction towards discounts on the ground that the same were not revealed at the time of issuance of tax invoices, though credit notes were issued at the end of the month concerned. The appeals filed by the appellant- assessee before the Commissioner of Commercial Taxes (Appeals), DVO–I & III, Bangalore though came to be dismissed, it succeeded before the jurisdictional Tribunal, whereafter the Revenue took the challenge to the High Court. By the decision impugned herein, the High Court relying on its earlier decision in ***M/s Southern Motors vs. State of Karnataka and Ors.*** rendered in Writ Appeal Nos. 5769-5785 of 2012 reiterated its view that once the sale invoice was issued and the sale price was collected along with the tax, the aggregate of such sales constituted the total turnover and the tax was payable on the taxable turnover. It took note of the deductions permissible under Rule 3(2) of the Rules to determine the taxable turnover and held that though the amounts allowed as discount did constitute permissible deduction to compute the eventual taxable turnover, such discount was to be necessarily reflected in the sale invoice to qualify for such deduction. It thus concluded that by issuing a credit note after receiving the amounts even before the filing of the returns, it could not be construed that the discounts were not includible in the turnover. The claim of deduction of the discount extended through credit notes after the completion of the sale but not divulged in the tax invoice was negated. As the above rendition was founded on the verdict under scrutiny in the previous batch of appeals where ***M/s Southern Motors*** figures as the appellant, and the issue seeking adjudication is common, all these appeals with the aforenoted marginal factual variations have been analogously heard.

6. As the dissension stems from contrasting interpretations of the underlying purport of Rule 3(2)(c) of the Rules in the context of the scheme of the Act as a whole and Section 30 thereof and Rule 31 of the Rules in particular, further reference to the factual details would be inessential.

7. The emphatic insistence on behalf of the appellant is that the combined reading of Section 30 and Rule 31 demonstrates in clear terms that the assesses are entitled to claim deduction of the discount allowed to their customers by credit notes, from the total turnover to quantify their taxable turnover. The learned counsel have urged that as some discounts, especially those linked to targets to be achieved in a particular period are not comprehendable at the time of sale, these logically cannot be reflected in the tax invoices. They have maintained that such discounts actualize through credit notes at the end of the prescribed period for which the target is fixed and are thus governed by Section 30 of the Act and Rule 31 of the Rules. They have asserted that in no view of the matter, Rule 3(2)(c) can be conceded a primacy to curtail or abrogate Section 30 or Rule 31 of the Rules, lest the latter provisions are rendered otiose. Such an explication would also be extinctive of the concept of the well ingrained concept of turnover/trade discount which is indefensible.

8. Referring to the definition of “total turnover” and “taxable turnover” as defined in Sections 2(36) and 2(34) of the Act, it has been urged that as the discount allowed by the credit notes is not payable to the assessee by the customers and does not form a part of the sale consideration, it is not exigible under the Act. According to the learned counsel, it is no longer res integra that trade discount is not a constituent of the sale price and therefore not taxable. It has been insistently pleaded that a post sale discount through credit notes is revenue neutral in terms of Section 30(3) of the Act, as a consequence whereof the selling and the purchasing dealers accordingly remodel their returns and pay tax as due. In endorsement of the above contentions, the following decisions have been relied upon:

1. ***Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes), Ernakulam vs. M/s. Advani Oorlikon (P) Ltd.***(1980) 1 SCC 360,

2. ***IFB Industries Ltd. vs. State of Kerala*** (2012) 4 SCC 618,

3. ***Commissioner of Central Excise, Madras vs. M/s. Addison & Co. Ltd.*** (2016) 10 SCC 56,

4.***Union of India and others vs. Bombay Tyres International (P) Ltd.*** (2005) 3 SCC 787.

9. In refutation, the the learned counsel for the respondents, has argued that a discount to qualify for deduction to compute the total and eventual taxable turnover, as contemplated in Rule 3(2)(c) of the Rules has to be essentially reflected in the tax invoice or the bill of sale issued in respect of the sales. According to them, Section 30 and Rule 31 deal with a situation where after a tax invoice is issued, it transpires that the tax charged has either exceeded or has fallen short of the tax payable for which a credit/debit note, as the case may be, would be issued. As these two provisions do not regulate the computation of a taxable turnover, there is no correlation thereof with Rule 3(2)(c) of the Rules which has been assigned an independent role to determine the tax liability. In absence of any specific provision in the parent statute granting tax exemption based on deduction founded on post sale trade discount, Section 30 and Rule 31 are of no avail to the assesses, he urged. It is maintained that in any view of the matter, a taxing statute has to be construed strictly and any exemption is permissible only if the legislation permits the same. Reliance in buttressal of the above has been placed on the decisions of this Court in ***A.V. Fernandez vs. The State of Kerala*** 1957 SCR 837, ***IFB Industries Ltd. vs. State of Kerala*** (2012) 4 SCC 618 and ***Jayam & Co. vs. Assistant Commissioner and Another*** (2016) 8 SCALE 70.

10. As the gravamen of the discord has its roots in the interplay of Sections 29 and 30 of the Act with Rule 3(2)(c) in particular, apposite it would be to refer to the same as well as the accompanying provisions as are construed indispensable.

11. The Act is a legislation, as its preamble suggests to provide for further levy of tax on the purchase or sale of goods in the State of Karnataka. It defines amongst others "dealer" "tax invoice" "taxable turnover" "total turnover" and "turnover" as contained in Sections 2(12), 2(32), 2(34), 2(35), 2(36). For immediate reference the relevant excerpts of these expressions are set out hereunder:

> ***"2(12) 'Dealer'*** *means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration, and includes-.........*
>
> ***2(32) 'Tax invoice'*** *means a document specified under Section 29 listing goods sold with price, quantity and other information as prescribed;*
>
> ***2(34) 'Taxable turnover'*** *means the turnover on which a dealer shall be liable to pay tax as determined after making such deductions from his total turnover and in such manner as may be prescribed, but shall not include the turnover of purchase or sale in the course of interstate trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India and the value of goods transferred or dispatched outside the State otherwise than by way of sale.*
>
> ***2(35) 'Total turnover'*** *means the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax, including the turnover of purchase or sale in the course of interstate trade or commerce or in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India and the value of goods transferred or despatched outside the State otherwise than by way of sale.*
>
> ***2(36) 'Turnover'*** *means the aggregate amount for which goods are sold or distributed or delivered or otherwise disposed of in any of the ways referred to in clause (29) by a dealer, either directly or through another, on his own account or on account of others, whether for cash or for deferred payment or other valuable consideration, and includes the aggregate amount for which goods are purchased from a person not registered under the Act and the value of goods transferred or despatched outside the State otherwise than by way of sale, and subject to such conditions and restrictions as may be prescribed the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of or before the delivery thereof.*

Explanation.- *The value of the goods transferred or despatched outside the State otherwise than by way of sale, shall be the amount for which the goods are ordinarily sold by the dealer or the prevailing market price of such goods where the dealer does not ordinarily sell the goods."*

12. Section 3 is the charging provision and the modes of fixation of rate and measure of tax exigible under the statute are enumerated in Section 4. Having regard to the exigency of the adjudication, appropriate it would be to extract Sections 29 and 30 of the Act as hereunder:

"29. Tax invoices and bills of sale

(1) A registered dealer effecting a sale of taxable goods or exempt goods along with any taxable goods, in excess of the prescribed value, shall issue at the time of the sale, a tax invoice marked as original for the sale, containing the particulars prescribed, and shall retain a copy thereof.

(2) A tax invoice marked as original shall not be issued to any registered dealer in circumstances other than those specified in sub-section (1), and in a case of loss of the original, a duplicate may be issued where such registered dealer so requests.

(3) A registered dealer:-

(a) selling non-taxable goods; or

(b) opting to pay tax by way of composition under section 15 and selling any goods; or

(c) permitted to pay tax under section 16 and selling any goods,

in excess of the prescribed value, shall issue a bill of sale containing such particulars as may be prescribed.

(4) Notwithstanding anything contained in sub-section (1) or (3) or sub- section (1) of Section 7, a registered dealer executing civil works contracts shall issue a tax invoice or bill of sale at such time and containing such particulars as may be prescribed

30. Credit and Debit Notes

(1) Where a tax invoice has been issued for any sale of goods and within six months from the date of such sale the amount shown as tax charged in that tax invoice is found to exceed the tax payable in respect of the sale effected, or is not payable on account of goods sold being returned within the prescribed period, the registered dealer effecting the sale shall issue forthwith to the purchaser a credit note containing particulars as prescribed.

(2) Where a tax invoice has been issued for sale of any goods and the tax payable in respect of the sale exceeds the amount shown as tax charged in such tax invoice, the registered dealer making the sale, shall issue to the purchaser a debit note containing particulars as prescribed.

(3) Any registered dealer who receives or issues, credit notes or debit notes shall declare them in his return to be furnished for the tax period in which the credit note is received or debit note is issued and claim reduction in tax or pay tax due thereon.

(4) Any document issued by the registered dealer as required under any other law containing particulars of credit note or debit note as prescribed shall be deemed to be a credit or debit note for the purpose of this Section"

13. Under Section 29, it is incumbent on a registered dealer effecting a sale of taxable goods or goods exempted from tax along with any taxable goods in excess of the prescribed value, to issue at the time of sale, a tax invoice marked as original for the sale and containing the particulars prescribed. Thereunder a registered dealer in the eventualities mentioned therein has to issue a bill of sale containing such particulars as may be prescribed. Section 30 mandates that where such a tax invoice has been issued for any sale of goods and withing six months from the date of such sale, the amount shown as tax charged in that tax invoice is found to exceed the tax payable in respect of the sale effected, or is not payable on account of goods sold being returned within the prescribed period, the registered dealer effecting the sale, would issue forthwith to the purchaser, a credit note containing the particulars as prescribed. The Section further stipulates that when a tax invoice has been issued for sale of any goods and the tax payable in respect of the sale exceeds the amount shown as tax charged in such tax invoice, the registered dealer making the sale would issue to the purchaser, a debit note containing the particulars as prescribed. It is further ordained that any registered dealer who receives or issues credit notes or debit notes would declare them in his return to be furnished for the tax period in which the credit note is received or debit note is issued and claim reduction in tax or pay tax due thereon. Noticeably, the period of six months for the issuance of the credit note on the eventuality of excess tax being paid is not a factor for the contingency requiring issuance of a debit note.

14. Be that as it may, Rule 3 of the Rules framed under Section 88 of the Act, is lodged under Part II dwelling on "Turnover, Registration and Payment Of Security". This provision in particular deals with the determination of total and taxable turnover and predicates that the taxable turnover would be determined by allowing the deductions from the total turnover as listed in sub-rule (2) thereof. Rule 3(2)(c) of the Rules, indispensable for the present adjudication is quoted hereunder for ready reference:

> ***"3(2)(c):*** *All amounts allowed as discount:*
>
> *PROVIDED that such discount is allowed in accordance with the regular practice of the dealer or is in accordance with the terms of any contract or agreement entered into in a particular case and the tax invoice or bill of sale issued in respect of the sales relating to such discount shows the amount allowed as discount.*
>
> *PROVIDED FURTHER that the accounts show that the purchaser has paid only the sum originally charged less discount."*

15. A plain reading of this quote would reveal that all amounts allowed as discount would qualify for deduction from the total turnover to ascertain the taxable turnover and thus the extent of exigibility under this statute. The first proviso which occupies the center stage of the debate prescribes that a discount to be eligible for deduction has to be one which is allowed in accordance with the regular practice of the dealer or is in accordance with the terms of any contract or agreement entered into in a particular case <u>and the tax invoice or bill of sale issued in respect of the sales relating to such discount shows the amount allowed as discount.</u> The second proviso enjoins further, that the accounts should show that the purchaser had paid only the sum originally charged less the discount. Whereas the Revenue insists in view of the first proviso in particular, that a discount to be entitled for deduction to quantify the taxable turnover should essentially be mentioned in the tax invoice or bill of sale issued in respect of the sales and further the purchaser has to reflect in his accounts that he had paid only the sum originally charged less the discount, the appellants contend that having regard to the uniform canons regulating the trade practice, a trade discount though in comprehension at the time of original sale is not always precisely quantifiable at that point of time and is contingent on variable factors to be computed only on the happening of a future event(s). In any case, however as the discount eventually sanctioned is tangible and actual, the literal interpretation sought to be given to the contents of first proviso to Rule 3(2)(c) is expressly illogical and if accepted would lead to absurd results rendering this provision redundant and unworkable.

16. Before embarking on analysis of the competing assertions, expedient it would be to advert to the citations addressed at the Bar.

17. In ***A.V. Fernandis (supra)***, a Constitution Bench of this Court while dwelling on the interpretation of the relevant provisions of the United State of Travancore and Cochin General Sales Tax Act, 1125 and the Travancore Cochin General Sales Tax Rules, 1950 framed thereunder ruled that in elucidating a fiscal statute, it is not the spirit thereof but the letter of law that has to be looked into and that if a particular tax cannot be brought within the letter of the law, the subject could not be made liable for the same. That the emphasis has to be to the strict letter of law and not merely on the spirit of the statute or the substance of law was highlighted. In this context, the observations of Lord Russel of Killowen in ***Inland Revenue Commissioner vs. Duke of Westminister*** (1936) AC 1 24 was extracted :

> *"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case"*

18. The following passage as well from ***Partington vs. Attorney General*** (1869)4 HL 100, 122 was quoted with approval.

> *"As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.".*

19. In the textual facts, in essence, the claim of the appellant-assessee to avoid deduction of an amount arising out of sales effected beyond the State concerned was negated as the same were not taxable in terms of Section 26 of the Travancore-Cochin General Sales Tax Amendment Act, 1951 in clear terms. Drawing a distinction between the provisions contained in a statute with regard to the exemptions, refund or rebate on one hand and non liability of tax or non imposition of tax on the other, it was enunciated that in the former, the sales or purchases would have to be included in the gross turnover of the dealer because those were prima facie liable to tax and the dealer was only entitled to deductions from the gross turnover so as to arrive at the net turnover on which the tax could be imposed. In the latter case, the sales or the purchases were exempted from taxation altogether. It was thus ruled that as the sales beyond the State, were not liable to tax, those were liable to be excluded from the calculation of the gross turnover as well as the net turnover on which the sales tax could be levied or imposed. The attempt on the part of the appellant-assessee to include the turnover of the sales beyond the State in the gross turnover and thereafter to seek a deduction thereof was thus disapproved.

20. The distinction between "trade discount" and "cash discount" was elaborated upon by this Court in ***M/s. Advani Oorlikon (P) Ltd.*** (supra), in re, the question whether for the purpose of computing the turnover assessed to sales tax therein, under the Central Sales Tax Act 1956, the sale price of goods was to be determined by including the amount paid by way of trade discount. The facts as unfolded evinced that the assessee was a private limited company, carrying on business as sole selling agent for certain brand of welding electrodes and for the goods supplied to the retailers, it charged them the catalogue price less the trade discount. The concerned Revenue Authority, for the assessment year in question, refused to allow the deduction and sans thereof, computed the taxable turnover, being of the view that the trade discount was not excludable from the catalogue price. It was contended on behalf of the Revenue that in view of the definition of "sale price" in Section 2(h) of the Central Sales Tax Act which permitted the deduction of sums alleged as cash discount only, the deduction by way of trade discount was not contemplated or permissible.

21. This Court referred to the definition of "sale price" in Section 2(h) of the Act and noted that it was defined to be the amount payable to a dealer as a consideration for the sale of any goods, less any sum allowed as cash discount, according to the practice normally prevailing in the trade. While observing that cash discount conceptually was distinctly different from a trade discount which was a deduction from the catalogue price of goods allowable by whole-sellers to retailers engaged in the trade, it was exposited that under the Central Sales Tax Act, the sale price which enters into the computation of the turnover is the consideration for which the goods are sold by the assessee. It was held that in a case where trade discount was allowed on the catalogue price, the sale price would be the amount determined after deducting the trade discount. It was ruled that it was immaterial that the definition of "sale price" under Section 2(h) of the Act did not expressly provide for the deduction of trade discount from the sale price. It also held a view that having regard to the nature of a trade discount, there is only one sale price between the dealer and the retailer and that is the price payable by the retailer calculated as the difference between the catalogue price and the trade discount. Significantly it was propounded that, in such a situation, there was only one contract between the parties that is the contract that the goods would be sold by the dealer to the retailer at the aforesaid sale price and that there was no question of two successive agreements between the parties, one providing for the sale of the goods at the catalogue price and the other providing for an allowance by way of trade discount. While recognizing that the sale price remained the stipulated price in the contract between the parties, this Court concluded that the sale price which enters into the computation of the assessee's turnover for the purpose of assessment under the Sales Tax Act would be determined after deducting the trade discount from the catalogue price.

22. The decision in ***Jayam and Company*** (supra) cited by the Revenue was to underline the postulation that whenever concession is given by a statute, notification etc., the conditions thereof are to be strictly complied with in order to avail the same. Section 19(20) of the Tamil Nadu Value Added Tax Act, 2006, which in clear terms, denied the benefit of Input Tax Credit, where any registered dealer sold goods at a price lesser than the price at which the same had been purchased, was adverted to consolidate this proposition. Noticeably, this provision of the statute involved, which fell for scrutiny, did by unequivocal mandate deny the availment of the income tax credit, in case the registered dealer/assessee had sold goods at a price lesser than the price at which the same had been purchased by him.

23. In ***IFB Industries Ltd.*** (supra), this Court was seized with the query as to how far deductions were allowable under Rule 9 (a) of the Kerala General Sales Tax Rules, 1963 for trade discounts. The jurisdictional High Court returned the finding that unless the discount was shown in the invoice evidencing the sale, it would not qualify for such deduction and further any discount that was given by means of credit note issued subsequent to the sale, in reality was an incentive and not a trade discount eligible for exemption under Rule 9 (a) of the Rules. The appellant was a manufacturer of home appliances having a scheme of trade discount for its dealers under which the latter on achieving a pre set sale target would earn certain discount on the price for which they had purchased the articles from it. As the discount was subject to achieving the sale target, the dealer would naturally be qualified for it in the later part of the Financial years/assessment period i.e. long after the sales had taken place. It was noted that for the sales taking place between the appellant and its dealer after the sale target was achieved, the dealer would get the articles on the discounted price but for the sales that had taken place before the sale target was achieved, the manufacturer would issue credit notes in favour of the dealer. Under the statute involved, in the computation of the turnover as defined, amongst others, any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by the customers, was deductible. Rule 9 (a) provided that in determining the taxable turnover, all amounts allowed as discount, provided such discount was accorded in accordance with the regular practice would stand deducted, if the accounts show that the purchaser had paid only the sum originally charged less the discount. Rule 9(a) therefore did stipulate, as the conditions precedent for deduction of any amount allowed as discount, two prescriptions i.e. the discount had been given in accordance with the regular practice in trade and that the accounts maintained by the purchaser would disclose that it had paid only the sum originally charged less the discount. This Court thus expounded that in absence of any prescript of reference of such discount availed in the sale invoices, the negation of the benefit of deduction of the trade discount in the quantification of the taxable turnover was erroneous. It was held, that there was nothing in Rule 9 (a) to read it in a restrictive manner to mean that the discount in order to eligible for exemption thereunder must be reflected in the invoice itself. While dilating on the notion of "trade discount" to be a deduction from the catalogue price of goods allowed by wholesalers to the retailers engaged in the trade to enable the latter to sell the goods at the catalogue price and yet make a reasonable margin of profit after taking into account his business expense, the following observations of this Court in ***Union of India and others vs. Bombay Tyres International (P) Ltd.*** (2005) 3 SCC 787, describing "trade discount" and countenancing its deductibility from the sale price were alluded to:

> ***"(1) Trade discounts*** *– Discounts allowed in the trade (by whatever name such discount is described) should be allowed to be deducted from the sale price having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, the allowance and the nature of the discount being known at or prior to the removal of the goods. Such trade discounts shall not be disallowed only because they are not payable at the time of each invoice or deducted from the invoice price."* ***(emphasis supplied)***

24. This rendering presumably had been cited on behalf of the respondents in order to underscore that the appellant's claim therein for the deduction of the trade discount had been approved as both the prerequisites stipulated by Rule 9(a) had been complied with. This is to reinforce the plea that the appellant in the case in hand thus by analogy of reasonings can avail the benefit of deduction of trade discount only if the same is reflected in the tax invoice as statutorily prescribed by Rule 3(2)(c) of the Rules.

25. This Court in ***M/s Addison and Co. Ltd.*** (supra) was chiefly seized with the issue of refund of excise duty under Section 11B of the Central Excise Act, 1944. The respondent, a manufacturer of cutting tools, filed a refund claim which, on being eventually allowed after persuading through the different tiers, culminated in a reference before the High Court of Madras which was also answered in favour of the respondent/assessee. It was held by the High Court that the refund towards deduction of turnover discount could not be denied on the ground that there was no evidence to show who was the ultimate consumer of the product and as to whether the ultimate consumer had borne the burden of duty. The word "buyer" used in Section 12B of the Act, as construed by the High Court did not refer to the ultimate consumer and was confined only to the person who bought the goods from the manufacturer. This Court accepted the postulation in ***Union of India and others vs. Bombay Tyre International Ltd. and others*** (1984) 1 SCC 467 and ***Bombay Tyres International (P) Ltd.*** (supra) to the extent that discounts allowed in the trade should be permitted to be deducted from the sale price having regard to the nature of the goods, if it established under agreements or in terms of sale or by established practice and that such trade discounts ought not to be disallowed only because those were not payable at the time of each invoice or deducted from the invoice price, but declined the relief of refund to the respondent on the consideration that the burden of duty had meanwhile been passed on to the ultimate buyer. It was explicated that the word “buyer” appearing in Clause (e) to the proviso of Section 11B(2) of the Central Excise Act could not be restricted to the first buyer from the manufacturer. The prevalence of trade discounts was recognized so much so that deductions on the basis thereof were also approved so as to determine the eventual tax liability.

26. The parties noticeably are not in issue over the prevalence of trade discount contemplated in regular practice and that wherever warranted, the dealing parties in accord therewith do enter into a contract or agreement to apply the same for reduction of the sale/purchase price. Understandably, the taxable turnover is the summation of the actual sale/purchase price exigible to tax under the Act and the Rules. Depending on the eventualities as comprehended in Section 30, credit and debit notes are issued, as a consequence whereof, the tax liability is reduced or enhanced correspondingly and the same is determined on the basis of the declarations made by the assessees in their returns. That there is an inseverable co- relation between the taxable turn over and the tax payable need not be over emphasized. Noticeably, Section 30 dilates on the contingencies witnessing reduction or enhancement of tax liability subsequent to the sale/purchase of goods. The tax liability, to reiterate would be contingent on the sale/purchase price in the eventual sale/purchase price, to be essentially reflected in the return of the assessee. Section 30 axiomatically thus deals only with the incidence of tax and not the spectrum of situations or eventualities bearing on the tax liability. Rule 3(2), in particular lists the array of deductions conditioned on variety of situations as scheduled therein to ascertain the taxable turnover. Allowance of discount is one of the several other permissible deductions contingent on the melange of determinants referred to therein. These deductions, however contribute to the reduction of the total turnover to quantify the taxable turnover and thus the tax liability. It is too trite to state that neither an assessee is liable to pay tax in excess of what is due in law nor is the revenue authorized to exact the same. Any interpretation of Rule 3(2)(c) though an integrant of a fiscal statute has to be in accord, in our estimate unite this fundamental mandatory postulation.

27. It is a matter of common experience that in the present contemporary competitive market, trade discounts not only are dependent on variable factors but also might be strategically not disclosable at the time of the original sale/purchase so as to be coevally reflected in the tax invoice or the bill of sale as the case may be. The actual quantification of the trade discount, depending on the nature of the trade and the related stipulations in any contract with regard thereto, may be deferred till the happening of a contemplated event, so much so that the benefit thereof is extended at a point of time subsequent to that of the original sale/purchase. That by itself, subject to proof of such regular trade practice and the contract/agreement entered into between the parties, would not render the trade discount otherwise legal and acceptable, either non est or fictitious for evading tax liability. In the above factual premise, the interpretation as sought to be provided by the Revenue would evidently reduce Section 3(2)(c) to a dead letter, ineffective and unworkable and would defeat the objective of permitting deductions from the total turnover on account of trade discount.

28. A trade discount conceptually is a pre sale concurrence, the quantification whereof depends on many many factors in commerce regulating the scale of sale/purchase depending, amongst others on goodwill, quality, marketable skills, discounts, etc. contributing to the ultimate performance to qualify for such discounts. Such trade discounts, to reiterate, have already been recognized by this Court with the emphatic rider that the same ought not to be disallowed only as they are not payable at the time of each invoice or deducted from the invoice price. In our comprehension, Sections 29, 30 and Rule 3 are the constituents of a same scheme to determine the taxable turnover and thus the extent of exigibility. Whereas Sections 29 and

30, to repeat, deal with the issuance of tax invoice and bill of sale to start with and thereafter credit and debit notes to be in accord with the tax actually payable, Rule 3 in a way espouses the exercise of ascertaining the taxable turnover by enumerating the permissible deductions from the total turnover. We are thus of the considered view that there is no repugnance or conflict amongst these three provisions so much so that Rule 3(2)(c) stands out in isolation and is incompatible with either the scheme of the Act or Sections 29 and 30 to be precise. The interplay of these three provisions is directed to ensure correct computation of the taxable turnover for an accurate computation of the tax liability. These provisions therefore for all practical purposes complement each other and are by no means militative in orientation or impact. Perceptionally, if taxable turnover is to be comprised of sale/purchase price, it is beyond one's comprehension as to why the trade discount should be disallowed, subject to the proof thereof, only because it was effectuated subsequent to the original sale but evidenced by contemporaneous documents and reflected in the relevant accounts.

29. This Court in ***K.P. Varghese vs. Income Tax Officer, Ernakulam and Anr.*** AIR 1981 SC 1922, while interpreting Section 52 of the Income Tax Act 1961 favoured an interpretation in departure from a strict literal reading thereof. For ready reference, Section 52, as interpreted, is extracted hereinbelow.

> *"Section 52 (1) Where the person who acquires a capital asset from an assessee is directly or indirectly connected with the assessee and the Income-tax Officer has reason to believe that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under Section 45, the full value of the consideration for the transfer shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be the fair market value of the capital asset on the date of the transfer.*
>
> *(2) without prejudice to the provisions of Sub-section (1), if in the opinion of the Income-tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital assets by an amount of not less than fifteen per cent of the value declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its fair market value on the date of its transfer."*

It was proclaimed thus:

> *"5. Now on these provisions the question arises what is the true interpretation of Section 52, Sub-section (2). The argument of the Revenue was and this argument found favour with the majority Judges of the Full Bench that on a plain natural construction of the language of Section 52, Sub-section (2), the only condition for attracting the applicability of that provision is <u>that the fair market value of the capital asset transferred by the assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer by an amount of not less than 15% of the value so declared.</u>* ***Once the Income-tax Officer is satisfied that this condition exists****, he can proceed to invoke the provision in Section 52 Sub-section (2) and take the fair market value of the capital asset transferred by the assessee as on the date of the transfer as representing the full value of the consideration for the transfer of the capital asset and compute the capital gains on that basis. No more is necessary to be proved, contended the Revenue. To introduce any further condition such as understatement of consideration in respect of the transfer would be to read into the statutory provision something which is not there: indeed it would amount to*

rewriting the section. <u>This argument was based on a strictly literal reading of Section 52 Sub-section (2) but we do not think such a construction can be accepted. It ignores several vital considerations which must always be borne in mind when we are interpreting a statutory provision. The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity." We can do no better than repeat the famous words of Judge Learned Hand when he said:</u>

> *"….it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning"*

We must not adopt a strictly literal interpretation of Section 52 Sub- section (2) but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which Section 52 Sub- section (2) appears, because, as pointed out by Judge Learned Hand in most felicitous language:-

> *"….the meaning of a sentence may be more than that of the separate words as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create"*

Keeping these observations in mind we may now approach the construction of Section 52 Sub-section (2).

6. *The primary objection against the literal construction of Section 52 Sub-section (2) is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but they can certainly help to fix its meaning. It is a well recognised rule of construction that a statutory provision must be so construed, if possible that absurdity and mischief may be avoided. There are many situations where the construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. Take, for example, a case where A agrees to sell his property to B for a certain price and before the sale is completed pursuant to the agreement and it is quite well-known that sometimes the competition of the sale may take place even a couple of years after the date of the agreement-the market price shoots up with the result that the market price prevailing on the date of the sale exceeds the agreed price at which the property is sold by more than 15% of such agreed price. This is not at all an uncommon case in an economy of rising prices and in fact we would find in a large number of cases where the sale is completed more than a year or two after the date of the agreement that the market price prevailing on the date of the sale is very much more than the price* *at which the property is sold under the agreement. Can it be contended with any degree of fairness and justice that in such cases, where there is clearly no understatement of consideration in respect of the transfer and the transaction is perfectly honest and bonafide and, in fact, in fulfillment of a contractual obligation, the assessee who has sold the property should be liable to pay tax on capital gains which have not accrued or arisen to him. It would indeed be most harsh and inequitable to tax the assessee on income which has neither arisen to him nor is received by him, merely because he has carried out the contractual obligation under-taken by him. It is difficult to conceive of any rational reason why the legislature should have thought it fit to impose liability to tax on an assessee who is bound by law to carry out his contractual obligation to sell the property at the agreed price and honestly carries out such contractual obligation. It would indeed be strange if obedience to the law should attract the levy of tax on income which has neither arisen to the assessee nor has been received by him. If we may take another illustration, let us consider a case where A sells his property to B with a stipulation that after some-time which may be a couple of years or more, he shall resell the property to A for the same price could it be contended in such a case that when B transfers the property to A for the same price at which he originally purchased it, he should be liable to pay tax on the basis as if he has received the market value of the property as on the date of resale, if, in the meanwhile, the market price has shot up and exceeds the agreed price by more than 15%. Many other similar situations can be contemplated where it would be absurd and unreasonable to apply Section 52 Sub-section (2) according to its strict literal construction. We must therefore eschew literalness in the interpretation of Section 52 Sub-section (2) and try to arrive at an interpretation which avoids this absurdity and mischief and makes the provision rational and sensible, unless of course, our hands are tied and we cannot find any escape from the tyranny of the literal interpretation. It is now a well settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even 'do some violence' to it, so as to achieve the obvious intention of the legislature and produce a rational construction, Vide: Luke v. Inland Revenue Commissioner [1963] AC 557. The Court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision. We think that, having regard to this well recognised rule of interpretation, a fair and reasonable construction of Section 52 Sub-section (2) would be to read into it a condition that it would apply only where the consideration for the transfer is under-stated or in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a bonafide transaction where the full value of the consideration for the transfer is correctly declared by the assessee. There are several important considerations which incline us to accept this construction of Section 52 Sub-section (2)."*

30. In ***Commissioner of Income Tax, Bangalore Vs. J.H. Gotla Yadagiri*** AIR 1985 SC 1698 this Court propounded that though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than injustice, then such construction should be preferred to the literal construction.

31. In a recent rendition in ***State of Jharkhand and others vs. Tata Steel Ltd. and Ors***. (2016) 11 SCC 147, this Court while exploring the underlying intent of a notification pertaining to the period of repayment by the respondents-assessee, which had earlier availed the benefit of deferment of payment of tax under the Jharkhand Value Added Tax Act, 2005 did exhaustively dwell on the golden rule of interpretation based on literal and plain meaning of the words/expressions used in a statute and with approval placed reliance on an earlier decision of this ***Court in Hansraj Gordhandas vs. H.H. Dave, Assistant Collector of Central Excise & Customs, Surat and others*** (1969) 2 SCR 252, in which it was propounded thus:

> *"It was contended on behalf of the respondent that the object of granting exemption was to encourage the formation of cooperative societies which not only produced cotton fabrics but which also consisted of members, not only owning but having actually operated not more than four power-looms during the three years immediately preceding their having joined the society. The policy was that instead of each such member operating his looms on his own, he should combine with others by forming a society which, through the cooperative effort should produce cloth. The intention was that the goods produced for which exemption could be claimed must be goods produced on its own behalf by the society. We are unable to accept the contention put forward on behalf of the respondents as correct. On a true construction of the language of the notifications, dated July 31, 1959 and April 30, 1960 it is clear that all that is required for claiming exemption is that the cotton fabrics must be produced on power-looms owned by the cooperative society. There is no further requirement under the two notifications that the cotton fabrics must be produced by the Co-operative Society on the power-looms "for itself". It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different, but that is not the case here."*

[Underlining is ours]

32. In the same vein, the following passage from ***M/s Doypack Systems Pvt. Ltd. vs. Union of India and Ors.*** (1988) 2 SCC 299 was adverted to:

> *"58. The words in the statute must, prima facie, be given their ordinary meanings. Where the grammatical construction is clear and manifest and without doubt, that construction ought to prevail unless there are some strong and obvious reasons to the contrary. Nothing has been shown to warrant that literal construction should not be given effect to. See Chandavarkar S.R. Rao v. Ashalata (1986) 4 SCC 447 approving 44 Halsbury's Laws of England, 4th Edn., para 856 at page 552, Nokes v. Doncaster Amalgamated Collieries Limited 1940 AC 1014. It must be emphasised that interpretation must be in consonance with the Directive Principles of State Policy in Article 39 (b) and (c) of the Constitution.*
>
> *59. It has to be reiterated that the object of interpretation of a statute is to discover the intention of the Parliament as expressed in the Act. The dominant purpose in construing a statute is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. That intention, and therefore the meaning of the statute, is primarily to be sought in*

the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand. …"

33. The following excerpts from ***Tata Steel Ltd.*** (supra), being of formidable significance are also extracted as hereunder.

24. In this regard, reference to **Mahadeo Prasad Bais (Dead) vs. Income- Tax Officer 'A' Ward, Gorakhpur and another** *(1991) 4 SCC 560 would be absolutely seemly. In the said case, it has been held that an interpretation which will result in an anomaly or absurdity should be avoided and where literal construction creates an anomaly, absurdity and discrimination, statute should be liberally construed even slightly straining the language so as to avoid the meaningless anomaly. Emphasis has been laid on the principle that if an interpretation leads to absurdity, it is the duty of the court to avoid the same.*

25. In ***Oxford University Press v. Commissioner of Income Tax*** *(2001) 3 SCC 359, Mohapatra, J. has opined that interpretation should serve the intent and purpose of the statutory provision. In that context, the learned Judge has referred to the authority in* ***State of T.N. v. Kodaikanal Motor Union (P) Ltd.*** *(1986) 3 SCC 91 wherein this Court after referring to* ***K.P. Varghese v. ITO*** *[(1981) 4 SCC 173 and Luke v. IRC (1964) 54 ITR 692 has observed:-*

> *"The courts must always seek to find out the intention of the legislature. Though the courts must find out the intention of the statute from the language used, but language more often than not is an imperfect instrument of expression of human thought. As Lord Denning said it would be idle to expect every statutory provision to be drafted with divine prescience and perfect clarity. As Judge Learned Hand said, we must not make a fortress out of dictionary but remember that statutes must have some purpose or object, whose imaginative discovery is judicial craftsmanship. We need not always cling to literalness and should seek to endeavour to avoid an unjust or absurd result. We should not make a mockery of legislation. To make sense out of an unhappily worded provision, where the purpose is apparent to the judicial eye 'some' violence to language is permissible."*

26. Sabharwal, J. (as His Lordship then was) has observed thus:-

> *"… It is well-recognised rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. It was held that construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. It was said that the literalness in the interpretation of Section 52(2) must be eschewed and the court should try to arrive at an interpretation which avoids the absurdity and the mischief and makes the provision rational, sensible, unless of course, the hands of the court are tied and it cannot find any escape from the tyranny of literal interpretation. It is said that it is now well-settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction. In such a case the court may read into the statutory*

provision a condition which, though not expressed, is implicit in construing the basic assumption underlying the statutory provision. …"

34. As would be overwhelmingly pellucid from hereinabove, though words in a statute must, to start with, be extended their ordinary meanings, but if the literal construction thereof results in anomaly or absurdity, the courts must seek to find out the underlying intention of the legislature and in the said pursuit, can within permissible limits strain the language so as to avoid such unintended mischief.

35. In ***Seaford Court Estates Ltd. vs. Asker*** [1949] 2 All ER 155 hallowed by time, outlining the duty of the Court to iron out the creases, it was enunciated, that whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity, the caveat being that the English language is not an instrument of mathematical precision. It was held that in an eventuality where a Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that or have been guilty of some or other ambiguity, he ought to set to work on the constructive task of finding the intention of the Parliament and that he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give "force and life" to the intention of the legislature.

36. It would, in any case be incomprehensible that the legislature, while occasioning the amendment to the first proviso to Rule 3(2)(c) of the Rules, was either ignorant or unaware of the prevalent practice of offering trade discount in the contemporary commercial dispensations. This is more so, as trade discount continued to be an accepted item of deduction. In such a premise, the intention of the legislature could not have been to deny the benefit of deduction of trade discount by obdurately insisting on the reflection of such trade discount in the text invoice or the bill of sale at the point of the sale as the only device to guard against possible avoidance of tax under the cloak thereof. Axiomatically, therefor the interpretation to be extended to the proviso involved has to be essentially in accord with the legislative intention to sustain realistically the benefit of trade discount as envisaged. Any exposition to probabilise exaction of the levy in excess of the due, being impermissible cannot be thus a conceivable entailment of any law on imperative impost. To insist on the quantification of trade discount for deduction at the time of sale itself, by incorporating the same in the tax invoice/bill of sale, would be to demand the impossible for all practical purposes and thus would be ill- logical, irrational and absurd. To reiterate, trade discount though an admitted phenomenon in commerce, the computation thereof may depend on various factors singular to the parties as well as by way of uniform norms in business not necessarily enforceable or implementable at the time of the original sale. To deny the benefit of deduction only on the ground of omission to reflect the trade discount though actually granted in future, in the tax invoice/bill of sale at the time of the original transaction would be to ignore the contemporaneous actuality and be unrealistic, unfair, unjust and deprivatory. This may herald as well the possible unauthorised taxation even in the face of cotaneous accounts kept in ordinary course of business, attesting the grant of such trade discount and adjustment thereof against the price. While, devious manipulations in trade discount to avoid tax in a given fact situation is not an impossibility, such avoidance can be effectively prevented by insisting on the proof of such discount, if granted. The interpretation to the contrary, as sought to be assigned by the Revenue to the first proviso to Rule 3 (2)(c) of the Rules, when tested on the measure of the judicial postulations adumbrated hereinabove, thus does not commend for acceptance.

37. On an overall review of the scheme of the Act and the Rules and the underlying objectives in particular of Sections 29 and 30 of the Act and Rule 3 of the Rules, we are of the considered opinion that the requirement of reference of the discount in the tax invoice or bill of sale to qualify it for deduction has to be construed in relation to the transaction resulting in the final sale/purchase price and not limited to the original sale sans the trade discount. However, the transactions allowing discount have to be proved on the basis of contemporaneous records and the final sale price after deducting the trade discount must mandatorily be reflected in the accounts as stipulated under Rule 3(2)(c) of the Rules. The sale/purchase price has to be adjudged on a combined consideration of the tax invoice or bill of sale as the case may be along with the accounts reflecting the trade discount and the actual price paid. The first proviso has thus to be so read down, as above, to be in consonance with the true intendment of the legislature and to achieve as well the avowed objective of correct determination of the taxable turnover. The contrary interpretation accorded by the High Court being in defiance of logic and the established axioms of interpretation of statutes is thus unacceptable and is negated. The appeals are thus allowed in the above terms. No costs.

SUPREME COURT OF INDIA

CIVIL APPEAL NO. 641 OF 2012

Go to Index Page

SAFETY RETREADING COMPANY (P) LTD.

Vs

COMMISSIONER OF CENTRAL EXCISE, SALEM

RANJAN GOGOI AND ASHOK BHUSHAN, JJ.

18th January, 2017

HF ▶ Assessee

Service Tax in the contract of Retreading of Tyres can be imposed only after deduction of value relatable to materials.

SERVICE TAX – RETREADING OF TYRES – MANAGEMENT, MAINTENANCE OR REPAIR SERVICE – VALUATION – TAX CAN BE IMPOSED ONLY ON SERVICE COMPONENT – VIEW TAKEN BY THE TRIBUNAL TO THE CONTRARY SET ASIDE – APPEAL ALLOWED. - SECTIONS 65(64), 65(105)(zzg), 67 OF FINANCE ACT, 1994; NOTIFICATION NO. 12/2013-ST DATED 20.06.2013

The assessee was fastened with a demand for levy of tax on the gross value of services rendered including the cost of material used and transferred. Appeal filed against the said order was decided by the majority members of Tribunal holding that gross value of the contract would be taxable. On appeal before the Supreme Court,

Held:

Valuation of Service under Section 67 is attributable only for the service portion in the contract and cannot include the cost of parts and other material, if any, sold to the customer while providing maintenance or repair service. On the very face of the language used in Section 67 of the Finance Act, 1994, the majority view taken by the Tribunal cannot be subscribed to the effect that in a contract of the kind under consideration, there is no sale or deemed sale of parts or other material used in the execution of the contract of repairs and maintenance. The finding of the Appellate Tribunal that it is the entire of the gross value of the service rendered, that is liable to service tax, does not lay down the correct proposition of law. Appeal allowed.

Present: ***For Petitioner(s):*** *Mr. Arvind P. Datar, Sr. Advocate*

Other Advocates: *Mr. S. Durairaj, Mr. S. Sukumaran, Mr. Anand Sukumar, Mr. Bhupesh Kumar Pathak, Ms. Meera Mathur,*

Ms. Yovini Rajesh Rohra, Mr. Balaji Srinivasan,

Mr. Sandeep Narain, Mr. P. Chandran Nair, Mr. M.H. Patil, For M/s. S. Narain & Co., *Ms. Pinky Anand, ASG Mr. K. Radhakrishnan, Sr. Ms. Nisha Bagchi, Mr. Ajay Singh, Mr. Rajiv Nanda, Mr. H.R. Rao, Ms. Pooja Sharma, Mr. B. Krishna Prasad,*

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RANJAN GOGOI, J.

1. The main issue for consideration in this appeal is whether in a contract for retreading of tyres, service tax is leviable on the total amount charged for retreading including the value of the materials/goods that have been used and sold in the execution of the contract.

2. The definition of 'taxable service' contained in Section 65(105)(zzg) of the Finance Act, 1994, as amended by Finance Act, 2003 may be noticed at this stage.

> *"65. Definitions*
>
> *In this Chapter, unless the context otherwise requires.—*
>
> * * *
>
> *(105) 'taxable service' means any service provided-*
>
> * * *
>
> *(zzg) to a customer, by any person in relation to maintenance or repair;"*

3. The expression "maintenance or repair" is defined by Section 65(64) of the Finance Act, 1994 is in the following terms:

> *"65. Definitions*
>
> *In this Chapter, unless the context otherwise requires.—*
>
> *(1)....*
>
> ....
>
> *(64) "management, maintenance or repair" means any service provided by-*
>
> *(i) any person under a contract or an agreement; or*
>
> *(ii) a manufacturer or any person authorized by him, in relation to,--*
>
> *(a) management of properties, whether immovable or not;*
>
> *(b) maintenance or repair of properties, whether immovable or not; or*
>
> *(c) maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle;"*

4. Section 66 which is the charging section brought about by the 2003 Amendment to the Finance Act, 1994, authorizes the levy of service tax, at the prescribed rate, on the value of taxable services referred to in, inter alia, sub-clause (zzg) of Clause 105 of Section 65 of the Finance Act, 1994.

5. Section 67 of the aforesaid Act deals with valuation of taxable services and specifically mentions that the same does not include the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service.

6. There is a government notification bearing No.12/2003-ST dated 20^{th} June, 2003 and a CBEC circular dated 7th April, 2004 dealing with the instant matter which may also be noticed and extracted below:

> *"Notification No.12/2013-ST dated 20th June, 2003.*
> *'Valuation (Service Tax) – Goods and materials sold by service provider to recipient of service – Value thereof, exempted.*
>
> *In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service tax leviable thereon under section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials.*
>
> *2.This notification shall come into force on the 1st day of July, 2003 (Notification No.12/2003-S.T. dated 20.6.2003)'*
>
> *CBEC Circular dated 7th April, 2004*
>
> *'I am directed to refer to your representation forwarded to Finance Minister vide letter dated 11-3-2003 and state that in terms of the notification 12/2003-ST dated 20-6-2003, the exemption in respect of input material consumed/sold by the service provider to the service recipient while providing the taxable service is available. However, the exemption is available only if the service provider maintains the records showing the material consumed/sold while providing the taxable service. The value of such material should also be indicated on the bill/invoice issued in respect of the taxable service provided."*

7. A demand for levy of tax on the gross value of the service rendered including the cost of materials used and transferred was raised and answered against the assessee leading to an appeal before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai (hereinafter referred to as "appellate Tribunal"). The learned appellate Tribunal returned a split verdict with the Technical Member taking the view that the gross value of the service rendered would be exigible to tax under the Act. The third member (Technical) to whom the matter was referred held as follows:

> *"21. From the foregoing, the following emerges:*
>
> a) *There is no evidence of sale of materials in rendering the impugned service of "Maintenance and Repairs".*
>
> b) *"Maintenance and Repair Service" being as specific service cannot be treated as service under the category of "Works Contract" for the service tax purposes.*
>
> c) *The concept of "deemed sales" is relevant only in respect of services under the category of "Works Contract" and not in respect of "Maintenance and Repair Service".*
>
> d) *The assessee has not proved that the conditions under Notification 12/03 ST dated 20.06.2003 have been satisfied and, therefore, they are not*

entitled to the benefit of deduction of cost of raw materials consumed in providing the impugned service."

8. Aggrieved, this appeal has been filed.

9. We have heard the learned counsels for the parties.

10. The exigibility of the component of the gross turnover of the assessee to service tax in respect of which the assessee had paid taxes under the local Act whereunder it was registered as a Works Contractor, would no longer be in doubt in view of the clear provisions of Section 67 of the Finance Act, 1994, as amended, which deals with the valuation of taxable services for charging service tax and specifically excludes the costs of parts or other material, if any, sold (deemed sale) to the customer while providing maintenance or repair service. This, in fact, is what is provided by the Notification dated 20th June, 2003 and CBEC Circular dated 7th April, 2004, extracted above, subject, however, to the condition that adequate and satisfactory proof in this regard is forthcoming from the assessee. On the very face of the language used in Section 67 of the Finance Act, 1994 we cannot subscribe to the view held by the Majority in the appellate Tribunal that in a contract of the kind under consideration there is no sale or deemed sale of the parts or other materials used in the execution of the contract of repairs and maintenance. The finding of the appellate Tribunal that it is the entire of the gross value of the service rendered that is liable to service tax, in our considered view, does not lay down the correct proposition of law which, according to us, is that an assessee is liable to pay tax only on the service component which under the State Act has been quantified at 30%.

11. An argument has been advanced by Ms. Pinky Anand, learned Additional Solicitor General that there is no evidence forthcoming from the side of the assessee that the value of the goods or the parts used in the contract and sold to the customer amounts to seventy per cent (70%) of the value of the service rendered which is the taxable component under the State Act. The aforesaid argument overlooks certain basic features of the case, namely, the undisputed assessment of the assessee under the local Act; the case projected by the Department itself in the show cause notice; and thirdly the affidavit filed before this Court by one S. Subramanian, Commissioner of Central Excise, Salem.

12. No dispute has been raised with regard to the assessment of the appellant on its turnover under the local/State Act, insofar as payment of value added tax on that component (70%) is concerned. A reading of the show cause notice dated 24th January, 2008 would go to show that the entire thrust of the Department's case is the alleged liability of the appellant – assessee to pay service tax on the gross value. In the aforesaid show cause notice, the details of the value of the goods, raw materials, parts, etc. and the value of the services rendered have been mentioned and service tax has been sought to be levied at the prescribed rate of ten per cent (10%) on the differential amount. It is now stated before us that the aforesaid figures have been furnished by the assessee himself and, therefore, must be understood not to be authentic. This, indeed, is strange. No dispute has been raised with regard to the correctness of the said figures furnished by the assessee in the show cause notice issued to justify the stand now taken before this Court; at no point of time such a plea had been advanced.

13. Besides the above, the affidavit of the learned Commissioner, referred to above, proceeds on the basis that the appellant assessee is also liable to pay service tax on the remaining seventy per cent (70%) towards material costs in addition to the 30% of the retreading charges. This is clear from the following averments made in the said affidavit of

the learned Commissioner:

"The relevant bills showed that the Appellant had paid service tax only on the labour component after deducting 70% towards material cost on the gross tyre

Retreading charges billed and received for the period from 16.06.2005. In short, they have paid service tax only on the 30% of the tyre Retreading charges received from the customers, by conveniently omitting 70% of the consideration received towards Retreading charges to avoid tax burden.

The verification of invoices of the Appellant for the period from Jan-2007 to March-2007, the officers noticed that the Appellant have shown material cost, patch cost and misc. charges i.e. Labour charges separately in their invoices. However, on the follow-up action the customers of the Appellant revealed that they have neither purchased nor received raw materials intended for Retreading and they had paid only the Retreading charges for carrying out the Retreading activity."

The invoices which the appellant assessee has also brought on record by way of illustration show the break up of the gross value received. There is again no contest to the same. Leaving aside the question that the case now projected, with regard to lack of proof of incurring of expenses on goods and materials which has been transferred to the recipient of the service provided, appears to be an afterthought, even on examination of the same on merits we have found it to be wholly unsustainable.

14. We, therefore, in the light of what has been discussed above, set aside the majority order of the appellate Tribunal dated 14th October, 2011 and hold that the view taken by the learned Vice President of the appellate Tribunal is correct and the same will now govern the parties. All reliefs that may be due to the appellant – assessee will be afforded to it forthwith and without any delay. All amounts, as may have been, deposited pursuant to the order(s) of this Court shall be returned forthwith to the appellant, however, without any interest. Bank guarantee furnished insofar as the penalty amount is concerned shall stand discharged.

The appeal is allowed in the above terms.

<u>CIVIL APPEAL NOS.6375-6376 OF 2014 AND CIVIL APPEAL NOS.6062-6063 OF 2013</u>

15. Order of this Court passed today i.e. dated 18th January, 2017 in Civil Appeal No.641 of 2012 will govern the proceedings in Civil Appeal Nos.6375-6376 of 2014 and Civil Appeal Nos.6062-6063 of 2013. Consequently, the appeals are disposed of on the same terms.

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SGA
LAW OFFICES

SUPREME COURT OF INDIA

Go to Index Page

CIVIL APPEAL NO. 5003 OF 2006

COMMISSIONER CENTRAL EXCISE, BANGALORE

Vs

UNITED SPIRITS LTD. & ANR.

DIPAK MISRA AND N.V. RAMANA, JJ.

5th January, 2017

HF ▶ None/Remand

Case remanded to Tribunal in the absence of any finding by the Tribunal about the exact nature of the process undertaken to determine whether it amounts to "Manufacturing" or not.

MANUFACTURING – FOOD FLAVOURS PURCHASED FROM THIRD PARTIES – MIXING OF ESSENCES – ALSO SOLD WITHOUT ANY PROCESSING – EXACT NATURE OF PROCESS – NOT DISCERNIBLE FROM THE ORDER OF THE TRIBUNAL – NEITHER ASCERTAINED NOR COMMENTED BY TRIBUNAL – REMAINS AMBIGUOUS AND INCONCLUSIVE – QUESTION OF FACT TO BE DECIDED BY TRIBUNAL FIRST – MATTER REMITTED BACK TO TRIBUNAL FOR RECONSIDERATION OF AFORESAID ASPECTS – ALL QUESTIONS LEFT OPEN – APPEAL ALLOWED – MATTER REMANDED. - *SECTION 2(f) OF CENTRAL EXCISE ACT, 1944*

Respondent is manufacturer of IMFL. Besides its own distillery units it has also entered into agreements with various manufacturers of liquor but who had their own Bottling Plants and appropriate license to manufacture liquor. Some food flavours are supplied by the respondent to their IMFL manufacturing units and were also sold to liquor manufacturers who were manufacturing IMFL under manufacturing/usership agreements. Food flavours were also sold to third parties of IMFL. It was contended by the assessee that it purchases duty paid essences from various suppliers and simply mixes them by a process of manual mixing in the proportion developed by the respondent and the mere process of manual mixing of the essence did not amount to manufacture. The tribunal, after analysing the various case laws and relying upon the Board Circular, held that both the essences and the result product food flavour fall under the same "Tariff" heading. Simply mixing of essence would not amount to manufacture as every change is not manufacture. It was held that the commercial identity of the ingredients and the finished product remain the same and the process of mixing two or more essences in certain proportions, does not bring into existence any new product. The essence remains essence only and therefore the process would not amount to manufacture. On appeal before Supreme Court,

Held:

From the order of the Tribunal the exact nature of process undertaken and how mixing is undertaken and the process involved is not discernible and has not been ascertained and commenting. It remains ambiguous and inconclusive. The respondent claims that about 26% of the sales of odoriferous substances were bought from third party and sold without any modification or process. These are questions of fact which must be first authenticated and the *actual factual position validated. The Tribunal has answered the question in favour of the respondent without the background check as to the actual process involved and undertaken. Different flavours may have different processes.*

In view of this, we are constrained to remit the matter to the Tribunal for reconsideration of the aforesaid aspects on the basis of observations made hereinabove and the law in the field. Resultantly, the appeal is allowed and matter remitted to the Tribunal.

Cases referred:

- *Pepsi Foods Ltd. v. Collector of Central Excise, Chandigarh (2005) 9 SCC 28*
- *Union of India & Ors v. Delhi Cloth and General Mills Co. Limited and Others 1997 ELT (J199)SC*
- *South Bihar Sugar Mills Limited & Anr. Etc. v. UOI & Anr, Etc 1978 ELT (J 336)*
- *Tata Chemicals Limited v. R.M. Desai, Inspector, Central Excise, Mithapur & Others, Moti Laminates Private Limited v. CCE 1995 (76) ELT 241(SC)*
- *Kilpest India Limited v. CCE 1999 (108) ELT 786 (Tri.)*
- *XI Telecom Limited v. Supdt. Of Central Excise, Hyderabad 1999 (105) ELT 263 (AP-DB)*
- *CCE v. Jagatjit Industries 2002 (141) ELT 306 (SC)*
- *Bhor Industries Ltd v. CCE, Bombay (1989) 1 SCC 602*
- *Union Carbide v. CCE 1986 (24) ELT 169 (SC)*
- *Moti Laminates Pvt. Ltd. & Ors v. CCE, Ahmedabad (1995) 3 SCC 23*
- *Union Of India & Others v. Sonic Electrochem (P) Ltd. and another (2002) 7 SCC 435*
- *CCE, Chandigarh-II v. Jagatjit Industries Ltd. (2002) 3 SCC 614*
- *Gopal Zarda Udyog v. CCE, New Delhi 2005 (188) ELT 251 (SC)*
- *O.K. Play (India) Limited v. CCE, New Delhi II 2005 (180) ELT 291 (SC)*
- *Nestle India Limited v. CCE, Chandigarh II 2004 (169) ELT 315 (Tri-Del)*
- *T.N. State Transport Corporation Limited v. CCE, Madurai 2004 (166) ELT 433 (SC)*
- *Kothari Products Limited v. Government of Andhra Pradesh 1998 (98) ELT 315 (AP)*
- *CCE, Guntur v. Crane Betel Nut Powder Works 2005 (187) ELT 106 (Tri-Bang)*
- *Henna Export Corporation v. CCE 1993 (67) ELT 907 (Tribunal)*
- *CCE Chennai v. Fountain Consumer Appliances Limited 2004 (171) ELT 329 (Tri-Chennai)*
- *Tega India Limited v. CCE, Calcutta II (2004) 2 SCC 727*
- *State of Maharashtra v. Mahalaxmi Stores (2003) 1 SCC 70*
- *CCE Chennai v. Titanium Equipment & Anode Manufacturing Co. Ltd. 2002 (142) ELT 162 (Tri-Chennai)*
- *Servo Med Industries Pvt. Ltd. v. CCE 2015 (6) SCALE 137*
- *Union of India v. Ahmedabad Electricity Co. Ltd & others. (2003) 11 SCC 129*
- *Hindustan Zinc Ltd. v. CCE, Jaipur (2005) 2 SCC 662*
- *Delhi Cloth & General Mills (supra) and Satnam Overseas Ltd. v. CCE, New Delhi (2015) 13 SCC 166*
- *CCE, Bangalore-II v. Osnar Chemicals Private Ltd. (2012) 2 SCC 282*
- *CCE, Meerut v. Goyal Gases (P) Ltd. (2000) 9 SCC 571*
- *Crane Betel Nut Powder Works v. Commr. of Customs & Central Excise, Tirupathi (2007) 4 SCC 155*
- *Shyam Oil Cake Ltd. v. CCE-I, New Delhi, Jaipur(2005) 1 SCC 264*
- *CCE v. S.R. Tissues (P) Ltd. (2005) 6 SCC 310*
- *Municipal Corporation of City of Thane v. Vidyut Metallics Ltd. (2007) 8 SCC 688*
- *Cosmic Dye Chemical v. CCE, Bombay (1995) 6 SCC 117*
- *Padmini Products v. CCE, Bangalore (1989) 4 SCC 275*
- *Pushpam Pharmaceuticals Co. v. CCE, Bombay 1995 Supp (3) SCC 462*
- *Uniworth Textiles Ltd. v. CCE, Raipur (2013) 9 SCC 753*
- *Union of India v. Delhi Cloth & General Mills Co. Ltd. AIR 1963 SC 791*
- *Anheuser-Busch Brewing Assn. v. United States 207 US 556 (1908)*
- *Ernakulam v. Pio Food Packers1980 Supp. SCC 174*
- *Anwarkhan Mahboob Co. v. State of Bombay AIR 1961 SC 213*
- *A. Hajee Abdul Shakoor and Co. v. State of Madras AIR 1964 SC 1729*
- *State of Madras v. Swastik Tobacco Factory AIR 1966 SC 1000*
- *Ganesh Trading Co., Karnal v. State of Haryana (1974) 3 SCC 620*
- *Tungabhadra Industries Ltd., Kurnool v. CTO AIR 1961 SC 412*
- *C.S.T., U.P., Lucknow v. Harbilas Rai and Sons (1968) 21 STC 17 (SC)*
- *Collector of Customs, Bombay v. S.H. Kelker & Co. Ltd. (2000) 10 SCC 478*

- *Income Tax Officer, Udaipur v. Arihant Tiles and Marbles Pvt. Ltd. (2010) 2 SCC 699*
- *CIT v. M/s N.C. Budharaja and Company 1994 Supp (1) SCC 280*
- *The Additional Commissioner of Commercial Taxes, Bangalore v. Ayili Stone Industries Etc. Etc. Civil Appeal Nos. 1983-2039 of 2016 dated 18.10.2016*

Present: *For Petitioner(s): Senior Advocates:* *Mr. Yashank Adhyaru, Sr. Advocate*

Other Advocates: *Mr. Arijit Prasad, Ms. Shirin Khajuria, Mr. B. Krishna Prasad, AOR*

For Respondent(s): Senior Advocates: *Ms. Indu Malhotra, Mr. S.K. Bagaria*

Other Advocates: *Ms. Nisha Bagchi, Mr. Prashant Singh, Adv Mr. Tanvir Nayar, Ms. Pooja Sharma, Mr. K. Ajit Singh Ms. Apoorva Bhumesh, Mr. Vikas Mehta,*

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DIPAK MISRA, J.

1. The respondent is a manufacturer of Indian Made Foreign Liquor (IMFL) and is a registered owner of several known brands of IMFL. The respondent, as the facts have been unfolded, also "manufactures" food flavours at its unit at Shayura Orchards, Kumbalagodu, Bangalore and the present appeal pertains only to food flavours.

2. The respondent has got its own distillery units at various places. In addition, it has entered into agreements with various manufacturers of liquor who had their bottling plants and also appropriate licences to manufacture liquor. With these liquor manufacturers the respondent had entered into Usership Agreement whereby they were permitted to use the trademark of the respondent on IMFL manufactured by them on the terms and conditions mentioned in the agreement. The respondent had also entered into another agreement with the liquor manufacturers called the manufacturing agreement which provides for manufacture and sale by liquor manufacturers of IMFL under the respondent's brand names or its purchase by the respondent on the terms and conditions mentioned in the agreement. It is stipulated in the agreement that sale and purchase of IMFL under the agreement shall be on principal to principal basis. These liquor manufacturers were to purchase raw materials such as rectified spirit, extra neutral alcohol and blending and packing materials in accordance with the standards and specifications set forth in the agreement and from the approved suppliers. It was also provided in the manufacturing agreement that modalities of price payable by the respondent to the liquor manufacturers for sale of IMFL and the price was to be the aggregate of cost of rectified spirit, extra neutral alcohol, blending and packing materials, storage, insurance premium and all manufacturing costs and expenses as mentioned in the agreement. In addition, the liquor manufacturers were entitled to the margin of profit called service charges in the agreement. The total price so paid to the liquor manufacturers was the sole consideration for the sales and such price is known as Ex- Distillery Price (EDP), which includes all costs, charges and expenses incurred by the liquor manufacturers for manufacture of IMFL as well as their margin described as service charges. The IMFL manufactured by liquor manufacturers was affixed with the brand names owned by the respondent. It provided the manufacturing logo, quality control, product research, etc. The respondent provided technical know-how/expertise to liquor manufacturers for manufacture of IMFL.

3. The liquor manufacturers sell IMFL manufactured by them either to the respondent or to the customers identified by the respondent or to the government-owned corporations. The sales personnel of the respondent contact the customers, book orders, collect outstanding amounts from the market, collect statutory forms like C-Forms, Excise Verification Certificates, Permits, etc. and forward the same to the liquor manufacturers. The respondent would promote its brands through marketing teams and operation of various promotional schemes and advertisements and all expenses with regard to the same are incurred by the respondent. The liquor manufacturers were entitled to receive EDP which include the actual cost of IMFL manufactured by them plus the profit margin. The prices were negotiated by the respondent even when the goods were sold by the liquor manufacturers to such buyers and they would bill by such buyers at the rates negotiated and determined by the respondent.

4. The respondent, however, asserts that such rates/prices negotiated with outside buyers were either more or less than the EDP with certain consequences, namely, (a) if the selling price to outside customers is more than EDP, the difference was paid by the liquor manufacturers to the respondent by calling it under different nomenclature like royalty or service charge; (b) if the selling price to outside customers was less than EDP, the difference/shortfall is borne by the respondent and paid to the liquor manufacturers; and (c) if the price realized from outside buyers is more than EDP, the difference accrued to the respondent.

5. As has been stated earlier, the respondent "manufactures" food flavours at its food flavour manufacturing unit at Bangalore. On the said aspect, the respondent asserts that the food flavours were "prepared" by mixing of various essences (odoriferous substances) purchased by the respondent from different suppliers.

6. Food flavours it is accepted play a role in the flavour profile of the liquor. Food flavours are not used in all brands of IMFL. There are certain brands of IMFL in which no food flavours are used and wherever they are used in IMFL, the percentage is very low ranging from 0.0001% to 00019% per litre. However, it is not the case of the respondent, that food flavours do not matter in the IMFL business.

7. Food flavours were supplied by the respondent to their IMFL manufacturing units and also sold to liquor manufacturers who were manufacturing IMFL under manufacturing/usership agreements. Food flavours were also sold to third party manufacturers of IMFL. The liquor manufacturers under the manufacturing agreement would use food flavours in such proportions as identified by the respondent and the blending proportion was maintained as a trade secret of the respondent.

8. The respondent stands registered under the Central Excise Act, 1944 (for short, "the Act") for manufacture of food flavours falling under Sub- Heading No. 3302.10 of the Central Excise Tariff since 1994 and holds the Central Excise Registration Certificate No. 8/94. Food flavours manufactured by the respondent have been always cleared on payment of central excise duty. As a procedure, the respondent used to file price lists/declarations from time to time declaring the assessable value of food flavours in accordance with law. The assessable value included the entire cost of raw material, labour cost, overheads and profit margin and were cleared from the factory on payment of central excise duty. The price of food flavours supplied to the respondent owned IMFL manufacturing units, liquor manufacturers and to other independent IMFL manufacturers, it is asserted by the respondent, did not vary and remain identical.

9. The royalty paid to the respondent by the liquor manufacturers, as asserted, is the difference between their selling prices of IMFL to outside buyers and the EDP of such IMFL. As pleaded, the payment of royalty has no nexus or connection with the food flavours. There are several brands of IMFL where no food flavour was supplied by the respondent to liquor manufacturers. However, royalty on the difference between the selling price of IMFL and EDP was still paid. The respondent claims that there were several instances where food flavours were sold and used in IMFL but no royalty was received. In those cases the selling price of IMFL was lower than the EDP and rather than receiving royalty, the respondent had borne the shortfall and reimbursed the same to liquor manufacturers. On this ground, the respondent intends to put forth the stand that royalty was solely relatable to the higher selling prices of IMFL over and above EDP and has nothing to do with food flavour. The food flavours were not used in IMFL products like Signature Whisky, Centenary Whisky, Single Malt Whisky, etc. which were manufactured without using food flavours. In respect of the same, the liquor manufacturers manufacturing the said brand were paying royalty to the respondent, that being the difference between their selling price of the said brands and their EDP.

10. We have narrated the aforesaid factual scenario as substantially put forth by the respondent. At this juncture, it is necessary to state that revenue issued a show cause notice on 11.04.2000 on the ground that the respondent-assessee received additional consideration from its franchisees in the form of royalty for supplying food flavours which were essential ingredients of the IMFL manufactured by the franchisees. The proviso to Section 11A of the Act was invoked by the adjudicating authority and it was propose to re-determine the assessable value of food flavours by including the royalty received by the assessee. The differential duty demanded for the period April, 1997 to March, 2009 was 35,45,865,860/-. Penalties were proposed on the unit and on the Senior Manager (Taxation) and interest was also levied. The adjudicating authority confirmed the demand vide his order dated 29.08.2002. The respondent approached the Customs, Excise and Service Tax Appellate Tribunal (for short, "tribunal") which in its order dated 08.07.2003 remanded the matter to the learned Commissioner as certain invoices of sales were produced before the tribunal which were not considered by the concerned Commissioner. While remitting the matter, the tribunal observed that as the matter was being remitted, the issue of limitation and such other issues were kept open for the adjudicator to re- determine and pass an appropriate order granting the opportunity to the parties for effective hearing. The issue of penalty was also kept open.

11. After the remit, the adjudicating authority passed an order on 27.02.2004. It placed reliance on the decision in ***Pepsi Foods Ltd. v. Collector of Central Excise, Chandigarh (2005) 9 SCC 28***, and held that the royalty from the various units under the manufacturing agreement deserve to be included in the assessable value of the food flavour supplied to them and accordingly confirmed the demand under proviso to Section 11A of the Act. Equal amount of penalty was imposed under Section 11 AC and interest under Section 11AB was also levied. A penalty of Rs. 3,00,000/- was imposed on the Senior Manager (Taxation) under Rule 26 of the Central Excise Rules, 2002.

12. Before the tribunal, it was contended by the assessee that it purchased duty paid essences from various suppliers and simply mixed them by a process of manual mixing in the proportion developed by the respondent and which was kept as a top secret and the mere process of manual mixing of the essence did not amount to manufacture; that though the said issue was raised before the jurisdictional Assistant Commissioner on 18.02.2000 and a prayer was made to consider their plea that the food flavour produced by them was not excisable and, pass an appropriate order, the concerned authority did not respond to the same and thereafter, the assessee informed the department that till a final decision was taken, the duty would be paid under protest. It is further contended that food flavours were odoriferous compounds and the quantum of food flavours used in IMFL wherever used were very negligible ranging from 0.0001% to 0.0019% per litre of various IMFL products and such use had no relevance in the marketability of IMFL product nor its final market price. Referring to the letters dated 18.02.2000 and dated 04.09.2001 wherein the assessee had taken a stand that mixing of duty paid flavours would not amount to manufacture. It reiterated the stand that it was not a manufacture on the basis of the decision rendered in ***Union of India & Ors v. Delhi Cloth and General Mills Co. Limited and Others 1997 ELT (J199)SC***. Reference was also made to the order passed by the Commissioner, Central Excise, Hyderabad who vide his letter dated 22.09.2003 had held that the mixing of duty paid food flavours could not result in emergence of a new product and the resultant essence which comes into existence in the premises of M/s.

Shaw Wallace Co. (SWC) does not answer the test of marketability and as the facts are identical in the case of the assessee, the same should have been followed by the jurisdictional Commissioner. To bolster the said stand, reliance was placed on ***Delhi Cloth and Generals Mills Co. Limited (supra), South Bihar Sugar Mills Limited & Anr. Etc. v. UOI & Anr, Etc 1978 ELT (J 336)***, and ***Tata Chemicals Limited v. R.M. Desai, Inspector, Central Excise, Mithapur & Others, Moti Laminates Private Limited v. CCE 1995 (76) ELT 241(SC)*** , ***Kilpest India Limited v. CCE 1999 (108) ELT 786 (Tri.)***, ***XI Telecom Limited v. Supdt. Of Central Excise, Hyderabad 1999 (105) ELT 263 (AP-DB)***, and ***CCE v. Jagatjit Industries 2002 (141) ELT 306 (SC)***.

13. It was further argued that in certain cases, the flavours which were not bought are not even mixed but were supplied directly to the bottlers, only the labels were changed in order to maintain secrecy and such an activity could not be regarded as 'manufacture' inasmuch as under Chapter Heading 3302.10 re-labelling does not amount to manufacture. It was argued that mixing of flavours does not bring into existence a new product and even after mixing flavours, the resultant products still remains to be a flavour only. Attention of the tribunal was invited to Board's Circular No. 247/81/96-CX dated 03.10.1996 clarifying that mixing duty paid paints to obtain paint in different shade would not amount to manufacture. Further submission before the tribunal was that flavours were either mixed or supplied in the form in which they were purchased to the bottlers and cannot be marketed to anyone else and no other manufacturer would buy these flavours, for they were meant only for use in the product manufactured for the assessee.

14. Commenting on the nexus between the royalty and the price of food flavours, it was canvassed before the tribunal that the royalty and service charges were received by the assessee for use of the trade mark and for marketing services provided by it to the contract bottling units and even though flavours were supplied to independent manufacturers, neither royalty nor service charges were received from them and hence, the royalty bill had no nexus with the price of the food flavour. That apart, it was argued that the assessee sold food flavours to Contract Bottling Units who employed them to manufacture IMFL products or to different other brand owners to whom they were paying royalty and service charges. However, the other brand owners paid only the price of flavours to the assessee and this would be indicative of the fact that the royalty had no nexus with the price of the flavours. Additionally, it was propounded that material was purchased before the concerned Commissioner showing that assessee had sold some kind of flavour to certain distilleries with whom there was no bottling agreement nor there was any receipt of royalty or service charges because the contract unit had not applied the brand of the assessee nor secured services of the assessee for marketing and in such a case, the Commissioner could not have asserted that the agreement was for sale of flavour and receipt of royalty and service charges. Reliance on the Pepsi Foods Ltd. (supra) was seriously criticised before the tribunal as the ratio laid down was not applicable to the case at hand. Before the tribunal the learned counsel for the assessee had drawn attention that the manufacturing agreement and usership agreement to highlight certain aspects, to draw distinction and the adjudicating authority could not have proceeded to allocate the entire receipts to the value of food flavours alone without any basis. Criticising the invocation of the jurisdiction under Section 11A of the Act, it was contended that there was no suppression on the part of the appellants as the factum of payment of royalty was known to the department and it was clear from the note of the Range Officer to the Deputy Commissioner which clearly laid down that the amount paid towards royalty was only for use of the brand name for sale of flavour and prior to the issue of show cause notice, there was an audit inspection on 28.03.2001 and the assessee was asked to clarify various points raised which had been clarified vide letter dated 28.04.2001 and all these aspects had not been taken into consideration while invoking the jurisdiction. It was also put forth that as royalty had no nexus with the price of food flavours, the assessee was not expected to declare it and, therefore, it could not be treated as suppression. That apart, at the time of audit objection even the Range Superintendent was of the view that there was no nexus between the royalty received by the appellant and the price of food flavours sold by the assessee and, therefore, in the obtaining circumstances, the notices were clearly barred by time.

15. The stand and stance put forth by the assessee was controverted by the revenue contending, inter alia, that the department had raised the question of excisability of the product in question, when it found the modification of stay order Nos. 838 and 839/2004 dated 10.08.2004 by the High Court. It was also urged that there was an earlier proceeding in 1995 relating to food flavour and the case was adjudicated by the then Commissioner, consequent upon which the assessee had started paying duty and hence, excisablity of the product in question was never an issue at all as the conduct of the assessee would reflect. Reference was made to Entry 3302 in the Tariff and 3302.10 to highlight that the tariff itself recognizes mixtures of odoriferous substances as excisable product and, hence, it could not be said that no manufacture was involved in the mixing of the essences to produce such food flavours. It was urged that goods to fit into the term 'manufacture' must be capable of being bought and sold in the market and to be known as such. In that regard, placing reliance on ***Bhor Industries Ltd v. CCE, Bombay (1989) 1 SCC 602***, ***Union Carbide v. CCE*** **1986 (24) ELT 169 (SC)** , ***Moti Laminates Pvt. Ltd. & Ors v. CCE, Ahmedabad (1995) 3 SCC 23***, ***Union Of India & Others v. Sonic Electrochem (P) Ltd. and another (2002) 7 SCC 435*** and ***CCE, Chandigarh-II v. Jagatjit Industries Ltd. (2002) 3 SCC 614*** , it was canvassed that in the case at hand the food flavours manufactured by the assessee were marketable as evidenced from the assesse's admissions that it has been selling food flavours to other independent bottlers who were not manufacturing the IMFL brands of McDowell but their own brands which establish marketability of the product. It was further argued that the inputs were essences and once they were mixed or prepared, they lost their original identity. It was also urged that though the input and finished goods were under the same tariff heading, still there was manufacture and the finished goods were having distinct, separate and identifiable function, with reference to the product, i.e., IMFL. The further stand was that mixing amounts to manufacture as has been laid down in ***Gopal Zarda Udyog v. CCE, New Delhi 2005 (188) ELT 251 (SC)***, ***O.K. Play (India) Limited v. CCE, New Delhi II 2005 (180) ELT 291 (SC)***, ***Nestle India Limited v. CCE, Chandigarh II 2004 (169) ELT 315 (Tri-Del), T.N. State Transport Corporation Limited v. CCE, Madurai 2004 (166) ELT 433 (SC), Kothari Products Limited v. Government of Andhra Pradesh 1998 (98) ELT 315 (AP), CCE, Guntur v. Crane Betel Nut Powder Works 2005 (187) ELT 106 (Tri-Bang)***, and ***Henna Export Corporation v. CCE 1993 (67) ELT 907 (Tribunal)***. The revenue further contended that as per Section 4 of the Act, the assessable value depends on the nature of transaction and each price in a transaction was an assessable value and it cannot be compared if the type of transaction was different. The assessee received royalty charges from buyers who were contract bottling units and separate assessable value was computable for these types of customers and in such cases, the royalty charged by the assessee from the buyers has to be treated as additional consideration.

16. After noting down the submissions of the learned counsel for the parties, the tribunal adverted to the issue of nexus between the royalty and the price of food flavours. The tribunal clearly stated that in the year 1995, the department had proceeded against the assessee for non-payment of central excise duty on the food flavours produced by them and the Commissioner confirmed the demands raised and at that time, the excisability of food flavours was not questioned by the assessee. After the adjudication order dated 30.01.1995, the assessee was clearing the goods on payment of duty. During 2001, the departmental audit raised certain objections with reference to the receipt of certain amounts towards royalty, service charges, etc. from the contract bottling units engaged in the manufacture of IMFL and according to the audit, the royalty charges should be added to the value of the food flavour sold to the contract bottling units. At that juncture, the assessee gave justification for non- inclusion of royalty charges. The tribunal, as the impugned order would reflect, has adverted in detail to the justification given by the assessee before the adjudicating authority which was basically founded on the conditions set out in the agreement that royalty was payable by the manufacture for use of the brand name and that the royalty had no relevance with the goods or various inputs that go into the manufacture of these goods. It was also set forth that the brands of the company had their own value and the royalty receivable from the manufacturer was primarily on account of company's brands of finished goods, namely, IMFL viz. No. 1 Brandy, No. 1 Whisky, Diplomat Whisky, Premium Whisky, Dry Gin, etc. It was also contended that the audit party had erroneously mis-interpreted the concept of royalty as one which was capable of being subdivided into and allocable to various manufacturing inputs, for it is neither feasible nor a correct procedure to apportion the royalty which was accruing to the company on the company's brand image. It was also contended that such an understanding would defeat the purpose of the agreement. Though such a stand was explained by the assessee, yet the department was of the view that the royalty should be added to the assessable value and consequently first show cause notice dated 11.04.2002 was issued. The tribunal thereafter chronologically analysed the facts and order of remit and the de novo order and perused the relevant agreements of the appellants with the CBUs. On scrutiny of the agreements, the tribunal found that there were two agreements, one is called the Manufacturing Agreement and the other is Usership Agreement. As per the terms and conditions of the agreement, the products were to be manufactured by the second party would include the products whose trade mark was owned by the assessee-appellant before the tribunal and any other associate company of it. The second party to the agreement was required to purchase blending and packing materials from such suppliers specified by the assessee and above condition was for the purpose of ensuring quality specification. The agreement defined the blending material. The tribunal referred to the definition of "Blending Material" and opined that the said definition includes food flavours. It referred to para 18 of the agreement which stipulates that during the currency of the agreement, the second party (as pointed out by the tribunal) Gemini Distilleries (Tripura) Pvt. Ltd. (GDPL) shall not use trade mark to or adopt any trade mark similar to any of the trade marks on or in connection with any product. On that basis, the tribunal opined that on careful reading of the agreement reveals that the assessee has good control over the manufacture of IMFL by GDPL and it ensures the quality of the product, which bears the trade mark of the assessee. Referring to the usership agreement, the tribunal observed that the proprietor was the assessee and the user was GDPL and according to the said agreement, at the request of the user, the proprietor had agreed to permit the user to use the trade marks in respect of the goods on the terms and conditions mentioned in the agreement. The tribunal referred to para 12 of the agreement which postulates that in consideration of this licence, the user shall pay to the proprietor such sum per case manufactured of the goods as may be mutually agreed upon by the parties from time to time and the consideration shall be paid by the user by the following month. It further observed that though the word royalty has not been used in the agreement, it was clear that the sum mentioned in para 12 of the agreement refers to royalty and the royalty was for the use of trade mark and there was no indication whatsoever to infer that the royalty was paid for supply of food flavour. It took note of the fact that food flavour was one of the blending materials and not the sole blending materials sold by the assessee to the CBU and hence, prima facie, there does not appear to be any close nexus between royalty and the food flavour.

17. Be it noted, the assessee before the tribunal highlighted that there were three types of transactions, namely, receipt of royalty and also supply of food flavours; royalty was received though there was no supply of food flavours; and royalty was not received even though there was supply of food flavours. Accepting the said submission, the tribunal held thus:-

"The appellants took us through the various documents and showed us that there is practically no difference in price in respect of sales to independent buyers and the prices at which food flavours are sold to CBUs. This fact clinches the issue. It is very clear that there is no nexus between the royalty and the food flavours. The adjudicating authority has relied on the Apex Court's decision in the Pepsi case. In our view, the ratio of the above decision should not have been blindly applied as done by the adjudicating authority. In the Pepsi case, both the concentrate and the final product are excisable which is not the case in the present appeals. The final product here is IMFL for which royalty is paid. IMFL is not subjected to Central Excise duty. In the Pepsi case, the concentrate is the most essential ingredient of Pepsi Cola whereas in the present case, it is not so. There are certain brands of IMFL which do not require any food flavour. In the Pepsi case, the concentrates are sold only for the franchisees. In the instant case, the appellants have sold food flavours to independent manufactures of IMFL who will not be using the brand name of the appellants. Such independent manufacturers would not pay any royalty. In the Pepsi case, an express prohibition restricting the bottlers to purchase the concentrate from any other source was there. No such express prohibition is there in the present agreement. It was further pointed out by the appellants that there are instances wherein the appellants have paid an amount to bottlers when the sale price of IMFL is much below the ex- distillery price. It is further seen that apart from food flavour, the appellants supplied other blending materials to these CBUs. In these circumstances, the entire royalty paid cannot be attributed to the food flavour whose cost is only 0.45% according to the appellants. Further we find that even in 2001, at the time of audit inspection, the appellants have taken a firm stand not only regarding the includibility of royalty but also the question of very excisability of the food flavour itself. In these circumstances, there is no justification for alleging suppression of facts to invoke the larger period. Hence the Show Cause Notice dated 11.04.2002 and 08.03.2004 are clearly time barred. For the above mentioned reasons, the royalty has no nexus with the price of the food flavour and hence, not includible in the assessable value. Moreover, the first two Show Cause notices are time barred as there is no suppression of facts."

18. After so stating, the tribunal addressed the issue pertaining to excisability of food flavours. It took note of the fact that there was purchased duty paid odoriferous compounds called essences and these essences were mixed manually to obtain food flavour. In what proportion and which essences were to be mixed has been kept a trade secret and different brands of IMFL require food flavour of different profiles. In order to ensure the quality consistency in the various brands of IMFL, the production of food flavour was centralized at Bangalore which does not use power. The tribunal referred to Board's circular dated 22.11.1999 wherein it has been clarified that agarbati manufacturing process involving simple mixing of a few aromatic chemicals with the base oil in a container in liquid form, which was mixed directly with the dough or applied on agarbati in the required proportion used for rolling of agarbati is not excisable product and, therefore, no duty was leviable on such compounds during the course of manufacture of agarbati. It was urged before the tribunal that the fact situation in the case of assessee was similar, as has been clarified in the Board's circular in respect of agarbati. It is further urged that there was a simple mixing of essences of different flavour profile and the food flavours produced by the assessee are exclusively used for making their brands of IMFL in their own units and contract units and it cannot be sold in the market as such. The tribunal posed a question whether the process of mixing of essences results in a distinct commodity, which was different from the original inputs. In that context, it held thus:-

"We find that both the essences and the resultant product food flavour fall under the same Tariff Heading. Since different proportion of the ingredients give different flavours to the resultant product, we cannot say that a ingredients give different flavours to the resultant product, we cannot say that a completely distinct product emerges. The comparison with agarbathi mention in Board's Circular is justified. Board's Circular dated 03.11.1996 deals with the process of tinting of duty paid base white Paint with duty paid strainer to obtain paint of different shades. It has been clarified that the above process does not amount to manufacture on the ground that the process of tinting does not bring about any new commodity with different commercial identity as the resultant emulsion/enamel point and hence, it may not be appropriate to consider this process as amounting to manufacture. While clarifying the above position, the Board has applied the ratio of the classic judgment of the Apex Court in the DCM case wherein it has been held that "Manufacture implies change, but every change is not manufacture and yet every change in an article is a result of treatment, labour and manipulation, but something more is necessary and there must be transformation; a new and different article must emerge having distinctive name, character and use."

In another Circular dated 13.07.1992, the Board has clarified that conversion of plain plastic granules into coloured plastic granules would not amount to manufacture.

In all these cases, the commercial identify of the ingredients and the finished product remained the same. In the present case also, the process of mixing two or more essences in certain proportions does not bring into existence any new product. The essence remained essences only and because of the different proportion, a distinct flavour is imparted to the resultant product. That cannot make the process as manufacture."

19. To arrive at the said conclusion, it placed reliance on ***CCE Chennai v. Fountain Consumer Appliances Limited 2004 (171) ELT 329 (Tri-Chennai), Tega India Limited v. CCE, Calcutta II (2004) 2 SCC 727, State of Maharashtra v. Mahalaxmi Stores (2003) 1 SCC 70***, and ***CCE Chennai v. Titanium Equipment & Anode Manufacturing Co. Ltd. 2002 (142) ELT 162 (Tri-Chennai)***

20. We have heard Mr. Yashank Adhyaru, learned senior counsel for the appellant and Ms. Indu Malhotra and Mr. S.K. Bagaria, learned senior counsel for the respondents. It is submitted by the learned counsel for the appellant that the final product 'food flavour' is classified under Chapter Heading 3302.10 and hence is excisable and dutiable. According to him, the assessee itself had admitted that it was selling the food flavours to independent bottling units and that establishes the marketability of the product. The assessee had claimed that its product is custom made and the formula is a trade secret and further it had availed CENVAT credit of inputs for payment of duty on final product. As the facts had been established, contend Mr. Adhyaru, the finished goods are sold on different code numbers assigned by the assessee, hence a new identity is established. Learned senior counsel would urge to construe a particular good has been manufactured, the goods must be capable of being bought and sold in the market, as has been held by this Court in ***Bhor Industries Ltd.*** (supra), ***Jagatjit Industries Ltd.*** (supra) and ***Servo Med Industries Pvt. Ltd. v. CCE 2015 (6) SCALE 137***. Learned senior counsel would contend that mixing which is prefixed by simple fixing by the assessee is not acceptable because the process of mixing can amount to manufacature as has been held in Gopal Zarda Udyog (supra) and O.K. Play (India) Limited (supra). As far as the royalty is concerned, it is urged by him that the assessee had received royalty charges from buyers who are contract bottling units and separate assessable value is computable for this type of customers.

21. In the instant case, as the revenue would put forth, the royalty/service charge received by the assessee under the various agreement with other manufacturers of IMFL forms additional consideration and is includible in the assessable value under Section 4 of the Act read with Valuation Rules as has been held in Pepsi Foods Ltd. (supra).

22. Mr. Bagaria and Ms. Indu Malhotra, learned senior counsel appearing for the assessee in their turn would contend that the food flavours were odoriferous compounds and are prepared by way of simple mixing of various essences (odoriferous substances) purchased from different suppliers and thus the food flavours that were obtained from simple mixing of duty paid essences/flavours done manually cannot be regarded as manufacture, for by such mixing no new commodity having existing name, character or use emerges. That apart, in around 26% of the cases even such mixing was not done and the flavours purchased from the market were cleared as such merely after relabeling and when flavours fall under the Heading No. 3302.10, no extended meaning is to be given to the expression 'manufacture'. Reliance has been placed on circular no. 247/81/96-Cx. dated 03.10.1996 issued by CBEC, Ministry of Finance, Government of India, which had clarified that the process of tinting of base emulsion/enamel paint with strainers to obtain paint of different shades does not amount to 'manufacture' within the meaning of Section 2(f) of the Act. It was their further submission that tribunal has rightly made the comparison between the process of tinting of base emulsion/enamel paint with strainers with the process of mixing two or more essences in certain preparation to arrive at the conclusion that no process of manufacture was involved in the case of the assessee. It was urged that it is well settled that mere mention of the goods in one of the Entries in the schedule to the Central Excise Tariff would not render them exigible to excise duty unless the twin tests of manufacture and marketability were satisfied. It has also been repeatedly held that manufacture implies a change but every change was not manufacture and in order to attract the concept of manufacture, there must be transformation of the raw materials into a new and different article having a distinctive name, character and use. In that regard reliance has been placed on ***Union of India v. Ahmedabad Electricity Co. Ltd & others. (2003) 11 SCC 129***, ***Hindustan Zinc Ltd. v. CCE, Jaipur (2005) 2 SCC 662***, ***Delhi Cloth & General Mills*** (supra) and ***Satnam Overseas Ltd. v. CCE, New Delhi (2015) 13 SCC 166***. It has been emphatically put forth that a simple process of mixing do not amount to manufacture as there is no transformation of the inputs into any new or differential commodity and for the said proposition, reliance has been placed on ***CCE, Bangalore-II v. Osnar Chemicals Private Ltd. (2012) 2 SCC 282***, ***CCE, Meerut v. Goyal Gases (P) Ltd. (2000) 9 SCC 571*** and ***Crane Betel Nut Powder Works v. Commr. of Customs & Central Excise, Tirupathi (2007) 4 SCC 155***. Further stand of the respondent is that in respect of the Sub-Heading 3302.10 which covers food flavours, no artificial or extended meaning has been given to the expression 'manufacture' by the legislature by exercising the power under Section 2(f)(iii) and hence, it cannot be regarded as manufacture. Heavy reliance is placed on the decisions in ***Shyam Oil Cake Ltd. v. CCE-I, New Delhi, Jaipur(2005) 1 SCC 264*** and ***CCE v. S.R. Tissues (P) Ltd. (2005) 6 SCC 310*** As far as the stand of the revenue that the assessee at one point of time had accepted the process of mixing and manufacture and paid the duty under the specified heading, it would debar the assessee to raise the plea again is sans substance as the Commissioner himself had admitted that food flavours were prepared by simple manual mixing of odoriferous substances but by the assessee. That apart, the assessee was entitled to raise such an issue in respect of the subsequent period and is not stopped to do so in view of the decision in ***Municipal Corporation of City of Thane v. Vidyut Metallics Ltd. (2007) 8 SCC 688*** As far as the conclusion arrived at by the tribunal that two show cause notices dated 11.04.2002 and 30.04.2004 are barred by limitation, no fault can be found with it inasmuch as the said show cause notices were issued after expiry of one year from the period covered thereunder and hence, plea barred by limitation as provided under Section 11A(1) of the Act. As regards the limitation, learned senior counsel for the respondent have drawn inspiration from ***Cosmic Dye Chemical v. CCE, Bombay (1995) 6 SCC 117, Padmini Products v. CCE, Bangalore (1989) 4 SCC 275, Pushpam Pharmaceuticals Co. v. CCE, Bombay 1995 Supp (3) SCC 462*** and ***Uniworth Textiles Ltd. v. CCE, Raipur (2013) 9 SCC 753***. As far as penalty imposed under Section 11AC is concerned, it is urged that there has been no fraud or collision or wilful mis-statement or suppression of facts or contravention of provisions of the Act or the Rules with the intention to evade payment of duty and, therefore, the authorities could not have mechanically imposed the penalty and the tribunal is absolutely justified in setting aside the same.

23. From the factual narration and the submissions advanced at the Bar, we find three issues, namely, (i) whether there was 'manufacture', (ii) whether there was nexus in royalty received and the price paid for the food flavour sold, and (iii) whether two show cause notices have been correctly determined to be barred by limitation by the tribunal. First we shall advert to the issue of 'manufacture'. The submission of the respondent is that they are mixing essences and in some cases merely selling food flavours purchased from third parties without any processing and in any case mixing of essences under no circumstances can amount to manufacture. The said submission is founded on the principle that by such process of mixing change takes place and no separate and marketable commodity comes into existence. Various judgments have been cited at the Bar to explain the term 'manufacture'. It is well settled in law that 'manufacture' implies change, but every change is not manufacture, such change is normally a result of treatment, labour and manipulation. In this regard, we think it appropriate to to reproduce a passage from ***Union of India v. Delhi Cloth & General Mills Co. Ltd. AIR 1963 SC 791*** wherein the Constitution Bench quoted with approval from an American judgment in ***Anheuser-Busch Brewing Assn. v. United States 207 US 556 (1908)***, which is to the following effect:-

> *"'Manufacture' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."*

24. In Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), ***Ernakulam v. Pio Food Packers1980 Supp. SCC 174***, a three-Judge Bench while interpreting Section 5-A(1)(a) of the Kerala General Sales Tax Act, 1963 opined that:-

> *"There are several criteria for determining whether a commodity is consumed in the manufacture of another. The generally prevalent test is whether the article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. Commonly manufacture is the end result of one more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity."*

25. After so stating, the Court posed the question: does the processing of original commodity brings into existence a commercially different and distinct article? In that context, the three-Judge Bench analysed the ratio in previous decisions and stated thus:-

> *"Some of the cases where it was held by this Court that a different commercial article held come into existence include* ***Anwarkhan Mahboob Co. v. State of Bombay AIR 1961 SC 213*** *(where raw tobacco was manufactured into bidi patti),* ***A. Hajee Abdul Shakoor and Co. v. State of Madras AIR 1964 SC 1729*** *(raw hides and skins constituted a different commodity from dressed hides and skins with different physical properties),* ***State of Madras v. Swastik Tobacco Factory AIR 1966 SC 1000*** *(raw tobacco manufactured into chewing tobacco) and* ***Ganesh Trading Co., Karnal v. State of Haryana (1974) 3 SCC 620****, (paddy dehusked into rice). On the other side, cases where this Court has held that although the original commodity has undergone a degree of processing it has not lost its original identity include* ***Tungabhadra Industries Ltd., Kurnool v. CTO AIR 1961 SC 412****, (where hydrogenated groundnut oil was regarded as groundnut oil) and* ***C.S.T., U.P., Lucknow v. Harbilas Rai and Sons (1968) 21 STC 17 (SC)*** *(where bristles plucked from pigs, boiled, washed with soap and other chemicals and sorted out in bundles according to their size and colour were regarded as remaining the same commercial commodity, pigs bristles)."*

26. Adverting to the fact situation which pertained to pineapple fruit and canned pineapple slices, the Court held:-

> *"In the present case, there is no essential difference between pineapple fruit and the canned pineapple slices. The dealer and the consumer regard both as pineapple. The only difference is that the sliced pineapple is a presentation of fruit in a more convenient from and by reason of being canned it is capable of storage without spoiling. The additional sweetness in the canned pineapple arises from the sugar added as a preservative. On a total impression, it seems to us, the pineapple slices must be held to possess the same identity as the original pineapple fruit."*

27. In ***Collector of Customs, Bombay v. S.H. Kelker & Co. Ltd. (2000) 10 SCC 478*** , the assessee had imported an organic chemical "abbalide" which the assessee had classified under Chapter 29 and not as an odoriferous substances under Heading 33.02 of the tariff. Reversing the judgment of the tribunal, it was held by the Court as under:-

> *"10. Heading 33.02 of the Tariff refers to*
>
> > *"mixtures of odoriferous substances and mixtures (including alcoholic solutions) with a basis of one or more of these substances, of a kind used as raw materials in industry".*
>
> *It envisages (i) mixtures of odoriferous substances, and (ii) mixtures (including alcoholic substances) with a basis of one or more of odoriferous substances and the mixtures are of a kind used as raw materials in industry. In the present case, it has been found that the chemical, in its original form, consists of various isomers and is an odoriferous substance. It has been dissolved in diethyl phthalate, a non-odoriferous substance. The odoriferous substance is the basis of the mixture. It is not disputed that the mixture is used as a raw material, viz., perfume in industry. It can, therefore be said that the compound is a mixture with a basis of an odoriferous substance and since it is for use as a raw material in industry, it would be classifiable under Heading 33.02.*

11. In our opinion, the Tribunal was in error in construing clause 1(e) of Chapter 29 and in holding that the said product was classifiable under Chapter 29. Clause 1(e) of the Notes in Chapter 29 postulates that if a product mentioned in sub-clauses (a), (b) or (c) of clause 1 is dissolved in a solvent and the solution constitutes a normal and necessary method of putting up these products adopted solely for the reasons of safety or for transport then the product would fall within Chapter 29 only if the solvent does not render the product particularly suitable for specific use rather than for general use. As per the certificate dated 19-9-1986 issued by the manufacturer the compound imported by the respondents cannot be used in the condition it is manufactured and for making it suitable for use and for retaining its suitability for use it has to be dissolved in a solvent. The need of a solvent is not only for the purpose of storage and transport of the chemical, but also for retaining the suitability of the product after it is manufactured. Its dissolution in the solvent is necessary in order to make the product suitable for use. Since the product is used only for perfumery and not for any other purpose, it has to be held that the product is intended for specific use only. In view of clause 1(e) of the Notes in Chapter 29, it may be held that the product imported by the respondents cannot be regarded as falling under Chapter 29 of the Tariff and would fall under Heading 33.02 in Chapter 33 of the Tariff. We are, therefore, unable to uphold the impugned judgments of the Tribunal."

28. We have referred to the decisions to highlight the concept of essential change in the character of the product. In this regard, useful reference may be made to the authority in ***Income Tax Officer, Udaipur v. Arihant Tiles and Marbles Pvt. Ltd. (2010) 2 SCC 699***, the Court after referring to ***CIT v. M/s N.C. Budharaja and Company 1994 Supp (1) SCC 280***, opined thus:-

"25. Applying the above tests laid down by this Court in Budharaja case to the facts of the present cases, we are of the view that blocks converted into polished slabs and tiles after undergoing the process indicated above certainly results in emergence of a new and distinct commodity. The original block does not remain the marble block, it becomes a slab or tile. In the circumstances, not only is there manufacture but also an activity which is something beyond manufacture and which brings a new product into existence and therefore, on the facts of these cases, we are of the view that the High Court was right in coming to the conclusion that the activity undertaken by the respondent assessees did constitute manufacture or production in terms of Section 80-IA of the Income Tax Act, 1961.

26. Before concluding, we would like to make one observation. If the contention of the Department is to be accepted, namely, that the activity undertaken by the respondents herein is not manufacture, then, it would have serious revenue consequences. As stated above, each of the respondents is paying excise duty, some of the respondents are job-workers and the activity undertaken by them has been recognised by various government authorities as manufacture. To say that the activity will not amount to manufacture or production under Section 80-IA will have disastrous consequences, particularly in view of the fact that the assessees in all the cases would plead that they were not liable to pay excise duty, sales tax, etc. because the activity did not constitute manufacture."

29. At this juncture, it is obligatory to state that revenue has heavily relied upon on ***Pepsi Foods Ltd.*** (supra). In the said case the Court had found that the consideration payable as royalty was an inevitable consequence of the sale of the concentrate and in such circumstances the price paid for the concentrate was not the sole consideration paid by the purchaser. The terms of agreement had obligated the bottler to purchase the concentrate from the assessee alone, use the assessees' trade mark on the bottled beverage and also pay royalty for assessees' trade mark at the specified percentage of the maximum retail price of each bottle. In the given circumstances and evidence available, it was held that the price actually paid for sale of concentrate was not to be the determinative factor as the price paid for the sale of concentrate, i.e., invoice would not be determinative, as the royalty payment was inseparably linked with the sale consideration paid for the concentrate. The indelible nexus and connect was established to club the two considerations.

30. The respondent, in its turn, has placed reliance on ***Shyam Oil Cake Ltd.*** (supra) and contended that mere separate tariff entry is not indicative whether the same amounts to manufacture, for tariff entry can be merely for the purpose of identifying the product and the rate applicable to it. In such case, it would not have the effect of rendering the specified commodity to be excisable. Section 2(f) defines "manufacture" and by deeming effect, a process can amount to manufacture. Albeit, for a deeming provision to come into play, it must be specifically stated that a particular process amounts to manufacture. The respondent has also placed reliance on Circular no. 495/61/99-CX-3 dated 22nd November, 1998, but the said circular relates to compound preparation during the course of manufacture of agarbati. In the context of the said product, clarification was issued. It is noticeable that the respondent had pleaded a different factual matrix which has been accepted by the tribunal, albeit, without referring to specific details. General observation and broad brush approach need not reflect true consideration paid for all transactions. A far greater and deeper scrutiny of facts is required before forming any opinion, one way or the other. It would be wrong to be assumptuous without full factual matrix being lucent and absolutely clear.

31. Recently, in ***The Additional Commissioner of Commercial Taxes, Bangalore v. Ayili Stone Industries Etc. Etc. Civil Appeal Nos. 1983-2039 of 2016 dated 18.10.2016*** the Court was dealing with the issue of grant of exemption on polished granite stone and the view of the revenue that the polished and unpolished granite stones are under separate Entries in the second schedule to the Karnataka Sales Tax Act, 1957. The question arose before this Court pertained to interpretation of polished and granite stones and in that context the concept of manufacture and after referring to various judgments, it held that:-

> *"28. There is a distinction between polished granite stone or slabs and tiles. If a polished granite stone is used in a building for any purpose, it will come under Entry 17(i) of Part S of the second schedule, but if it is a tile, which comes into existence by different process, a new and distinct commodity emerges and it has a different commercial identity in the market. The process involved is extremely relevant. That aspect has not been gone into. The Assessing Officer while framing the assessment order has referred to Entry 17(i) of Part S but without any elaboration on Entry 8. Entry 8 carves out tiles as a different commodity. It uses the words "other titles". A granite tile would come within the said Entry if involvement of certain activities is established. To elaborate, if a polished granite which is a slab and used on the floor, it cannot be called a tile for the purpose of coming within the ambit and sweep of Entry 8. Some other process has to be undertaken. If tiles are manufactured or produced after undertaking some other activities, the position would be different. A finding has to be arrived at by carrying out due enquiry and for that purpose appropriate exercise has to be undertaken. In the absence of that, a final conclusion cannot be reached."*

32. In the case at hand, as we find from the order of the tribunal the exact nature of the process undertaking and how mixing is undertaken and the process involved is not discernible and has not been ascertained and commented. It remains ambiguous and inconclusive. The respondent claims that about 26% of the sales of odoriferous substances were brought from third party and sold without any modification or process. These are all questions of fact which must be first authenticated and the actual factual position validated. The tribunal has answered the question in favour of the respondent without the background check as to the actual process involved and undertaken. Different flavours may have different processes.

33. The third issue relates to the issue of limitation. The tribunal has held that certain show cause notices are barred by limitation. Mr. Bagaria, learned senior counsel has submitted that the said conclusion is absolutely flawless, if the dates are taken into consideration. For the aforesaid purpose, he has commended us to the decision already referred to hereinabove. As we notice, the tribunal on this score has also not scrutinized the dates appropriately, but has returned a cryptic finding.

34. In view of the aforesaid analysis, we are constrained to remit the matter to the tribunal for reconsideration of the aforesaid aspects on the basis of observations made hereinabove and the law in the field. However, we may proceed to state that we have not expressed anything on the merits of the case including the imposition of penalty and interest. We expect the tribunal shall advert to each and every facet in detail so that this Court can appropriately appreciate the controversy.

35. Resultantly, the appeal is allowed and the matter is remitted to the tribunal for fresh determination. There shall be no order as to costs.

SGA LAW OFFICES

PUNJAB & HARYANA HIGH COURT

CWP NO. 1020 OF 2005

Go to Index Page

SINGHI OIL AND GENERAL MILLS
Vs
STATE OF PUNJAB AND OTHERS

RAJESH BINDAL AND HARINDER SINGH SIDHU, JJ.

19th December, 2016

HF ▶ Assessee

Rectification application is maintainable only when mistake is apparent on face of record and not on mere change of opinion.

RECTIFICATION APPLICATION– MAINTAINABILITY OF – ASSESSMENT YEAR 1999-2000 - NOTIFICATION ISSUED IN 2002 HELD TO OPERATE RETROSPECTIVELY BY TRIBUNAL CONSIDERING IT TO BE CLARIFICATORY IN NATURE – RECTIFICATION APPLICATION FILED BY REVENUE ON GROUNDS THAT ASSESSMENT YEAR BEING MUCH LATER , NOTIFICATION ISSUED PRIOR TO IT CANNOT BE APPLIED RETROSPECTIVELY TO THE ADVANTAGE OF APPELLANT – ARGUMENT ACCEPTED HOLDING THAT PRIOR ORDER PASSED BY DIFFERENT OFFICER STOOD PATENTLY WRONG RENDERING MAINTAINABILITY OF RECTIFICATION – WRIT FILED QUESTIONING POWER TO RECTIFY – HELD RECTIFICATION IS POSSIBLE ONLY WHEN MISTAKE IS APPARENT ON FACE OF IT – PRESENT CASE PERMITS TWO OPINIONS –PREVIOUS ORDER CANNOT BE CONSTRUED TO BE A MISTAKE APPARENT OF FACE OF RECORD – NO RECTIFICATION IS POSSIBLE U/S 21 –A EVEN IF THE ORDER IN QUESTION IS ERRONEOUS – WRIT ALLOWED - *SECTION 21-A OF PUNJAB GENERAL SALES TAX ACT, 1948*

Facts

For the assessment year 1999-2000, assessment was framed. Subsequently refund was disallowed on suo motto revision. The appellant filed a Revision petition before Tribunal which was allowed holding that the notification dated 15/4/2002 was issued to rectify omission of S.5(3) in Rule 29(xii) which was clearly an inadverdent mistake. Hence the notification in question being clarificatory in nature ought to be given retrospective effect. However, the revenue argued that the assessment year being of later years, the notification cannot operate retrospectively to the appellant's advantage. On rectification application being filed, the different presiding officer allowed the rectification holding that the order holding said amendment in Rule 29(xii) to be operating retrospectively was a patently wrong order.

Aggrieved by this, a writ is filed before High court contending that the rectification was not maintainable.

Held:

It is an issue which can have two opinions. Such a decision cannot be construed to be a mistake apparent on the record and was not liable to be rectified in exercise of power u/s 21-A of the Act. Even if the earlier view is erroneous view in law, it cannot be corrected u/s 21-A . The Tribunal allowing the rectification application of the respondent state is set aside and the order dated 30/4/2004 is restored.

Cases referred:

- *CCE V. RDC Concrete (I) (P) Ltd,, (2011) 12 SCC166*
- *Mepco Industries Ltd. v. CIT, (2010) 1 SCC 434*

Present: Mr. K.L.Goyal, Sr. Advocate with
Mr. Sandeep Goyal, Advocate for the petitioner.
Mr. Piyush Bansal, DAG, Punjab.

******

HARINDER SINGH SIDHU. J.

1.The short question raised in this petition is whether the Sales Tax Tribunal, Punjab, Chandigarh (for brevity, 'the Tribunal') could have validly exercise its jurisdiction while deciding the rectification application, filed under Section 21A(2) of the Punjab General Sales Tax Act, 1948 (for brevity, "the Act").

2. The petitioner is a registered dealer under the Sales Tax laws and is engaged in the business of manufacturing and sale of oil. For Assessment Year 1999-2000, it filed its returns of sales with the Assessing Authority, Ropar. The Assessing Authority framed assessment vide order dated 13.3.2002 and the refund of Rs. 1,07,382/- was issued. Subsequently, the Revisional Authority, in exercise of its powers under Sections 21(1) of the 1948 Act initiated suo motu action to rectify the order. After hearing the petitioner the Revisional Authority, Ropar, disallowed the claim of refund vide order dated 30.7.2003.

3. The petitioner filed Revision Petition before the Tribunal. The question before the Tribunal was the implication of the notification dated 15.4.2002 whereby Section 5(3) had also been included in Rule 29(xii) of the Punjab General Sales Tax Rules, 1949 (for short "the Rules") which deals with deduction of purchase value of goods subjected to tax from the gross turnover of the assessee.

4. Before the Tribunal, it was submitted on behalf of the petitioner that it had purchased cotton seeds for crushing to extract oil. Such purchase of cotton seeds attracts tax at first stage of sale as per Schedule-D. Accordingly, the cotton seed had already suffered tax when it was crushed to extract oil. The oil and oil cakes manufactured out of cotton seeds were also taxable at first sale as provided under Section 5(1-A) of the Act. It was explained that generally all goods were taxable at last stage of sale except those notified under Section 5(1-A) and Section 5(3). Section 5(1-A) deals with non-declared goods while 5(3) deals with declared goods. It was argued that as per the scheme of the Act, if the finished manufactured goods were taxable at the point of its sale/purchase then the dealer would be entitled to claim rebate of tax paid on the raw materials used for such manufacture. After 3.5.1993, all declared goods which were earlier taxed at the point of last stage of sale came to be taxed at the first stage and this was duly notified under Section 5(3) of the Act. Hence, after 3.5.1993, all declared goods notified under Section 5(3) and non-declared goods notified under Section 5(1-A) were to be taxed at the first stage of sale. Though Rule 29(i) was amended on 9.7.1993 to provide for deduction from the gross turnover of a registered dealer of the sale or purchase of goods which had already been subjected to tax under Section 5(1-A) or Section 5(3), but Rule 29(xii) only provided for deduction of the purchase value of goods which had been subjected to tax under Section 5(1-A). It was only on 15.4.2002 that Section 5(3) was included in Rule 29(xii).

5. It was argued before the Tribunal that the omission of Section 5(3) in Rule 29(xii) was clearly an inadvertent mistake, which was rectified vide notification dated 15.4.2002. Hence, the notification dated 15.4.2002 being in the nature of a clarification ought to be given retrospective effect. On behalf of the Revenue it was argued that as Section 5(3) was incorporated in Rule 29(xii) only on 15.4.2002, it did not cover the case of the petitioner, which related to the assessment year 1999-2000.

6. The Tribunal in its order dated 30.04.2004 held in favour of the petitioner observed as under:-

> "*… … … It is true that the notification dated 15.3.2002 including section 5(3) in rule 29(xii) is subsequent to the assessment proceedings of this case and have not been given retrospective effect. However, since under Rule 29(xi) goods notified under section 5 (1-A) and 5(3) are both eligible for adjustment of the tax already suffered when they are subsequently sold or purchased it seems that the claim of the Id. counsel for the applicant that section 5(3) had not been earlier included along with section 5(1-A) in rule 29 (xii) by oversight and that notification dated 15.4.2002 which so included it was issued by way of a clarification is credible. Accepting this logic the ruling of the Hon'ble Supreme Court of India referred to above would support his prayer. No contrary ruling of the Supreme Court on this issue has been brought to my notice. Hence, the petitioner's plea has to be accepted. Accordingly, this Revision petition succeeds, and the tax already paid on cotton seed is directed to be either refunded to the petitioner or adjusted against his subsequent return.* "

7. The Assessing Authority filed an application dated 12.8.2004 being Rectification Application No.34 of 2004-2005 under Section 21A of the Act for rectification of the order dated 30.4.2004. This time, the Tribunal, presided over by different officer, allowed the rectification application vide order dated 11.11.2004 holding as under:-

> "8. *I have considered the facts of the case and submissions made by both the parries. I am convinced that the arguments advanced by the Learned counsel for the State are more appropriate to the facts of the case. A perusal of the order of the Tribunal clearly indicates that the Tribunal stretched its imagination beyond the legal frame work provided by law and has gone out of its way to make the amendment made in rule 29(xii) vide notification dated 15.4.2002 applicable retrospectively, whereas no such provision had been made. The arguments advanced by the Learned Counsel for the dealer that the provisions under rule 29(xi) and 29(xii) were similarly and applicable to each case are not valid. A reading of the two rules clearly brings out that rule 29(xi) is applicable to trading activity and rule 29(xii) applies to a manufacturing unit. The Learned Counsel for the dealer has accepted that the unit owned by the dealer was a manufacturing unit. Accordingly under no stretch of imagination the logic could be extended to the application of rule 29(xi) to the extent case. Since the rule 29(xii) during the assessment year contained only provision for covering item covered by rule 5(1-A) relating to undeclared goods, there is no justification for granting any relief to the dealer by including items covered by section 5(3) of the Act. Under these circumstances, I am fully convinced that the order of the Tribunal was patently a wrong order arrived at on the basis of a wrong interpretation of law which could clearly be termed as a patent error which makes the correct rectification application entertainable. Accordingly, the rectification application is accepted. The order of the Tribunal is modified and it*

> *is held that the revision petition filed by the dealer did not merit any consideration and the same is dismissed.*"

It was held that the earlier order making the said amendment in rule 29(xii) applicable retrospectively, without there being any such provision, was a patently wrong order, based on a wrong interpretation of law which could clearly be termed as a patent error. Hence the rectification application was maintainable. The earlier order dated of the Tribunal dated 30.4.2004 was modified and the revision petition was dismissed.

8. Ld. Counsel for the petitioner has argued that the order passed in the rectification application is wholly unsustainable. He argued that the jurisdiction under Section 21- A of the Act is limited to rectifying any mistake apparent from the record, but in this case the successor Presiding officer has entered into the merits of the controversy. The order reflects a change of opinion. The Ld. State counsel on the other hand argued that the earlier order of Tribunal was clearly illegal on the face of it. The Tribunal has no jurisdiction to declare a provision which is to operate prospectively as having retrospective application. No process of reasoning was required to discern this defect of the earlier order which was clearly apparent from the record.

9. We have heard Ld. Counsel for the parties and perused the record.

10. Section 21-A is reproduced below:

> ***"Section 21-A***
>
> *[RECTIFICATION OF MISTAKES]*
>
> *(1) The Commissioner or the officer on whom powers of the Commissioner under sub-section (1) of Section 21 have been conferred by the State Government may, at any time within two years from the date of any order passed by him, of his own motion, rectify any mistake apparent from the record and shall within a like period rectify any such mistake which has been brought to this notice by any person affected by order;*
>
> *Provided that no such rectification shall be made if it has the effect of enhancing the tax or reducing the amount of refund, unless the Commissioner or the Officer on whom powers of the Commissioner under sub-section (1) of section 21 have been conferred by the State Government has given notice in writing to such person of his intention to do so and has allowed such person a reasonable opportunity of being heard.*
>
> *(2) The provisions of sub-section (1) shall apply to the rectification of a mistake by a Tribunal as they apply to the rectification of a mistake by the Commissioner.*
>
> *(3) Where any such rectification has the effect of reducing the amount of the tax or penalty, the Commissioner shall in the prescribed manner order the refund of the amount so due to such person.*
>
> *(4) Where any such rectification has the effect of enhancing the amount of the tax or penalty or reducing the amount of the refund, the Commissioner shall order the recovery of the amount due from such person in the manner provided for in section 11 and 11-B (Relevant Rules 63, 64)"*

As per this section, the Tribunal may, at any time within two years from the date of any order passed by it, rectify any mistake apparent from the record. This may be done either on its own motion or on the matter being brought to its notice by any person.

11. Similar provisions in different statutes have been the subject matter of consideration of Courts.

12. In ***CCE* v. *RDC Concrete (I) (P) Ltd,, (2011) 12 SCC166*** The Supreme Court was construing Section 35-C(2) of the Central Excise Act, 1944 as per which the Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectify any mistake apparent from the record, amend any order passed by it and shall make such amendments if the mistake is brought to its notice by the Commissioner of Central Excise or the other party to the appeal.

13. Explaining the scope of the power under the aforesaid section, it was held that power to rectify a mistake should be exercised when the mistake is a patent one and is quite obvious. The mistake cannot be such which can be ascertained by a long-drawn process of reasoning. It was held that while rectifying a mistake, an erroneous view of law or a debatable point cannot be decided. It was specifically held that incorrect application of law can also not be corrected. The Court observed as under:

> *"**21.** This Court has decided in several cases that a mistake apparent on record must be an obvious and patent mistake and the mistake should not be such which can be established by a long-drawn process of reasoning. In T.S. Balaram v. Volkart Bros this Court has already decided that power to rectify a mistake should be exercised when the mistake is a patent one and should be quite obvious. As stated hereinabove, the mistake cannot be such which can be ascertained by a long-drawn process of reasoning. Similarly, this Court has decided in ITO v. Asok Textiles Ltd., that while rectifying a mistake, an erroneous view of law or a debatable point cannot be decided. Moreover, incorrect application of law can also not be corrected. "*

Similarly, in ***Mepco Industries Ltd. v. CIT, (2010) 1 SCC 434,*** it was held that decision on debatable point of law cannot be treated as "mistake apparent from the record".

> *"**18.** Before concluding, we may state that in Deva Metal Powders (P) Ltd. v. CTT, a Division Bench of this Court held that a "rectifiable mistake" must exist and the same must be apparent from the record. It must be a patent mistake, which is obvious and whose discovery is not dependent on elaborate arguments. To the same effect is the judgment of this Court in CCE v. ASCII Ltd., wherein it has been held that a "rectifiable mistake" is a mistake which is obvious and not something which has to be established by a long-drawn process of reasoning or where two opinions are possible. Decision on debatable point of law cannot be treated as "mistake apparent from the record". "*

14. Now, the question as to whether a particular amendment to a statute or a Rule is prospective or retrospective being clarificatory / declaratory, has at times posed considerable difficulty in interpretation. The High Courts and Hon'ble the Supreme Court have grappled with this question, with the contending parties urging one view or the other. It is, thus, clearly an issue of a debatable nature on which two views are possible. Hence, whether the amendment to Rule 29(xii) vide notification dated 15.4.2002 was merely clarificatory and hence retrospective in nature, being a decision on a debatable question of law, could not have been construed to be a mistake apparent on the record and was not liable to be rectified in exercise of power under Section 21-A of the Act. Even if the earlier view was an erroneous view in law, it was, as per the aforementioned decisions, not amenable to be corrected in exercise of the power under Section 21-A.

15. For the aforementioned reasons, the writ petition succeeds. The order dated 11.11.2004 (Annexure P-8) passed by the Tribunal allowing the rectification application of the respondent State is set aside and order dated 30.04.2004 (Annexure P-6) is restored.

16. The writ petition is accordingly disposed of.

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PUNJAB & HARYANA HIGH COURT

Go to Index Page

VATAP NO. 53 OF 2009

UNIQUE CHAINS
Vs
STATE OF PUNJAB AND ANOTHER

RAJESH BINDAL AND HARINDER SINGH SIDHU, JJ.

19th December, 2016

HF ▶ Assessee

Jurisdiction to impose penalty under Section 51 for roadside checking cannot be invoked if a person is not transporting the goods in a goods vehicle even if no declaration is made at the ICC

PENALTY – ATTEMPT TO EVADE TAX – GOODS VEHICLE – PERSON FOUND CARRYING GOLD ORNAMENTS WHILE TRAVELLING BY TRAIN – GOODS DETAINED AND PENALTY IMPOSED ON THE GROUND OF NON-REPORTING OF TRANSACTION AT THE ENTRY POINT IN PUNJAB – APPEALS FILED UPTO TRIBUNAL – ON APPEAL BEFORE HIGH COURT – JURISDICTION U/S 51 DOES NOT EXTEND TO TRANSPORTATION OF GOODS BEING CARRIED OTHER THAN BY WAY OF GOODS VEHICLE – FIRST PROVISO TO SECTION 51(2) HAS TO BE READ IN CONJUNCTION WITH MAIN PROVISION OF SECTION 51(2) – OBLIGATION TO GIVE INFORMATION AT ICC ONLY UPON PERSON TRANSPORTING GOODS IN A GOODS VEHICLE – PROCEEDINGS INITIATED AGAINST THE APPELLANT WITHOUT JURISDICTION – APPEALS ALLOWED – PENALTY QUASHED. - *SECTION 51 OF PUNJAB VAT ACT 2005*

Information was received by Excise and Taxation Officer, Mobile Wing, Amritsar from GRP Amritsar that their team had detained one Ankit Mehra who was carrying the gold ornaments while travelling by Dadar Express train from Amritsar to Patiala. The goods were accordingly detained under Section 51 and after finding that these were not covered by proper and genuine documents as required under Section 51(2) of the Act, a penalty of Rs. 39,07,235/- was imposed. The penalising officer came to the conclusion that there was a violation of Section 51(2) and 51(4) of the Act with a view to avoid tax as the goods were taxable and meant for trade. On appeal filed before the Tribunal, it was pleaded by the appellant that checking under section 51 could have been made only if the goods are being transported in a goods vehicle and since in the present case it has been detained in a train, the provisions of Section 51(2) and 51(4) of the Act were not attracted. The Tribunal held that as per proviso to Section 51(2), the person selling the goods from within or outside the State in the course of inter-state trade or commerce is also required to furnish a declaration as may be prescribed and the requirement of travelling in a goods vehicle does not apply to him. On appeal before the High Court,

Held:
There is no denial to the fact that in terms of Section 51(2) and 51(4) of the Act, the detention of the goods can be made only for the goods which are being transported in a goods vehicle Thus,

the only question remains is as to whether first proviso to Section 51(2) which does not contain the words "goods vehicle" leads to a different conclusion.

On a plain reading of the aforesaid provisions, it is clear that first proviso to section 51(2) puts an additional obligation upon the "owner or person incharge of the goods vehicle" of carrying the declaration in addition to other documents required under Section 51(2). Proviso to section 51(2) cannot be thus read disconjunctively from section 51(2). The proviso thus also necessarily applies to goods being carried in a goods vehicle though being carried for the purpose specified in the proviso i.e. being sold within or outside the State, in the course of inter-state trade or commerce.

The conclusion is further fortified when provisions of Rule 63 and 64 of the Rules are taken note of. In Form VAT 12, the name and address of the transport company is required to be entered in addition to GR/TR No. As well as date. Even the Vehicle No. is also required to be mentioned and if the provision was meant to cover a person transporting goods otherwise than in a goods vehicle, then there was no need for Form VAT-12 to contain the columns. Further, Rule 64(1) which requires submission of documents and Form at the ICC repeatedly makes reference to the term "owner or person incharge of the goods vehicle". These provisions also indicate that the obligation to submit the declaration in terms of first proviso to Section 51(2) of the Act is also on the owner or person incharge of the vehicle of the goods and not any other person.

The proceedings initiated against the appellant are held to be without jurisdiction and orders of the Tribunal as well as lower authorities are quashed.

Cases referred:

- *International Switch Gears vs. Union Territory of Chandigarh & others (1998) 109 STC 75 (P&H)*
- *State of Punjab and another Vs. M/s Indo Arya Central Transport Ltd. and others VAT Appeal No. 73 of 2009*

Present: Mr.Sandeep Goyal, Advocate for the Appellant.
Mr.Piyush Bansal, DAG, Punjab.

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HARINDER SINGH SIDHU. J.

1. The assessee is in appeal before this Court against the order dated 20.02.2009 passed by the Value Added Tax Tribunal, Punjab (for short 'the Tribunal) in Appeal (VAT) No.73 of 2008-09 raising the following substantial questions of law: -

"(i) Whether under Section 51(6)(b) of the Punjab VAT Act 2005, a person bringing the goods from outside the State of Punjab in the Railway train, is required to report the goods at ICC?

(ii) Whether it is right to conclude that under proviso 1 to Section 51(2), the words 'goods vehicle' is not there when in the first line of Section 51(2) itself it is written "The owner or person in charge of a goods vehicle"

(iii) Whether on the facts and circumstances of the case, any offence has been committed for which penalty u/s 51(7)(c) has been imposed?

(iv) Whether a dealer who is not registered under the provisions of the Punjab VAT Act 2005 will be a casual trader u/s 31(5) of the Act ibid and for its contravention, any penalty u/s 51(7)(c) can be imposed upon him?"

2. The facts in brief as recorded in the order of the Tribunal are that on 12.01.2008 information was received by ETO(MW) Amritsar from one Shri Gurdial Singh, SHO, GRP, Amritsar that their team had detained one Ankit Mehra who was carrying gold ornaments while travelling by Dadar Express train from Amritsar to Patiala. The ETO went to Beas Station and checked Ankit Mehra under Section 51 of the Punjab Value Added Tax Act, 2005 (for short 'the Act'). Gold ornaments were found from a bag in his possession. The examination of the goods revealed that these were not covered by proper and genuine documents as required under Section 51(2) of the Act. The gross weight of the gold ornaments was 8,135.320 gms and net weight 8,060.820 gms. The value thereof was assessed to be Rs.76,61,246/-. The detaining officer issued show cause notice to the owner of the goods under Section 51(6)(b) of the Act. None appeared despite proper service. The matter was referred by the Detaining Officer to the Designated Officer for action under Section 51 of the Act. The AETC(MW) came to the conclusion that there was violation of Sections 51(2) and 51(4) of the Act with a view to avoid tax as the goods were taxable and meant for trade. The plea of the appellant that these goods were samples to show for getting orders or that these ornaments were prepared from gold given by the parties, was not accepted. Vide order dated 25.1.2008 passed by the AETC (MW) Amritsar penalty of Rs. 39,07,235/- was imposed under Sections 51(7)(c) read with Section 51(12) of the Act. The appeal filed by the appellant was dismissed by DETC(A), Jalandhar Division vide order dated 20.5.2008. The further appeal to the Tribunal was dismissed vide order dated 20.2.2009.

3. Before the Tribunal, it had been argued on behalf of the appellant that the provisions of Sections 51(2) and (4) of the Act were applicable only in a case where goods were being transported in a 'goods vehicle'. Relying on the definition of 'goods vehicle' as given in Section 2(1) of the Act, it was argued that a vehicle running upon fixed rails, was specifically excluded from the definition of 'goods vehicle'. Accordingly, as Ankit Mehra from whose possession, the gold ornaments were found, was travelling in a train, the provisions of Sections 51(2) and 51(4) of the Act were not attracted. Reliance was placed on a decision of this Court in ***International Switch Gears vs. Union Territory of Chandigarh & others (1998) 109 STC 75 (P&H)***. The Tribunal, however, did not agree with the appellants. It was held that the judgment in ***Switch Gears*** case (supra) could not be relied upon as it was in relation to a case under Section 14-B of the Punjab General Sales Tax Act, 1948 (for short 'the Sales Tax Act'), as applicable to the Union Territory of Chandigarh, which at the relevant time did not have a proviso similar to that in Section 51(2) of the VAT Act. The first proviso to Section 51(2) of the Act reads as under:-

> *"Provided that a person selling goods from within or outside the State in the course of inter-state trade or commerce shall also furnish or cause to be furnished a declaration with such particulars, as may be, prescribed. "*

4. The Tribunal held that as in the proviso, the term used is 'person' and not 'person in-charge of a goods vehicle', it means that any person selling goods within or outside the State in the course of inter-state trade or commerce has to furnish or cause to be furnished a declaration with such particulars, as may be prescribed. As per Rule 63 of the Punjab Value Added Tax Rules, 2005 (for short "the Rules") the declaration referred to in the first proviso to Section 51(2) of the Act shall contain the particulars as prescribed in Form VAT 12. Such declaration was to be given at the nearest Information Collection Centre (for short "ICC") or Check Post. Though there was an ICC outside Railway Station, Ludhiana, no such declaration was furnished. The argument of the Counsel for the appellant that he be considered to be a casual dealer under Section 31 of the Act or that he be treated to be an unregistered dealer, liable to penal action under Section 52 and 53 of the Act was rejected. It was held that as the goods were intercepted in transit, there was clear violation of the first proviso of sub-section (2) of Section 51 of the Act. Accordingly, the appeal was dismissed.

5. It is this order of the Tribunal which has been impugned in the present appeal.

6. Sh. Sandeep Goyal, Ld. Counsel for the appellants has argued that the Tribunal has erred in relying on the proviso to distinguish the present case from that of ***Switch Gear's*** case (supra). He argued that the proviso cannot be read in the manner as done by the Tribunal. The proviso has to be interpreted in the context of the entire Section 51, particularly sub section (2) thereof, which is concerned only with the liability of the 'owner or person in charge of a goods vehicle' in respect of 'goods being carried in the goods vehicle'. It is only vide the Punjab Value Added Tax (Amendment) Act, 2013 which come into force on 9.4.2013, that Section 51 of the Act has been amended. After this amendment in Section 51(2) of the Act, the words used are "the owner or person In charge of the goods or a goods vehicle" instead of only 'the owner or person Incharge of the goods vehicle' at the relevant time. Similar amendments have been made in Sub sections (3), (4) and (5) of Section 51 of the Act. Also in sub-section (2) of Section 51 of the Act after the words "as are being carried in the goods vehicle" the words "or by any other means" have been inserted which now reads as "as are being carried in the goods vehicle or by any other means". The first proviso has also been amended and the words "intrastate or" has been inserted. He further argued that recently interpreting Section 51 (as it existed before the 2013 amendment) this Court in ***VAT Appeal No. 73 of 2009*** titled "***State of Punjab and another Vs. M/s Indo Arya Central Transport Ltd. and others***" decided on 16.08.2016 has opined that goods being transported in a vehicle running upon fixed rails could not be detained under Section 51 of the Act.

7. Accordingly, Ld. Counsel has argued that as the checking was done in respect of goods not being carried in a goods vehicle (railway train) the entire proceedings were without jurisdiction. He forcefully contended that whatever may be the interpretation of the provision after the 2013 amendment, the finding of the Tribunal on the basis of the un-amended provision cannot sustain.

8. Ld. State Counsel on the other hand, while supporting the reasoning of the Tribunal argued that the first proviso to Section 51(2) of the Act will be applicable to any person carrying goods in the course of inter-state trade irrespective of whether the goods were being transported in a goods vehicle or not. Hence, if the declaration in terms of the proviso is not furnished, the the checking, detention and imposition of penalty etc. on such a person would be legal and valid even if the goods were not being transported in a goods vehicle.

9. We have heard Ld. Counsel for the parties and perused the record.

10. On the facts of the aforesaid appeals, the following substantial question of law arises for decision:

> *Whether the use of the term 'person' in the first proviso to Section 51(2) as distinct from 'the owner or person in charge of a goods vehicle' in Section 51(2) foists the obligation in terms of the proviso to furnish or cause to be furnished a declaration in the form prescribed, on any person selling goods in the course of inter-State trade or commerce even when such goods are not being transported in a 'goods vehicle' ?*

11. Section 51 of the Act as it existed at the relevant time is reproduced below:-

"S.51. ESTABLISHMENT OF INFORMATION COLLECTION CENTRES

(1) If, with a view to prevent or check avoidance or evasion of tax under this Act, the State Government considers it necessary so to do, it may, by notification, direct for the establishment of a check post or, information collection centre or both at such place or places, as may be specified in the notification.

(2) The owner or person Incharge of a goods vehicle shall carry with him a goods vehicle record, goods receipt, a trip sheet or a log-book, as the

case may be, and a sale invoice or bill or cash memo, or delivery challan containing such particulars, as may be prescribed, in respect of such goods meant for the purpose of business, as are being carried in the goods vehicle and produce a copy each of the aforesaid documents to an officer Incharge of a check post or information collection centre, or any other officer not below the rank of an Excise and Taxation Officer checking the vehicle at any place:

Provided that a person selling goods from within or outside the State in the course of inter-State trade or commerce, shall also furnish or cause to be furnished a declaration with such particulars, as may be prescribed:

Provided further that a taxable person, who sells or despatches any goods from within the State to a place outside the State or imports or brings any goods or otherwise receives goods from outside the State, shall furnish particulars of the goods in a specified form obtained from the designated officer, duly filled in and signed.

(3) At every check post or information collection centre or at any other place when so required by an officer referred to in sub-section (2), the driver or any other person Incharge of the goods vehicle shall stop the vehicle and keep it stationary, as long as may reasonably be necessary, and allow the officer Incharge of the check post or the information collection centre or the aforesaid Establishment of information collection centres or check posts and inspection of goods in transit. 43 officer to check the contents in the vehicle by breaking open the package or packages, if necessary, and inspect all records relating to the goods carried, which are in the possession of the driver or any other person, as may be required by the aforesaid officer, and if considered necessary, such officer may also search the goods vehicle and the driver or other person Incharge of the vehicle or of the goods.

(4) The owner or person Incharge of a goods vehicle entering the limits or leaving the limits of the State, shall stop at the nearest check post or information collection centre, as the case may be, and shall furnish in triplicate a declaration mentioned in sub-section (2) alongwith the documents in respect of the goods carried in such vehicle before the officer Incharge of the check post or information collection centre. The officer Incharge shall return a copy of the declaration duly verified by him to the owner or person Incharge of the goods vehicle to enable him to produce the same at the time of subsequent checking, if any:

Provided that where a goods vehicle bound for any place outside the State passes through the State, the owner or person Incharge of such vehicle shall furnish, in duplicate, to the officer Incharge of the check post or information collection centre, a declaration in respect of his entry into the State in the prescribed form and obtain from him a copy thereof duly verified. The owner or person Incharge of the goods vehicle, shall deliver within forty-eight hours the aforesaid copy to the officer Incharge of the check post or information collection centre at the point of its exit from the State, failing which, he shall be liable to pay a penalty to be imposed by an order, made by the officer incharge of the check post or information collection centre equal to fifty per cent of the value of the goods involved:

Provided further that where the goods carried by such vehicle are, after their entry into the State, transported outside the State by any other vehicle or conveyance, the burden of proving that the goods have actually moved out of the State, shall lie on the owner or person Incharge of the vehicle:

Provided further that no penalty shall be imposed unless the person concerned has been given an opportunity of being heard.

(5) At every station of transport of goods, bus stand or place of loading or unloading of goods, when so required by the Commissioner or the designated officer, the driver or the owner of the goods vehicle or the employee of transport company or goods booking agency, shall produce for examination, transport receipts and all other documents and accounts books concerning the goods carried, transported, loaded, unloaded, consigned or received for transport, maintained by him in the prescribed manner. The Commissioner or the 44 designated officer shall, for the purpose of examining that such transport receipts or other documents or account books are in respect of the goods carried, transported, loaded, unloaded or consigned or received for transport, have the powers to break open any package, or packages of such goods.

(6)(a) If the officer Incharge of the check post or information collection centre or any other officer as mentioned in sub-section (2), has reasons to suspect that the goods under transport are meant for trade and are not covered by proper and genuine documents as mentioned in sub section (2) or sub-section (4), or that the person transporting the goods is attempting to evade payment of tax, he may, for reasons to be recorded in writing and after hearing the person concerned, order detention of the goods alongwith the vehicle for a period not exceeding seventy-two hours. Such goods shall be released on furnishing of security or executing a bond with sureties in the prescribed form and manner by the consignor or the consignee, if registered under this Act to the satisfaction of the officer on duty and in case the consignor or the consignee is not registered under this Act, then on furnishing of a security in the form of cash or bank guarantee or crossed bank draft, which shall be equal to the amount of penalty leviable rounded upto the nearest hundred.

(b) If the owner or the person Incharge of the goods has not submitted the documents as mentioned in sub-sections (2) and (4) at the nearest check post or information collection centre, in the State, as the case may be, on his entry into or before exit from the State, such goods shall be detained alongwith the vehicle for a period not exceeding seventy-two hours subject to orders under clause (c) of sub-section (7).

(7)(a) The officer detaining the goods under sub-section (6), shall record the statement, if any, given by the consignor or consignee of the goods or his representative or the driver or other person Incharge of the goods vehicle and shall require him to prove the genuineness of the transaction before him in his office within the period of seventy-two hours of the detention. The said officer shall, immediately thereafter, submit the proceedings alongwith the concerned records to the designated officer for conducting necessary enquiry in the matter;

(b) *The designated officer shall, before conducting the enquiry, serve a notice on the consignor or consignee of the goods detained under clause (a) of sub-section (6), and give him an 45 opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to avoid or evade the tax due or likely to be due under this Act, he shall, by order, impose on the consignor or consignee of the goods, a penalty, which shall be equal to thirty per cent of the value of the goods. In case he finds otherwise, he shall order release of the goods and the vehicle, if not already released, after recording reasons in writing and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings;*

(c) *The officer referred to in clause (b), before conducting the enquiry, shall serve a notice on the consignor or consignee of the goods detained under clause (b) of sub section (6) and give him an opportunity of being heard and if, after the enquiry, such officer is satisfied that the documents as required under subsections (2) and (4), were not furnished at the information collection centre or the check post, as the case may be, with a view to attempt to avoid or evade the tax due or likely to be due under this Act, he shall by order, for reasons to be recorded in writing, impose on the consignor or consignee of the goods, penalty equal to fifty per cent of the value of the goods involved. In case, he finds otherwise, he shall order release of the goods for sufficient reasons to be recorded in writing. He may, however, order release of the goods and the vehicle on furnishing of a security by the consignor or the consignee in the form of cash or bank guarantee or crossed bank draft for an amount equal to the amount of penalty imposable and shall decide the matter finally within a period of fourteen days from the commencement of the enquiry proceedings;*

(d) *The officer incharge of a check post or information collection centre or any other officer referred to in sub section (2), may receive the amount of cash security as referred to in clause (a) of sub-section (6) and clause (c) of sub-section (7) and the amount of penalty imposed under sub-section (4) and clauses (b) and (c) of sub section (7) against a proper receipt in the prescribed manner.*

Explanation. *-The detained goods and the vehicle shall continue to be so detained beyond the period specified in sub sections (6) and (7), unless released by the detaining officer or enquiry officer against surety or security as provided for in these sub-sections or the penalty imposed, has been realized or the 46 enquiry officer orders release of the detained goods after enquiry, whichever is earlier. "*

12. It is not denied or sought to be argued by the respondent-State, that the reference in Sections 51(2) and 51(4) of the Act being only to 'the owner or person In charge of a goods vehicle', there is no power in terms of these provisions to detain the goods being transported otherwise than in a 'goods vehicle'. In view of the specific exclusion of 'vehicle running upon fixed rails' from the definition of 'goods vehicle' there would be no jurisdiction to detain goods being transported on a railway train as held by this Court in ***Indo Arya Central Transport Ltd.'s case*** (supra)

13. The question is whether the first proviso to Section 51(2) leads to a different conclusion?

14. In our view the answer has to be in the negative.

15. The first proviso has already been reproduced above. As per Section 51(2) of the Act 'the owner or person in charge of a goods vehicle' is required to carry with him a goods vehicle record, goods receipt, a trip sheet or a log- book, a sale invoice or bill or cash memo etc in respect of goods meant for the purpose of business which are being carried in the goods vehicle and produce a copy of these documents at the check post or information collection centre or to any other officer not below the rank of Excise and Taxation Officer checking the vehicle at any place.

16. As per first proviso to Section 51(2) a person selling goods from within or outside the State in the course of inter-state trade or commerce shall also furnish a declaration with such particulars, as may be prescribed.

17. On a plain reading of the above provisions it appears that Section 51(2) of the Act obliges each and every 'owner or person in charge of a goods vehicle' to carry with him the documents prescribed therein in respect of goods meant for the purpose of business and being carried in the goods vehicle.

18. But in respect of goods being sold from within or outside the State in the course of inter-state trade or commerce the first proviso imports an additional condition of furnishing a declaration with such particulars as may be prescribed. Thus the purpose of the proviso appears to be to require furnishing of an additional declaration in respect of goods being sold from within or outside the State in the course of inter-state trade or commerce. This declaration would be in addition to the documents required to be carried in respect of every goods vehicle carrying goods for the purpose of business. It is made clear by the use of the words 'shall also' in the first proviso.

19. In view of the admitted position that sub-section (2) of Section 51 of the Act applies only in respect of goods being carried in a goods vehicle and the language of the proviso clearly importing an additional condition of furnishing a declaration in the form prescribed, over and above the requirement of sub-Section (2) of Section 51 of the Act, the proviso necessarily takes its colour from Section 51(2) of the Act. Meaning thereby that those covered by the first proviso are not absolved of the requirement of sub-section (2) of Section 51 of the Act. Now as sub-section (2) of Section 51 of the Act applies to goods being carried in a goods vehicle, the proviso which prescribes an additional obligation over and above sub-section (2) of Section 51 of the Act, would be rendered meaningless if it applied only to persons not using a goods vehicle for transport of the goods, for such a person transporting goods other than in a goods vehicle, (may be carrying them on his own person), cannot be required to carry all the documents contemplated in Section 51(2) of the Act, most of which namely goods vehicle record, goods receipt, trip sheet or log book are in relation to a goods vehicle only. Accordingly, it has to be held that the proviso also necessarily applies to goods being carried in a goods vehicle though being carried for the purpose specified in the proviso i.e., being sold within or outside the State, in the course of inter-state trade or commerce.

20. Thus, merely the use of the term 'person' in the proviso instead of the term 'owner or person in charge of the goods vehicle' would not support the conclusion of the Tribunal that it applies to any person selling goods within or outside the State in the course of inter-state trade or commerce even though such goods are not being transported in a goods vehicle.

21. This conclusion is further fortified when provisions of Rule 63 and 64 of the Rules are taken note of.

22. Rules 63 and 64 of the Rules fall in Chapter -IX titled ***`Transportation of Goods'***. Rule 63 is titled as ***`Delivery challan and declaration'***. As per Rule 63(1) of the Rules, the declaration referred to in the first proviso to sub-section (2) of Section 51 of the Act, shall contain the particulars as are prescribed in Form VAT 12.

Form VAT 12 is reproduced below:

Form VAT – 12

(See rule 30, 63 & 64)

Declaration at ICC or check post

Name of ICC		ICC Code	
Serial No.		Import / Export	
Sr. No. of FORM VAT- 36		Date:	/ / 20
		Time:	

DECLARATION

1.	R.C. No of the Consignor	
(i)	Name & Complete Address of the Consignor	
3.	R.C. No of the Consignee	
(ii)	Name & Complete Address of the Consignee	
5.	Description of Goods	
6.	Name and Address of the Transport Company	
7.	GR/TR/Way Bill/Log Book/Trip Sheet Number	
8.	GR/TR/Way Bill/Log Book/Trip Sheet Date	/ / 2 0
9.	Vehicle Number	
10.	Name and Address of the owner of the person incharge of goods	
11.	Bill / Delivery Challan Number	
12.	Bill / Delivery Challan Date	/ / 2 0
13.	Value of Goods	**Rs.**
14.	Destination of Goods	

Signature of the Officer-incharge alongwith his Code No. and Stamp appended after the check.

Signature or thumb impression of the person transporting the goods.

Rule 64 of the Rules is titled ***'Procedure for furnishing information at the Information Collection Centre'***

The same is reproduced below:

*"**64. Procedure for furnishing information at the Information Collection Centre -***

(1) The owner or person in charge of the goods vehicle shall submit before the authorised person at the Information Collection Centre :-

(a) transporter's copy of VAT invoice or retail invoice or delivery challan, as the case may be;

(b) declaration for transport of goods to and from the State in Form VAT-36, in duplicate; and

(c) Goods Receipt or trip sheet or way bill or log book, as the case may be.

(2) The authorised person at the Information Collection Centre, shall enter the relevant information in the computer and generate serially numbered computerized printouts of Form VAT-12 or Form VAT-35, in duplicate, whereafter the documents mentioned in sub-rule(l), shall be returned to the person in charge of the goods along with the aforesaid Forms in duplicate.

(3) The authorised person shall charge such sum, as may be fixed by the Commissioner from time to time as service charges for issuing the computer printouts in Form VAT- 12 or Form VAT-35, as the case may be, from the owner or the person in charge of the goods vehicle.

(4) The owner or the person in charge of the goods vehicle,

shall submit the documents referred in rub-rule(l), in original and copies thereof along with the duly signed copies of Form VAT-12 or Form VAT-35, as the case may be, to the officer in charge of the Information Collection Centre:

Provided that no such copies of the documents, shall be required where declaration in Form VAT-36 is submitted.

(5) The officer-in-charge of the Information Collector Centre, shall retain the original foil of declaration furnished in Form VAT-36 and a copy of Form VAT-12 or Form VAT-35, as the case may be, and shall return the duly stamped and signed copies of the following documents to the owner or person in charge of the goods vehicle, namely;

(a) a copy each of the duplicate copy of VAT invoice or retail invoice or delivery challan and trip sheet or log book or way bill and goods receipt;

(b) a copy of Form VAT-12 or Form VAT-35, as the case may be; and

(c) duplicate foil of Form VAT-36:

Provided that where Form VAT 36 is not required to be submitted under these rules, the officer in charge shall also retain copies of the documents as mentioned in clause (a) and (b). "

At Sr. No.6 of the Form VAT-12, the name and address of the Transport Company is required to be entered. At Sr. No. 7 the GR/TR/Way Bill/Log Book/Trip Sheet Number is to be entered. At Sr. No. 8 the GR/TR/Way Bill/Log Book/Trip Sheet date is to be filled. At Sr. No.9, the Vehicle Number is required. If the proviso were meant to cover a person transporting goods otherwise than in a goods vehicle, then there was no need for Form VAT 12 to contain these columns with reference to the Transport Company, GR/TR/Way Bill/Log Book/Trip Sheet Number and date and the Vehicle number.

23. Further, sub-rule (1) of Rule 64 of the Rules which requires submission of documents and Forms at the Information Collection Centre, sub-rule (3) which deals with charging sums for issuing computer print outs in Form VAT-12 or Form VAT-35, sub- rule (4) which requires that the documents referred to in sub-rule (1) along with the duly signed copies of Form VAT-12 or Form VAT-35 be submitted to the officer in charge of the Information Collection Centre, sub-rule (5) which prescribes that the officer-in-charge of the Information Collection Centre shall retain the original foil of the declaration furnished and return the duly stamped and signed copies thereof, all use the term 'owner or person in charge of the goods vehicle'.

24. This further indicates that just as in Section 51(2) of the Act, the obligation to submit the declaration in terms of the first proviso to Section 51(2) of the Act is also on 'the owner or person in charge of the goods vehicle' and not of any other person who is not 'the owner or person in charge of the goods vehicle'

25. Hence, it is opined that in terms of the provisions at the relevant time, the use of the term 'person' in the first proviso to Section 51(2) of the Act as distinct from 'the owner or person in charge of a goods vehicle' in Section 51(2) of the Act does not foist obligation of furnishing a declaration in terms of the first proviso, on any person when goods are not being transported in a goods vehicle. It is opined that as per the scheme of the Section 51 (at the relevant time), the declaration in terms of the first proviso to Section 51(2) is required to be furnished only by 'the owner or person in charge of a goods vehicle' in respect of goods as are being carried in the goods vehicle for the purpose as mentioned in the first proviso.

26. In the light of the answer to this question, the appeal is allowed. The proceedings initiated against the appellant are held to be without jurisdiction.

27. The orders of the Tribunal dated 20.2.2009 are quashed. The order dated 25.1.2008 of the AETC (MW) Amritsar, imposing penalty of Rs. 39,07,235/- under Sections 51(7)(c) read with Section 51(12) of the Act on the appellant and the order dated 20.5.2008 of DETC (A), Jalandhar Division dismissing the appeal of the appellant are also quashed.

SGA
LAW OFFICES

PUNJAB VAT TRIBUNAL

Go to Index Page

APPEAL NO. 8 OF 2014

E-MEDITEK T.P.A. SERVICES LTD.
Vs
STATE OF PUNJAB

JUSTICE A.N. JINDAL, (RETD.)
CHAIRMAN

8th December, 2016

HF ▶ Revenue

Non-reporting of goods and absence of documents leads to imposing of penalty u/s 51.

PENALTY – CHECK POST/ ROAD SIDE CHECKING – ATTEMPT TO EVADE TAX – GOODS IN TRANSIT CHASED AND BROUGHT BACK - NO DOCUMENTS PRODUCED EXCEPT A LETTER HEAD OF APPELLANT COMPANY WITHOUT NUMBER AND DATE – PENALTY IMPOSED U/S 51(7) AND 51(12) OF THE ACT – APPEAL FILED CONTENDING GOODS TO BE CAPITAL GOODS NOT MEANT FOR TRADE AS THE APPELLANT HAD BROUGHT THESE GOODS FROM HARYANA FOR IMPLEMENTING OF BHARAT SWASTHYA BIMA SCHEME – GOOD ALLEGED TO HAVE BEEN TAKEN BACK TO GURGAON FROM JALANDHAR AFTER COMPLETING WORK – HELD: CERTIFICATE OF INVENTORY PRODUCED NOT IN CONSONANCE WITH RULE 57 OF RULES – NO CERTIFICATE OF DATE AND COMPLETION OF WORK IN JALANDHAR PRODUCED TO CO RELATE WITH THE INVOICE PRODUCED – ABSENCE OF INVOICE OF OTHER GOODS SHOWN IN THE LETTER – NON REPORTING AT ICC AND NON PRODUCTION OF DOCUMENTS TAKEN INTO ACCOUNT –CONTRADICTORILY, GOODS TAKEN TO JALANDHAR FROM GURGAON (AS PER THE LETTER) INSTEAD OF APPELLANT CLAIM OTHERWISE -REPORTING OF GOODS BEING TAKEN OUT OF PUNJAB IS MANDATORY – PENALTY RIGHTLY IMPOSED U/S 51 (7) BUT DELETED U/S 51(12) FINDING IT WITHOUT ANY REASONS – APPEAL DISMISSED WITH MODIFICATION- *S. 51 OF PUNJAB VAT ACT, 2005.*

Facts

Penalty u/s 51(7) and 51(12) of the Act has been imposed as the driver of the vehicle did not stop the vehicle and was chased to bring back the goods. The goods were not accompanied by any challan or invoice except a letter head of the appellant company without any date and number. The appeal filed is dismissed. Aggrieved by the order, an appeal is filed before Tribunal.

It is contended that the goods were only capital goods not meant for trade as required by appellant for implementing the Rashtriya Swasthya Bima Yojna Scheme. The goods were allegedly sent back to appellant company in Gurgaon from Jalandhar after completion of work in Jalandhar.

Held:

Examination of the certificate produced showing inventory and quantity reveals that it is not in consonance with Rule 57 of the Rules. No proper invoice showing purchase and date of purchase of these goods is produced. In absence of any certificate and date of completion of work in Punjab, the documents produced cannot be co related to the letter.

Contradictorily, the letter shows movement of goods from Gurgaon to Punjab whereas the appellant alleges it otherwise.

Vehicle was not stopped at ICC and the goods being not accompanied by proper documents shows that attempt to evade tax is there.

Section 51(2) makes it clear that reporting is imperative while taking goods out of Punjab. Therefore, penalty u/s (7) is rightly levied. But no reason for imposing penalty u/s 51(12) is observed.

Therefore, appeal is dismissed with the modification that the order of penalty u/s 51(7) of the Act is maintained whereas penalty u/s 51(12) is deleted.

Present: Mr. K.L. Goyal, Sr. Advocate alongwith Mr. R.K. Malhotra, Advocate Counsel for the appellant.
Mr. B.S. Chahal, Dy. Advocate General for the State.

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JUSTICE A.N. JINDAL,(RETD.) CHAIRMAN

1. The Designated Officer, Information Collection Centre, Shamboo (Export) at Mehmadpur vide his order dated 15.9.2010 imposed a penalty to the tune of Rs.1,26,000/- U/s 51 (7) (c) and Rs. 34,650/- U/s 51 (12) of the Punjab Value Added Tax Act, 2005 (herein referred as the Act of 2005).

2. On the following grounds that:-

1. The driver/incharge of the goods did not stop the vehicle inspite the signal given to him.
2. The vehicle was chased and brought back at the ICC.
3. The goods were not accompanied by any delivery challan, invoice or other documents except a note on letter head of the appellant company which was without number and date.
4. No information was furnished at the ICC.
5. The driver had admitted his fault that no bill/ invoice was accompanied by the goods and no information was furnished at the ICC by him.

3. On appeal against the order dated 15.9.2010, the first appellate authority dismissed the same. Hence this regular second appeal.

4. In order to assail the impugned orders passed by the authorities below, the counsel for the appellant has contended that the appellant is a Public Ltd. Company and is carrying on business of providing services as Third Party Administrator in respect of Medical Insurance cover rendered by the general insurance company of India. It was allotted the job of Third Party Administrator for Implementation of execution of Rashtriya Swasthya Bima Yojna Scheme meant for BPL Families of Jalandhar by M/s United India Insurance Company Ltd., Chandigarh. The goods in question were capital goods not meant for trade but were brought to Jalandhar for implementation of the Scheme and after completion of work at Jalandhar, these were shifted to Gurgaon in vehicle bearing No. PB-08BP-1912 and were accompanied by cover note which clearly indicated that the goods were transported back to the parent place of the company i.e. Gurgaon. It was further argued that the goods being capital goods not meant for trade, were not taxable. There was no statutory obligation on the part of the appellant under the Punjab Value Added Tax Act, 2005 to furnish information at any ICC at the time of leaving the State of Punjab. The appellant is not trader but a service provider. It has further been contended that the following goods were purchased through the in voices:-

1. 5 Laptops, 5 Carry bags, 5 Web Cameras, 1 HDD External vide invoice dated 25 January, 2010.
2. 4 Laptops and 4 Carry bags through invoice dated 23 February, 2010.
3. 15 Gen Set through invoice dated 13 May, 2010.
4. 45 Evolis Colour print, 45 Bi-meteric Scanner, 45 Smart Card Reader through invoice dated 6.8.2009.

5. Since the goods were going back after completion of the project, therefore, there was no requirement for furnishing information at ICC consequently, a prayer for acceptance of the appeal has been made.

6. To the contrary, the State Counsel has argued that the goods were sent from Punjab to Gurgaon and same were not accompanied by any document. The mandatory provisions of law have not been complied with at the time of transferring the goods which were meant for trade, therefore, the penalty was rightly imposed.

7. Having given my thoughtful consideration to rival contentions no merit could be found in the arguments advanced by the counsel for the appellant. Since the goods were used by the appellant in connection with business of implementing the project which has been taken over by the appellant for consideration therefore, it can't be said that the goods were not meant for trade.

8. Now the question arises as to "whether the goods were accompanied by proper and genuine any document"?

9. It may be mentioned that even if the goods are sent back from Punjab to outside the State of Punjab, otherwise then in the course of trade, it must be accompanied by the delivery note/ delivery challan containing such particulars as may be prescribed in respect of such goods meant for the purpose of business. Section 45 (4) of the Act of 2005 reads as under:-

"45 (4) Where the goods are transferred otherwise than by way of sale, the taxable or registered person shall in respect of the goods transferred or consigned by him or on his behalf, issue to the consignee a delivery challan in such manner and containing such particulars as may be prescribed.

10. Besides Section 45 and 51 of the Act Rule 57 of the framed under the Act of 2005 prescribe a procedure and the contents delivery challan which the consignor has to prepare and hand over to the carrier of the goods record at the time of dispatch of the goods. Rule 57 reads as under:-

RULE 57 PARTICULARS AND INFORMATION TO BE MENTIONED IN A DELIVERY CHALLAN (Section 45 and 51):

(1) A delivery challan for transfer of goods other than by way of sale, shall be issued from duly bound book, expect when the challans are prepared on computer or any other electronic or mechanical device. It shall be at least in triplicate. The first

copy shall be for purchase or consignee. The second copy shall be for the transporter. The last copy shall retain by the consignor. The serial number shall be printed by a mechanical process.

(2) A delivery challan shall contain the following particulars:-

(a) The words/' Delivery Challan shall be prominently printed on the document.

(b) Serial number of form VAT 36 (from the date of its introduction by the Chandigarh Administration) in case of interstate transaction.

(c) Date of transfer of goods.

(d) Name, address and registration number of the consignee.

(e) Description of goods, weight, quantity, estimated price per unit and total estimated value of goods.

(f) Mode of transportation of goods and details thereof.

(g) Signature of consignor

11. In this case, no such delivery challan as prescribed under Section 45 or Rule 57 was accompanying the goods however, an unnumbered and undated letter was accompanying the goods which reads as under:-

E-MEDITEK
—(TPA) SEVICES LIMITED

To whomsoever it May concern

This is to certify that we are transferring our inventory from Gurgaon to Jalandhar branch for Rashtriya Swasthya Bima Yojna Project. Goods are not having any commercial value and not for sale purpose.

Sr.No.	Particulars	Qty.
1.	Laptop with adopter	11
2.	Mouse	11
3.	Web Camera	11
4.	MSO30Q	11
5.	Card Readers	12
6.	Smart Cards	5000
7.	Generator	5
8.	Printer with dopter	5
9.	Zem Plus	6
10.	Ribbons	15
11.	Extn, Boards	6
12.	USB Hubs	6

Sd/-

Authorized Signatory
For-E-Meditek (TPA) Services Ltd.,
Gurgaon, Haryana.

12. A critical examination of the certificate, it transpires that it is not in consonance with Rule 57 of the Rules.

13. Even otherwise the appellant has failed to prove, by any genuine document, as to through which invoice 11 Laptops, 11 Web Cameras, 12 Card Readers, 5000 Smart Cards and 5 Generators were purchased and these are the same goods which were sent back to the destination. The invoices so produced before me reveal that 9 Laptops and 5 Web Cameras and 15 Gen Sets were once purchased. It is not established as to when these goods were dispatched to Punjab the inventory shows 11 Laptops and 5 Gen Sets alongwith many other goods. Whereas, the invoices reflect 9 Laptops and 15 Gen Sets. No purchase invoices regarding the other goods have been placed on the record. No evidence regarding purchase of 5000 Smart Card readers, 12 Card readers have been led. In the absence of any date of the certificate and the date of completion of the work and the date when those were received in Punjab, it is difficult to correlate these invoices with the letter bearing title (To whom it may concern). The case of the appellant is that he was taking the goods from (Jalandhar) Punjab to Gurgaon whereas the letter is otherwise and it shows that the goods were taken from Gurgaon to Jalandhar.

14. Admittedly, the driver did not stop the vehicle at the ICC and jumped the ICC without furnishing information regarding the delivery note. Admittedly, the goods were not accompanied by any other document. The goods were chased and brought back at the ICC, therefore, the intention to evade the tax is apparent, it would also be pertinent to mention here that certificate regarding dispatch of the goods from Jalandhar to State of Punjab has been placed on record which is contradictory the certificate produced earlier. It contains the contents i.e. 7 Laptops, 4 Gen Sets and 3 Printers. As such it appears that the appellant had clear intention to evade the tax and was taking protection of manipulated and contradictory documents. Had it been a government company, then everything would have been in procedure as well as in black and white.

15. Since, it is clear from Section 51 (2) that the appellant was required to report the goods while taking the same out of the Punjab, therefore, the violation of Section 51 (2) and (4) of the Punjab Value Added Tax Act, 2005 would attract penalty.

16. Having gone through the impugned orders the same appear to be well reasoned and well founded as far as Section 51 (7) (c) however, there are no reasons to impose the penalty U/s 51 Punjab Value Added Tax Act, 2005.

17. Resultantly this appeal is dismissed with the modification that the order of penalty U/s 51(7)(c) of the Punjab Value Added Tax Act 2005 is maintained, whereas, the penalty U/s 51(12) of the Act is deleted.

18. Pronounced in the Open Court.

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HARYANA TAX TRIBUNAL

Go to Index Page

STA 05/2015-16

JINDAL TRADERS
Vs
STATE OF HARYANA

JUSTICE L.N. MITTAL, (RETD.) CHAIRMAN
SUKHPAL SINGH KANG, MEMBER
SACHIN JAIN, MEMBER

19th December, 2016

HF ▶ Assessee

Subsequent sales under Section 3(b) of CST Act 1956 can be made even in case of pre-existing contracts.

INTER-STATE SALE – SUBSEQUENT SALE – SALES UNDER SECTION 3(b) READ WITH SECTION 6(2) – PRE-EXISTING CONTRACTS – SALES MADE OUTSIDE STATE OF HARYANA DURING TRANSIT BY TRANSFER OF DOCUMENT OF TITLE TO THE GOODS PURCHASED FROM OTHER STATES – CONDITIONS REGARDING FURNISHING OF FORM FULFILLED UNDER SECTION 6(2) – REVISION MADE HOLDING THAT ASSESSEE DOES NOT FULFIL THE CONDITIONS OF SUBSEQUENT SALES FALLING UNDER SECTION 3(b) HOLDING THAT SALES ARE COVERED UNDER SECTION 3(a) OF CST ACT – ON APPEAL BEFORE TRIBUNAL – SECTION 3(b) OF CST ACT DOES NOT BAR PRE-EXISTING CONTRACTS FOR SUBSEQUENT SALES – TITLE OF THE GOODS SHOULD BE TRANSFERRED DURING TRANSIT – ASSESSEE ENTITLED TO EXEMPTION FROM TAX UNDER SECTION 6(2) OF CST ACT – IF SALES ARE FALLING UNDER SECTION 3(a), THEN ONLY THE STATE FROM WHICH THE MOVEMENT OF GOODS ORIGINATED HAS THE POWER TO LEVY AND COLLECT THE TAX – HARYANA HAS POWER TO COLLECT TAX WHERE MOVEMENT OF GOODS ORIGINATED FROM INSIDE THE STATE OF HARYANA – MATTER REMITTED BACK TO CONSIDER THE FACTUAL ASPECT – ORDER SET ASIDE – CASE REMANDED. *- SECTIONS 3(a), 3(b), 6(2) AND 9 OF CST ACT 1956*

The appellant assessee had made certain sales claiming the same to be subsequent sales under section 3(b) of CST act and claimed exemption under Section 6(2) of CST Act on the authority of furnishing Form "C" and Form "E1". The assessment was framed accepting the contention of assessee. The Revisional authority took up the matter and held that appellant-assessee does not satisfy all the conditions of subsequent sales falling under Section 3(b) of CST Act so as to qualify for exemption from tax under Section 6(2) of CST Act and the same are covered under Section 3(a) of CST Act and hence rejected the exemption allowed by Assessing Authority. On appeal before Tribunal,

Held:

Section 3(b) of CST Act does not bar pre-existing contracts for subsequent sales. It simply says that during the movement of goods from one State to another State, title over the goods could be transferred by way of transfer of documents of title of goods and on production of statutory declarations in "C" forms and Certificate in Form "E1", assessee is entitled for exemption under Section 6(2) of CST Act for subsequent sale. If the sale of assessee falls under section 3(b) of CST Act, then it is entitled for exemption under Section 6(2) of CST Act. However, if the sales made by assessee fall under section 3(a) of CST Act, then only the State from which the movement of goods originated has power to levy and collect the tax, if any, payable thereon.

In the instant case, the movement of goods originated from outside the State of Haryana as well as from inside the State of Haryana. Consequently, the State of Haryana would have the power to levy and collect the tax, if any, payable thereon where the movement of goods has originated from within the State. It would not have power to levy tax in case the movement of goods has originated from outside the State. Resultantly, the matter has to be remanded to Revisional Authority for fresh adjudication. Appeal allowed. Case remanded.

Present: Mr. Sandeep Goyal, Advocate Counsel for the Appellant
Sh. N.K. Gupta, Joint Director (Legal) for the State.

******

SACHIN JAIN, MEMBER

1. This appeal of appellant assessee M/s Jindal Traders, 18, Avtar Colony, Kunjpura Road, Karnal has been filed against the order dated 31-07-2014 passed by Revisional Authority, Karnal, thereby disallowing exemption claimed by appellant assessee under S. 6(2) of the Central Sales Tax Act, 1956 (hereinafter called the CST Act) on furnishing declaration Form 'C' and certificates in Form E-1 for subsequent sales and creating tax demand of Rs. 8743 under the Central Sales Tax Act, 1956 (the CST Act) for assessment year 2008-09 and directing the Assessing Authority to charge interest thereon which is automatic. Feeling aggrieved with the Revisional Order dated 31-07- 2014 this appeal has been filed by appellant assessee.

2. During revisional proceeding, Revisional Authority, Karnal observed that sales made by the appellant assessee do not satisfy all the conditions of subsequent sales falling under section 3(b) of the CST Act so as to qualify for exemption from tax under section 6(2) of the CST Act and the same are covered under section 3(a) of the CST Act and hence rejected the exemption allowed by the Assessing Authority for subsequent sales made worth Rs. 40,74,099/- against submitting of Form E-1 and sales are treated as interstate sales (ISS) against 'C' Forms.

Moot questions in this case is :-

> *Whether sales made outside the State of Haryana during transit by transfer of documents of title of the goods purchased from other state are subsequent sales as defined in section 3(b) of the CST Act and are exempt under S. 6(2) of the CST Act or are sales as defined in section 3(a) of the CST Act and are liable to tax under section 9 of the CST Act.*

3. Learned counsel for the appellant assessee has argued that goods were purchased from other state and during transit, sold to other parties outside the state of Haryana by way of transfer of documents of title of the goods and received 'C1 Forms from the purchasers and E-1 Forms from the sellers and both forms were furnished to the Assessing Authority and the goods never entered into the state of Haryana and the appellant assessee took only constructive delivery of the goods and not physical and transferred the ownership of the goods to the dealer of other state from outside the state of Haryana and hence the transfers are subsequent sales within the meaning of section 3(b) of the CST Act, and since requisite Forms 'C1 and FormjE-1 are furnished,, the appellant assessee is fully entitled for exemption under section 6(2) of the CST Act and relied upon the judgement of Hon'ble Supreme Court reported at (2009) 2-SCC-326 titled as A & G Projects and Technologies Ltd. Vs State of Karnataka and also the Order dated 22-09-2011 of this Tribunal in STA Nos. 871, 872, 914 of 2000-01 and 226 of 2003-04. Learned counsel further argued that transactions were effected outside the State of Haryana and never entered into the state of Haryana and therefore, learned Revisional Authority had no right and power to assess the same and it is only the Assessing Authority of the state of origin which is authorised to assess the same.

4. Learned State Representative relied upon the action of the Revisional Authority and argued that exemption has rightly been disallowed and charging of tax is correct and directions for levying of interest to the Assessing Authority are also correct as there was pre-existing contract.

5. We have heard the arguments advanced by both the parties carefully and also gone through the record on the file and after considering the gamut of the case, we hold that it is un-disputed that in many sales, delivery of the goods was taken physically directly by the subsequent dealers outside the state of Haryana without breaking the movement of goods purchased by appellant assessee from other state. The goods were never physically delivered to the appellant assessee. Moreover, the goods never entered into the territory of the State of Haryana and even not touched the limits of Haryana. The constructive delivery of the goods and transferred the ownership of the goods to subsequent dealers outside the State of Haryana by transfer of documents of title during the course of the movments of the goods from other state to appellant assessee. Thus sales fall under section 3(b) of the CST Act and are exempt under section 6(2) of the CST Act as appellant assessee has already produced the statutory declarations in 'C' Form and certificates in Form E-1 in support of his claim and satisfied the conditions for availing the exemption. Since transactions were effected outside the State of Haryana and never entered into the limits of Haryana, therefore, Revisional Authority has no jurisdiction to assess and tax- up the same under section 9 of the CST Act treating those sales within the meaning of section 3(a) of the CST Act.

6. Case of appellant assessee is fully covered with the judgement of Hon'ble Apex Court reported at (2009) 2-SCC-326 titled A & G Projects and Technologies Ltd. Vs State of Karnataka which is law of the land and applicable on all the courts and authorities and this case is also covered by the decision of this Tribunal in STA Nos. 871, 872, 914 of 2000-01 and STA No. 226 of 2003-04 titled BPCL Vs State of Haryana vide order dated 22-09-2011. In those appeals, it, was also held that exemption under section 6(2) of the CST Act is available to the assessee even on pre-existing contract.

7. In our opinion, section 3(b) of the CST Act does not bar pre-existing contracts for subsequent sales. It simply says that during the movement of goods from one state to another state, title over the goods could be transferred by way of transfer of documents of title of goods and on production of statutory declarations in 'C' Form and certificate in Form E-1, assesses is entitled for exemption under section 6(2) of the CST Act for subsequent sales.

8. In nutshell, if the sales made by the assessee fall under section 3(b) of the CST Act, the assessee is entitled to exemption from tax thereon under section 6(2) of the CST Act because it has fulfilled the other conditions thereof for exemption by submitting requisite forms and certificates. On the other hand, if the sales made by the assessee fall under section 3(a) of the CST Act, then only the state from which the movement of goods originated has power to levy and collect the tax, if any, payable thereon. In the instant case, during the course of hearing, counsel for the appellant submitted that in some sales, the movement of goods originated from outside the state of Haryana and also in some sales, the movement of goods originated from inside the state of Haryana. Consequently, in respect of sales in which movement of goods originated from inside the state of Haryana, this state has power to levy and collect the tax, if any, payable thereon whereas for sales in which movement of goods originated from outside the state has power to levy and collect the tax, if any, payable thereon whereas for sales in which movement of goods originated from outside the state of Haryana and also terminated in some other state without touching the state of Haryana, this state has no power to levy and collect tax thereon, if the said sales fall under section 3(a) of the CST Act. Resultantly the matter has to be remanded to the Revisional Authority for fresh adjudication.

9. Resultantly, the instant appeal is allowed. Impugned order dated 31.07.2014 passed by Revisional Authority, Karnal is set aside. The case is remanded to the Revisional Authority, Karnal for fresh adjudication in the light of the observations made by herein before. To be communicated accordingly.

10. Released on this 22nd day of December, 2016 at Chandigarh.

CLARIFICATION (HARYANA)

BEFORE THE ADDITIONAL CHIEF SECRETARY TO
GOVERNMENT, HARYANA,
EXCISE AND TAXATION DEPARTMENT

Querist : ZYDUS WELLNESS SIKKIM, PANCHKULA

19th January, 2017

HF ▶ Assessee

Table Margarine/Fat Spread by the brand name of "Nutralite" is edible oil and covered by Entry 28 of Schedule-C of Haryana VAT Act, 2003 and hence, taxable @ 5%.

ENTRIES IN SCHEDULE – CLARIFICATION – TABLE MARGARINE – NUTRALITE VEGETABLE OIL – PRODUCT OF APPLICANT IS VEGETABLE FAT SPREAD – CONSUMED AS SUBSTITUTE OF BUTTER – CAN BE USED IN COOKING AND BAKING – REFERRED TO AS VEGETABLE FAT/OIL IN VEGETABLE OIL PRODUCTS (REGULATION) ORDER 1998 – TO BE CONSIDERED AS EDIBLE OIL COVERED BY ENTRY 28 OF SCHEDULE-C OF HARYANA VAT ACT 2003 – TAXABLE @ 5%.

Applicant is a manufacturer of 'Nutralite', which is a table margarine/fat spread. The consignment agent of the applicant is paying tax @ 5.25% and the applicant sought clarification under Section 56(3) regarding taxability of said item claiming it to be covered under Entry 28 of Schedule-C which deals with edible oil. The matter is clarified by the Commissioner as under:

***Clarification**:*

Various States such as Delhi, Punjab, Chandigarh, West Bengal and High Court of Karnataka have clarified that the product sold by the company is covered by the term 'edible oil'. The product of the applicant is vegetable fat spread and is consumed directly as substitute of butter. It can also be used in cooking as well as in baking. The definition of milk fat spread in Clause II(ga) of the Vegetable Oil Products (Regulation) Order, 1998 also clarifies that it refers to vegetable fat/oil.

Based on the order of High Court and clarifications of other States, the product 'Nutralite' being a fat spread is edible oil covered by Entry 28 of Schedule-C appended to Haryana Vat Act 2003 and is thus liable to tax @ 5%. However, the clarification will be utilised only with prospective effect since the content of the product before this clarification and/or its licence etc. were not gone into. Matter is clarified accordingly.

ORDER

1. M/s Zydus Wellness Sikkim, Panchkula, Haryana holding TIN 06522507701 has sought a clarification u/s 56(3) of Haryana Value Added Tax Act, 2003 on the following issue:

> ***Whether table margarine/fat spread commonly known by the brand name of 'Nutralite' containing vegetable oil can be considered as edible oil and thus***

covered by Entry 28 of Schedule 'C' appended to the Haryana Value Added Tax Act, 2003?

2. The product is manufactured by the queriest, i.e., M/s. Zydus Wellness at Ahmedabad. In Haryana, the product 'Nutralite' is not sold by the querist himself, rather M/s MicroPark Logistics Pvt. Ltd., Gurugram (West), a consignment agent of the querist sells 'Nutralite' in the State, paying tax @5.25%. The lower rate of tax is being charged and paid w.e.f. 28 July 2012. 'Nutralite' is the trade name and the ingredients of Nutralite are, vegetable oils 68% by weight, water, common salt, skimmed milk powder, emulsifiers, preservatives, acidity regulator, starch, antioxidants and vitamins.

Entry 28 of schedule 'C' is reproduced as under:-

28 'Edible oil'.

3. Governments of various States such as Delhi, Punjab, Chandigarh, West Bengal and High Court of Karnataka have clarified/held that product 'Nutralite' sold by the company is covered by the term 'edible oil'. The High Court of Karnataka in the case of M/s Pioneer Marketing Vs. State of Karnataka (CWP No. 15894 of 2016) had held that:

"Nutralite' would fall under Entry 31 of Schedule III of KVAT Act, 'Edible Oil' and would attract the rate of tax prescribed in respect of edible oils."

4. All the authorities / High Court of Karnataka have based their opinion on the judgment delivered by Supreme Court in the case of M/s Aluva Sugar Agency Vs. State of Kerala. The Supreme Court in that case gave the following finding:

"So as to simplify the conclusion, we may say that normally anything which is used for preparation of a food article is edible because ultimately it is being consumed by human beings. Though one may not consume margarine directly or may not use for normal cooking, the fact is that margarine is used for preparing Bakery items which are consumed by human beings and, therefore, margarine is also edible. Having around 80% fat, and being in the nature of oil, in our opinion, it should be considered as edible oil."

5. The product of the applicant is vegetable fat spread and is consumed directly as substitute of butter. It can also be used in cooking as well as in baking. Premises of table margarine and that of baking margarine are almost same. The definition of Mixed Fat Spread (even if the 4% composition of skimmed milk, preservatives, etc., are counted) in Clause II (ga) of the Vegetable Oil Products (Regulations) Order, 198 also clarifies that it refers to Vegetable Fat/Oil.

6. The content of Nutralite as certified by FSSAI Licence No.10012021000301 and printed on the cover of the product is as given below:

"Nutritional Information per 100g (approx, values):

Energy 616 kcal, Fat 68g, Protein 0.37g Carbohydrate 0.53g, Added Sugar 0g.

Ingredients: *Edible Vegetable Oils, Water, Common Salt, Skimmed Milk Powder, Emulsifiers (E-471, E-322), Preservatives (E-202, E-200), Acidity Regulator (E-330), Starch, Sequestering Agents (E-385), Antioxidents (E- 319), Vitamin not less than 30 IU/g. Vitamin D2 IU/g., Vitamin E 0.03 mg/g."*

Based on the orders of the High Court, clarification of other States and the content printed by the manufacturer with the licence of FSSAI, the product nutralite being a 'fat spread' is an edible oil covered by Entry 28 of Schedule 'C' appended to the Haryana Value Added Tax Act, 2003 and is, thus, liable to tax @ 5%.

7. This clarification will be utilised only with prospective effect since the content of the product before this clarification and/or its licence, etc., were not gone into.

The matter is clarified accordingly.

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NOTIFICATION (Haryana)

Go to Index Page

NOTIFICATION REGARDING CONSTITUTION OF HARYANA TRADERS WELFARE BOARD

HARYANA GOVERNMENT
EXCISE AND TAXATION DEPARTEMT

Notification

The 23, December, 2016.

No.28791-ET-3-16/23473 The Governor of Haryana hereby constitutes the Haryana Traders Welfare Board consisting of the following members, namely:-

1.	Sh. Gopal Sharan Garg	Chairperson
2.	Additional Chief Secretary to Government Haryana, Finance Department	Member
3.	Additional Chief Secretary to Government Haryana, Food and Supplies Department	Member
4.	Additional Chief Secretary to Government Haryana, Labour Department	Member
5.	Additional Chief Secretary to Government Haryana, Excise and Taxation Department	Member
6.	Principal Secretary to Government Haryana, Industries department	Member
7.	Principal Secretary to Government Haryana, Power Department	Member
8.	Principal Secretary to Government Haryana, Mines and Geology Department	Member
9.	Principal Secretary to Government Haryana, Environment Department	Member
10.	Not more than 10 Non-official members as may be nominated by the Government from time to time.	Members

The Haryana Traders Welfare Board will advise the Government for the fulfillment of the following objectives:

1. to address the problems and issue of traders and to take redressal measures;
2. to work as bridge between State Government and traders;
3. to initiate social security/insurance scheme for traders;
4. to promote investments and employment in the state;
5. to analyze the laws and bye-laws of various departments relating to traders;
6. to suggest simplifications in the Acts/Rules applicable to traders and;
7. to establish a Traders Welfare Fund.

The tenure of Chairperson shall be for **FIVE** years.

SANJEEV KAUSHAL
Additional Chief Secretary to Government Haryana,
Excise and Taxation Department.

PUBLIC NOTICE (Punjab)

Go to Index Page

PUBLIC NOTICE REGARDING EXTENSION OF VAT-15 OF Q-3 OF 2016-17

GOVERNMENT OF PUNJAB
DEPARTMENT OF EXCISE & TAXATION

PUBLIC NOTICE

KIND ATTENTION: DEALERS/CHARTERED ACCOUNTANTS/LAWYERS/OTHER STAKEHOLDERS

This is to inform all the concerned that the last date of e-filing of VAT-15 for the 3rd Quarter of 2016-17 has been extended till 10th February, 2017.

Dated: 28th January, 2017

Excise & Taxation Commissioner, Punjab

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NEWS OF YOUR INTEREST

Go to Index Page

STAGE SET FOR GST ROLLOUT ON 1 JULY

After GST council meeting, finance minister Arun Jaitley says centre, states have reached consensus on administrative powers over tax payers

New Delhi: The goods and services tax (GST) is set to be rolled out from 1 July after the centre and the states struck a consensus on the contentious issue of sharing of administrative powers.

The way is now clear for the Union government to table the associated bills in the second half of the upcoming budget session of Parliament commencing from 31 January. To be sure, there are other issues that need addressing; for instance, the GST council will have to also resolve the various tax slabs.

At the end of the ninth GST council meeting on Monday, both sides agreed to work towards meeting the new deadline and sharing administrative control over small and big taxpayers in a fixed ratio.

Both, but especially the centre, conceded some ground to generate a consensus on this long-pending issue that was threatening to derail the implementation of the singular piece of tax reform which will, for the first time, economically unify the country.

GST rollout delay won't impact India's bid for better Doing Business ranking

The centre had earlier targeted a rollout on 1 April.

"There was a significant headway in today's meeting," said Union finance minister Arun Jaitley, adding that the council was of the view that it may not be easy to implement GST from 1 April given the work that is remaining.

"Industry also needs to be given time to prepare for GST rollout. So GST council is of the view that 1 July may be a more realistic target."

There will be an estimated 8 million taxpayers under GST.

As per the agreement arrived between the centre and the states, small taxpayers with an annual revenue of less than Rs1.5 crore under GST will be divided between the states and the centre in the proportion of 90:10 for the purpose of scrutiny and audit. This will be done randomly.

All taxpayers above this revenue threshold will be equally shared (again randomly) between the centre and the states. The divisions will also not make a distinction between goods and services.

For intelligence-based assessments, powers of scrutiny and audit will be shared between the centre and the states.

Further, through a special provision of the law, states will also be empowered under integrated GST (IGST) law to administer taxpayers in the ratio mentioned above. At present, the power to levy and collect IGST is with the central government.

The centre also yielded to the states' demands for taxation powers in territorial waters up to 12 nautical miles in the IGST law.

Demonetisation and budgets: all in the mind

All states except West Bengal agreed to this new formula, said Jaitley, adding that West Bengal finance minister Amit Mitra "disagreed to the limited extent of sharing of small traders in the ratio of 90:10 and wanted the division to be 100:0".

K. Pandiarajan, Tamil Nadu's representative in the GST council, said the division is reflective of the on-ground resources of the centre and the states, though some states would have preferred a larger pool of the bigger taxpayers.

In the next meeting of the GST council on 18 February, the council will finalize the draft laws—the central GST law, the state GST law and the IGST law—after incorporating the changes that have been agreed upon. Thereafter, the time-consuming task of assigning items to different tax slabs will begin. Information technology systems also have to be readied to meet the implementation date.

Finalizing the rollout date helps the government incorporate GST revenues in its budget calculations.

"Excise and service tax collection will be budgeted for three months and GST for the remaining 9 months," said a senior finance ministry official, adding that the GST numbers will be calculated on the assumption that the rates will be split equally between the centre and the states.

Harishanker Subramaniam, national leader, indirect tax, EY India, said the stage is now set for introduction of GST bills in Parliament and state assemblies in February/March. "It is now clear that the new date for GST implementation will be 1 July 2017, which gives some time for industry to prepare. It's indeed a very positive development and takes GST journey forward," he said.

Courtesy: liveMint
16th January, 2017

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NEWS OF YOUR INTEREST

Go to Index Page

CAG WANTS PROVISION IN GST LAW TO SEEK ANY INFO FOR AUDIT

NEW DELHI: As government prepares ground for roll-out of GST from July 1, CAG has demanded explicit provision in the law to empower the official auditor to call for any information for audit of Goods and Service Tax (GST) receipts and utilisation of their funds.

While the Comptroller and Auditor General of India (CAG) by law audit any receipts in the Consolidated Funds of India, the GST Council is not in favour of giving powers to the official auditor under the new GST law to call for information outside of the GST tax receipt for audit.

The GST Council, headed by Union Finance Minister Arun Jaitley and comprising representatives of all states, had in its meeting last month decided to keep out a provision from the Draft Model GST Law giving CAG powers to call for any other information for audit.

Official sources said CAG Shashi Kant Sharma met Jaitley after the December 11 meeting of the GST Council to seek a modification in the draft law to include the word "any information" can be sought by auditors to facilitate audit.

Section 16 of the CAG Act mandates the auditor to conduct audits of the receipts of governments, giving it no discretion in the matter.

"It shall be the duty of CAG to audit all receipts which are payable into the Consolidated Fund of India and of each state and of each UT having a legislative assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed and to make for this purpose such examination of the accounts as he thinks fit and report thereon," the Section reads.

Section 18 of the same Act provides that CAG the authority to require "any accounts, books, papers and other documents which deal with or form the basis of or otherwise relevant to the transactions to which his duties in respect of audit extend, shall be sent to such place as he may appoint for his inspection."

Sources said the two sections read together provide CAG access to records of an assessee.

Section 65 of the draft model GST law provides for power of CAG to call for information for audit. The section as it exists, provides that revenue officer would make available to the CAG "information, records and returns required for conduct of audit."

Sources said CAG is of the opinion that it was important to provide enabling powers to departmental officers in the GST law to call for any other information to facilitate the audit.

It felt that otherwise an assessee may legally challenge the calling for additional information for CAG audit, they said.

The modified Section 65 of model GST law as suggested by the CAG states: "The proper officer shall, upon request made in this behalf, make available to the CAG or an officer authorised by him, information, records, and returns furnished under the Act and such other information as required for conduct of audit as required under the CAG's DPC Act".

The CAG's DPC (Duties, Powers and Conditions of Service) Act provides that "it shall be the duty of the CAG to audit all receipts payable into the consolidated fund and to satisfy himself that the rules and procedures in relation receipts into the consolidates fund of India are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed".

The government auditor was of the view that it is essential to check the accounts and records of assessees that form the basis for tax assessment.

It said that CAG's (DPC) Act gives it the authority to access the "records of an assessee".

The GST Council in its sixth meeting on December 11, 2016 was, however, not in favour of keeping the provision in the GST law.

The GST Council, headed by Jaitley and having state representatives as members, have already agreed on CAG conducting an audit of tax receipts in the first five years to ascertain the amount of compensation to be paid to the states.

The Council in its earlier meetings had said the Centre would compensate states for any revenue loss arising out of GST implementation for the first five years.

The base year for calculating the revenue of a state has been kept at 2015-16 and a 14 per cent growth rate has been envisaged for calculating the likely revenue of each state in the first five years of implementation of GST.

Courtesy: Economic Times
17th January, 2017

SGA
LAW OFFICES

NEWS OF YOUR INTEREST

Go to Index Page

TAX TRIBUNAL CHAIRMAN'S APPOINTMENT CHALLENGED

The appointment of Justice LN Mittal as chairman of the Haryana Tax Tribunal has come under the judicial scanner.

Acting on a petition seeking directions for quashing Justice Mittal's appointment, a Division Bench of the Punjab and Haryana High Court today issued notice of motion.

The notice by the Bench of Justices SS Saron and Darshan Singh came on a petition filed by Ravinder Kumar against the state and another respondent. The Bench fixed March 28 as the next date of hearing. The petitioner contended that the appointment of Justice Mittal as chairman of the tribunal was in violation of provisions of the Administrative Tribunals Act. Elaborating, he asserted that the respondent had been a judicial member of the Central Administrative Tribunal since August 24, 2015, and this term came to an end on November 6, 2016, on attaining the age of 65 years. Referring to the Administrative Tribunals Act, the petitioner, through advocate Rajesh Garg, contended that a member of the tribunal could not assume office under the state, except as a member of any other administrative tribunal.The statute imposed a complete legal ban on the appointment of the respondent after ceasing to hold office as a member of the tribunal either under the Government of India or any other state government.

Courtesy: The Tribune
18th January, 2016

SGA
LAW OFFICES

NEWS OF YOUR INTEREST

Go to Index Page

EXCISE DEPARTMENT CONDEMNED FOR FAILING TO REFUND VAT

LUDHIANA :A day after Comptroller and Auditor General (CAG) report exposed the irregularities in the functioning of the state excise department, tax practitioners' fraternity condemned the apathetic attitude of the department officials for failing to issue value added tax (VAT) refunds to dealers.

The tax practitioners rued that with refunds amounting to crores of rupees piling up with the department, their clients keep visiting to get value added tax refunds from them.

BR Kaushal, secretary general of Punjab Tax Practitioners Association (PTPA), said, "The VAT refunds worth crores of rupees are pending with the excise and taxation department". "A number of files of VAT refunds are lying pending in the state of Punjab but no refunds are being issued on the account of non-availability of funds," he said.

"We demand that the value added tax refunds should be issued without any delay as the same is a hard-earned money of the taxpayers. There is a strong resentment against the department for not issuing the genuine value added tax refunds to the tax practitioners, traders and industry. The payment of value added tax refunds cannot be withheld as this amount is a working capital of the businessmen," added BR Kaushal, secretary general of Punjab Tax Practitioners Association.

Saket Garg, vice-president, District Taxation Bar Association (DTBA), said, "The allocation of funds should be made available to the department otherwise, we will be compelled to hold demonstration all over the state against the department or might have to go on strike for this genuine cause."

Courtesy: Hindustan Times
22nd January, 2017

NEWS OF YOUR INTEREST

Go to Index Page

FAITH APPROACHES FINANCE MINISTRY ON SERVICE TAX ISSUE

NEW DELHI: The Federation of Associations in Indian Tourism and Hospitality of FAITH has approached the finance ministry on the matter of increasing service tax levies on outbound tour operators from India to an effective 9% from 22 January.

FAITH stated Indian tour operators who sell 'internationally based', accommodation and travel bookings and packages do not get any input tax credits for CENVAT from them. Thus a 9% levy (post 40% abatement on service tax) will immediately pass through their bookings to travellers and will make travel booked out of India, by Indian 'tours & travel' businesses immensely uncompetitive.

FAITH has highlighted that in their GST representation dated 4th November, and in their earlier meetings with service tax officials, they had mentioned that the 'place of provision' of service, for outbound is not in India and hence, for Indian tour operators 'booking travel from India' the 'place of provision', clause for service taxes should ideally not apply.

FAITH said an increase of 500%, from 1.5% to 9% on international hotel bookings will have massive disruptive implications and will impact the holiday booking season for April end onwards which starts between 3-6 months in advance. If this is immediately not addressed, travellers from India will resort to booking with 'international tour operators and online travel agents based outside of India, which do not have such tax levies in their jurisdictions.

FAITH has requested ministry of finance to consider the matter for corrective action and has also brought it to the notice of tourism minister, tourism secretary and commerce secretary for their intervention.

Courtesy: The Economic Times
22nd January, 2017

SGA
LAW OFFICES

NEWS OF YOUR INTEREST

Go to Index Page

GIVE RENEWABLE ENERGY ZERO-RATE STATUS UNDER GST: MINISTRY

The Ministry of Power has recommended that renewable energy be given a zero-rate tax status under the Goods and Services Tax, predicting several adverse effects to the economy if there is any increase in power tariffs due to the new tax regime.

"Any further tariff increase due to GST may have a multiplier effect on economic development (such) as: (i) difficulty in passing through the impact to agriculture and domestic consumers, (ii) adverse impact on industrial production and GDP, (iii) adverse impact on Make in India, and (iv) adverse impact on export competitiveness of Indian products and services," according to a presentation made by it to the GST Council during the ninth meeting of the GST Council on January 16.

In the presentation, a copy of which is in the possession of The Hindu, the Ministry took a benchmark GST rate of 18% and calculated that, if renewable energy is taxed at this rate, then capital expenditure in the sector would increase between 10% and 12% and tariffs for wind and solar energy could increase by as much as ?0.5 per unit.

The Power Ministry's recommendation was for the GST Council to choose one of two options: either give renewable energy supply a zero-rate status, or give it a deemed export status.

The Ministry also asked for the inclusion of all hydro projects as renewable energy projects. Currently, only small hyrdro projects of a capacity of up to 25 MW are deemed renewable energy projects.

"It is a very arbitrary decision to have this distinction," Sabyasachi Majumdar, Senior Vice President at ICRA, said. "Having all hyrdo projects as renewable will be good for the entire renewable sector because, with large renewable capacity being put in place, you need grid stability and large hyrdro is very good for grid stability."

The Ministry also requested that supplies made to under-construction hydro power projects be granted deemed export status in line with what is being contemplated for solar projects.

"Granting deemed export status may involve tax shortfall of ?880 crore spread over a period of five years," according to the presentation.

"If the idea is to have affordable power, it makes sense to have zero rate GST for renewable energy," Mr. Majumdar said. "It would be very critical to maintain the growth and competitiveness of the sector. Either of the two options of zero rate or deemed export status will work for this."

Courtesy: The Hindu
22nd January, 2017

NEWS OF YOUR INTEREST

Go to Index Page

GST: TOP RATE FOR SERVICES AT 28 PCT IS A BAD IDEA; HERE'S WHY

A reported 28% top rate for services is a bad idea

Though, after the breakthrough on dual control, it is almost certain India will have a working GST by July or September, the worry is that instead of being revolutionary, the tax may turn out to be just evolutionary—at least in the initial years. When GST was being proposed, the plan was to have a moderate single rate which would not only remove all classification disputes, it would raise compliance dramatically through a combination of computer-trails as well as reasonable tax rates. While there is still a hope things may converge towards that over the years, for now a very large proportion of goods are likely to be put in a 28% tax slab since the working principle is one of replacing the current tax rate with an almost similar GST rate—so, a car being taxed at 40% right now, if you combine the excise and VAT rates, will, under GST, be taxed at 28% with a 12% additional cess. While the cess is supposed to be temporary, to fund the compensation to states for a period of five years, India's history suggests it is difficult to get rid of cesses. If that turns out to be correct, it is difficult to see how GST will be the game-changer it is supposed to be since overall tax rates in the country will remain high.

If this isn't bad enough, a report in Business Standard suggests the GST Council may be looking at something similar for services, with multiple rates instead of the single rate right now, with an abatement for some services. What is proposed is a three-tier services GST structure, with lower rates for essential services and the highest rate for luxury services. Apart from the fact that this will push up costs dramatically, India will once again go back to the position decades ago, when different tax rates applied to air-conditioned restaurants and non-air-conditioned ones on grounds one was luxury while the other was not. GST was supposed to remove classification disputes and the need for lobbying—classifications such as the ones planned will ensure neither will happen. While the central government is committed to pushing through GST, it cannot be at any cost—it is better not to have a GST than to have a bad GST.

Courtesy: The Financial Express
23rd January, 2017

SGA
LAW OFFICES

NEWS OF YOUR INTEREST

Go to Index Page

VIEW: DO YOU KNOW YOUR GST? SMES HAVE 90 DAYS TO CATCH UP ON TECHNOLOGY AND PROCESSES

The stage is now set for GST roll out on July 1, 2017 with consensus in the GST council on the contentious issue of sharing of administrative powers between the Centre and States. This comes as a relief to the Centre after concerns that the demonetisation announcement may cause states to put up their price and derail this most sweeping tax reform since independence that has a deadline to be in place by September 2017.

The GST Bill will have to be cleared by the GST council in its next meeting on February 18 after which it will be presented in the Parliament in the second half of the Budget session starting March 9. All rules need to be framed and announced latest by March 31. Further the council needs to finalise the classification of products and services and rates (5%, 12%, 18%, 28%).

This gives 90 days for SMEs to prepare and be ready to go live by July 1, 2017.

GST is expected to drive several benefits for the economy including, incremental GDP growth of 1%, improvement in export competitiveness by 5%, increased FDI owing to transparency in indirect taxes, common market advantages across the country, increased indirect and direct tax revenues. The primary intent of GST is to expand the base of indirect tax payers by covering most transactions and not to increase the overall tax outlay of businesses.

A major implication from a business standpoint for SMEs would be, creation of a level playing field by having a low threshold which should de-motivate larger organizations from tax evasion practices like having multiple entities. This could also put pressure on SMEs who would no longer be able to avail excise duty exemptions but will have full GST impact thereby increasing competition from larger organizations.

According to CA Ashok Batra, senior partner, AK Batra & Associates, there are three areas that SMEs need to be aware of while moving into the GST regime. First, stock status as on the penultimate date that will determine the credit for VAT and Excise which can be claimed for discharge of GST liability. The challenge here could be that many SMEs may not be maintaining stock registers. Second, migration to GST that will ecessitate changes in business processes. For instance, physical location of central warehouse and the timing for transferring goods across multiple states. Third, necessary changes in the accounting system to reflect requirements of the GST regime. Will existing accounting and ERP software companies be ready to deliver within the timeline?

CA Kamal Aggarwal, founding partner, SARC & Associates, outlined several implications for SMEs and tax consultants and steps to be taken to streamline implementation and administration:

SMEs have limited knowledge of the law with many of them functioning on the basis of hearsay. The consultants they use also have limited capabilities given that most of them have either knowledge of VAT, Excise or Service Tax and rarely a combination of them

Who will train SME owners and their leadership teams? What about training for central and state departments who will be regulating, enforcing and assessing. Given the recent announcement that 90% of the tax payers with revenue less than Rs 1.5 crore will be administered for scrutiny and audit purpose by the States and likewise 50% of those with revenue in excess of Rs 1.5 crore, the accelerated knowledge dissemination will be a significant challenge for those empowered to administer. Everyone will have to unlearn the old law while onboarding GST

There are serious cash flow implications for SMEs given issues of getting credit from suppliers

GST will be technology driven given digital invoicing and therefore unchartered territory for several small businesses

So what needs to be done to accelerate this journey towards a smooth implementation?

Conduct workshops with industry associations and ensuring that owners of businesses and their business heads are also involved. Invite a range of experts in IT, supply chain, accounting to address the process and implications of GST implementation

The CA community needs to come up to speed to advise and service the vast SME tax payer base (there are over 1 lakh CAs in practice). A minimum of 20 hours of intensive training is required to upgrade the knowledge of each CA

Training of accountants, VAT practitioners and Advocates (the combined number could be at least a million)

In my view the SME needs to take the following urgent steps:

Understand the GST model law and track changes in the Bill and Rules. It is important for the owners and key business heads in the SME to get involved and understand the implications

Hire a good tax consultant to advise around the current implications and migration of processes to optimize tax implications in the new regime

Implement an accounting or ERP system that is compliant with the GST regime

Be cognizant of the steps to be taken prior to moving over. Eg: VAT & Excise credit for stocks

Be prepared to operate in a more competitive environment as tax protectionism and other practices will no longer be relevant making small and large companies compete on the same field.

The writer is the founder of T-Ventures. Abraham advises high growth technology enabled entrepreneurial ventures with their growth strategy and helps them scale their businesses.

Courtesy: Economic Times
24th January, 2017

NEWS OF YOUR INTEREST

Go to Index Page

RECENT GST COUNCIL'S DECISIONS NOT IN NATIONAL INTEREST: IRS OFFICERS BODY

Citing deep anguish and feeling of dejection among them, an association of about 3,000 Indian Revenue Service officers today claimed that certain decisions taken recently by GST Council were not in national interest and they may have "serious implications" for government revenue and smooth implementation of Goods and Services Tax (GST).

Citing deep anguish and feeling of dejection among them, an association of about 3,000 Indian Revenue Service officers today claimed that certain decisions taken recently by GST Council were not in national interest and they may have “serious implications” for government revenue and smooth implementation of Goods and Services Tax (GST).

The Indian Revenue Service (Customs and Central Excise) officers' association has also sought fair representation of their members in the GST Council which has representatives from central and state governments.

Claiming attempts by officers of state governments VAT departments to equate themselves with IRS (Customs and Central Excise) officers, the association asked the government not to wish away sanctity of their service.

Various such matters including the implementation of the GST were discussed during a meeting of the association held here yesterday under the chairmanship of its President Anup K Srivastava.

The GST Council had in its meeting on January 16, agreed to give states the power to levy tax on economic activity within 12 nautical miles of territorial waters.

Also, it was decided that the states will have the power to assess and administer 90 per cent of the tax payers under Rs 1.5 crore annual turnover, while the remaining would be controlled by the Centre.

“The decision to transfer much of the work related to the assessees below Rs 1.5 crore is not proper as it amounts to transferring the rightful assignment of IRS(C&CE) officers to Group B officers of states through an administrative arrangement. Revenue collection is an encadred assignment and officers are selected through Union Public Service Commission (UPSC) process.

“The sanctity of the same can not be wished away. Officers of states through cross-empowerment can not be effectively made into IRS(C&CE) officers without qualifying the UPSC exam. Unless the distribution of assessee is done fairly, the issue would not get resolved,” said a senior IRS officer, who attended the meeting.

All members of the service have expressed their deep anguish and concern over such decisions, he said.

The association has asked the Finance Ministry to look into the serious concerns of IRS(C&CE) to raise the morale of officers of such large cadre, the officers said.

"The prevailing feeling of dejection and anguish may have serious implications for government revenue and smooth implementation of GST," he said, citing the resolution of the association.

The GST Council, in the present form, has representatives from all the state as well as central governments through the Finance Minister.

"All have voting rights. However, the post of Secretary to the GST Secretariat, as well as Additional Secretary are IAS officers. The chairman of Central Board of Excise and Customs (CBEC), the lone domain specialist is merely an invitee.

"Accordingly, the concerns of CBEC and indirect tax experts are not adequately represented in the GST Council leading to adverse decisions such as the one dated 16-1-2017. This anomaly needs to be corrected by appointing Secretary and Additional Secretary in the Council from an IRS officer," the officer said.

There are about 3,000 IRS (C&CE) officers working across the country.

The association has asked the Finance Minister and senior officers concerned of the Finance Ministry that they should immediately take up the serious concerns of IRS(C&CE) to raise the morale of officers of such a large cadre.

"The prevailing feeling of dejection and anguish may have serious implications for government revenue and smooth implementation of GST," he said.

The GST is likely to be rolled out from July 1, as against April 1 decided earlier by the government.

Courtesy:The Financial Express
24th January, 2017

SGA
LAW OFFICES

NEWS OF YOUR INTEREST

Go to Index Page

ARUN JAITLEY MAY HIKE SERVICE TAX TO 16-18 PER CENT IN BUDGET

NEW DELHI: Finance Minister Arun Jaitley may hike service tax rate to 16-18 per cent from the current 15 per cent in the Budget, due on Wednesday, as a precursor to the Goods and Services Tax (GST) rollout.

The move, that will make flying, eating out, phone bills and a host of other services expensive, would be an attempt to take the rates closer to the proposed tax slabs for GST.

GST, which will subsume central and state levies like excise duty, service tax and VAT, is scheduled to be rolled out from July 1.

The tax slabs decided for the GST are 5, 12, 18 and 28 per cent and taking service tax closer to one of the slabs is a logical move in the Budget, tax experts said.

Tax experts say, Jaitley, who had in his previous budget hiked service tax rate by 0.5 per cent to 15 per cent, may raise the levy by at least one percentage point to 16 per cent.

Some others feel there could be different service tax rates with a lower 12 per cent for basic services and a higher 18 per cent for the rest.

Also, a higher service tax for April-June will help the government garner more revenue to meet expenses on schemes and programmes it may be planning to contain the impact of demonetisation.

A service tax rate closer to the GST rate will also help consumers avoid a greater price shock when the new national sales tax is rolled out.

While service tax until now is a central levy, it will be equally split between the Centre and states under the new GST regime. Most services, except essential ones like primary healthcare and basic education, will be covered by GST.

Service tax was budgeted to provide Rs 2.31 lakh crore in 2016-17, more than 14 per cent of the Centre's total tax revenues of Rs 16.30 lakh crore.

This will be the third time that Jaitley will raise service tax rate. Service tax from June 1, 2015 was hiked from 12.36 per cent to 14 per cent. A 0.5 per cent Swachh Bharat Cess was levied on all services, taking the total incidence of service tax to 14.5 per cent from November 15, 2015.

In the last Budget, he imposed a Krishi Kalyan Cess at the rate of 0.5 per cent on all taxable services to take the levy to 15 per cent.

Courtesy: Economic Times
29th January, 2017