

SUPREME COURT OF INDIA

State of Haryana

Vs.

Liberty Enterprises

C.A.No.1618 of 2009

(S.H. Kapadia and H. L. Dattu JJ.)

17.03.2009

JUDGEMENT

S. H. Kapadia, J.

1. Delay condoned.
2. Leave granted.

Facts in the Lead Matter:

3. For the sake of convenience we state the facts occurring in Civil Appeal No. 1618 of 2009 - Arising out of S.L.P.(C) No.23970 of 2007 - State of Haryana vs. M/s. Liberty Enterprises.
4. M/s. Liberty Enterprises (assessee) is engaged in the REPORTABLE manufacture of shoes in the State of Haryana. They availed exemption from payment of sales tax under Section 13B of *Haryana General Sales Tax Act, 1973* read with Rule 28A of *Haryana General Sales Tax Rules, 1975* respectively. Assessee was granted Exemption Certificate No.116 for an amount of Rs.533 lakhs with effect from 15.3.95 to 14.3.2002 in terms of Rule 28A of the said 1975 Rules. The assessee availed benefit of exemption till 31.12.96 and from 1.1.97 the assessee switched over to the deferment tax payment scheme. Till 31.12.96 the exemption granted to the assessee was for an amount of Rs.53.94 lakhs. On exercising option of deferment, an entitlement Certificate No.07 for an amount of Rs.479.06 lakhs effective for the period 1.1.97 to 14.3.2002 was issued to the assessee in place of earlier Exemption Certificate.
5. The assessment of the assessee for the year 1996-97 was finalized vide order dated 12.3.01; from the total gross turnover the Assessing Authority allowed the deduction of Export Sales against the Declaration Forms. However, the assessment was revised by the Revisional Authority, Karnal, which assessed the Export Sales made during the period of exemption (1.4.96 to 31.12.96) at 4&percent; for the purpose of Rule 28A of the 1975 Rules.

Since the exempted quantum of the assessee fixed at Rs.53.94 lakhs stood exhausted, the excess amount was ordered to be recovered by the Revisional Authority.

REPORTABLE Against the said order of the Revisional Authority, the assessee appealed before the Haryana Tax Tribunal. Vide Order dated 13.1.04 the Tribunal set aside the order of the Revisional Authority which was challenged by the State of Haryana (Department) by way of civil writ petition before the High Court of Punjab & Haryana at Chandigarh. By the impugned Order dated 26.5.06, the High Court dismissed the said writ petition in terms of its earlier judgment rendered in the case of M/s. Kagaz Print-N-Pack (India) Pvt. Ltd. v. State of Haryana- (G.S.T.R.No.10 of 2004) ISSUE

6. The short question which arises for determination in this civil appeal is : whether Export Sales are includible in "notional tax liability" of a unit as defined in Rule 28A(2)(n) of the 1975 Rules.

CONTENTIONS

7. Mr. Anoop G. Choudhary, learned senior counsel appearing on behalf of the State, submitted that in terms of the proviso to Rule 28A (4)(a) of the 1975 Rules, the benefit of exemption on payment of tax was available to a unit on its `gross turnover' which was defined to mean the total receipt on account of sales made by a dealer, which included even the Export Sales. In this connection, reliance was placed on the REPORTABLE proviso to Rule 28A(4)(a) which inter alia states that the benefit of exemption shall extend to tax on `gross turnover', which according to learned counsel would cover total sales receipts (including Export Sales).

8. On the other hand, Mr. Monish Panda, learned counsel appearing on behalf of the assessee, submitted that exemption from payment of sales tax stood provided for under Section 13B of the said 1973 Act. It provided for exemption from payment of sales tax to eligible units subject to the conditions mentioned in the Rules. The conditions for availing the exemption were provided for under Rule 28A of the 1975 Rules. The exemption was available from the date of commercial production. The benefit of exemption, according to learned advocate, was available for a specified period and upto the specified quantum. According to learned advocate, for the purpose of calculating the quantum of exemption, the "notional sales tax liability" was to be taken into consideration. The expression "notional sales tax liability" stood defined in Rule 28A(2)(n) of the 1973 Rules. According to learned advocate, on a bare reading of 28A(2)(n), it is clear that all the incidences of sales transaction that are to be computed for arriving at the notional sales tax liability stood incorporated in the said sub- rule. According to learned advocate, on a bare reading of the above REPORTABLE sub-rule, it is clear that sale made in the course of export outside India ("Export Sale", for short) was not included in "notional sales tax liability" as defined in Rule 28A(2)(n). According to learned advocate, such exclusion of Export Sale from the meaning of "notional sales tax liability" under Rule 28A(2)(n) leads to the clear conclusion that Rule 28A never intended to deem "Export Sale" within "notional sales tax liability" and, therefore,

learned advocate urged that in the context of `notional tax liability', turnover of export goods could not have been included in the `gross turnover'.

Relevant Provisions of Law:

9. To decide the controversy we need to quote relevant provisions of the 1973 Act and 1975 Rules which read as under:

"1973 ACT:

Section 2. Definitions: - In this Act, unless there is anything repugnant in the subject or context.- (e) - "export" means the taking out of goods from the State to any place outside it otherwise than by way of sale in the course of inter-State trade or commerce or in the course of export out of the territory of India (gg) - "gross turnover" means the aggregate of the amounts of sales and purchases and parts of sales and purchases made by any dealer whether as principal, agent or in any other capacity during the given period less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof;

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

Section 6 - Incidence of Taxation:- (1) Subject to the provisions of Section 15 and 27 of this Act, every dealer whose gross turnover during the year immediately preceding the 27th day of May, 1971 exceeded the taxable quantum, shall from the 27th day of May, 1971 and every other dealer shall, on the expiry of thirty days after the date on which his gross turnover first exceeds the taxable quantum, be liable to pay tax under this Act on the sale or purchase of goods by him in the State at the stage hereinafter provided.- (a) to (c) xxx xxx xxx (i) & (ii) xxx xxx xxx Provided ... xxx xxx xxx Provided further that in the case of a dealer, - (a) who imports any goods for sale or for use in manufacturing or processing any goods for sale, the liability to pay tax shall commence from the date on which he imports such goods;

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

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

... ..

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

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

(ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India; or (iii) where such sale or purchase takes place in the course of inter-State trade or commerce.

Section 13B.- Power to exempt certain class of industries.- **REPORTABLE** The State Government may, if satisfied that it is necessary or expedient so to do in the interest of industrial development of the State, exempt such class of industries from the payment of tax, for such period and subject to such conditions as may be prescribed.

Section 27 - Taxable turnover.- (1) In this Act, the expression, "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom his turnover during that period - (a) on account of - (i) to (iii) xxx xxx (iv) Sale and purchase of goods falling under Section 12:

... .."

"1975 RULES :

Rule 28A. Class of industries, period and other conditions for exemption/deferment from payment of tax (Sections 13B and 25A) - (1) The industries covered under this rule shall not be entitled to any deferment or exemption from payment of tax under any other provisions of these rules.

(2) For the purposes of this Chapter, unless the context otherwise requires - (n) "notional sales tax liability" means- (i) amount of tax payable on the sales of finished products of the eligible industrial unit under the Local Sales Tax Law but for an exemption computed at the maximum rates specified under the Local Sales Tax Law as applicable from time to time; and Explanation:- The sales made on consignment basis within the State of Haryana or branch transfer within the State of Haryana shall also be deemed to be sales made within the State and liable to tax;

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

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

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

Rule 28A (3) Option - An eligible industrial unit may opt either to avail benefit of tax exemption or deferment. Option once exercised shall be final except that it can be changed once from exemption to deferment for the remaining period and balanced quantum of benefit.

Rule 28A (4)(a) Subject to other provisions of this rule, the benefit of tax exemption or deferment shall be given to an eligible industrial unit holding exemption or entitlement certificate, as the case may be to the extent, for the period, from year to year in various zones from the date of commercial production or from the date of issue of entitlement exemption/exemption certificate as may be opted as under:-

Provided that in the case of exemption the benefit shall extend to tax on gross turnover and in the case of deferment, it shall extend to tax on the taxable turnover of goods manufactured by the unit.

... ..

Explanation:- 1. For the purpose of arriving at the limit of tax exemption/deferment, the notional sales tax liability of the unit shall be taken into consideration."

(emphasis supplied by us) FINDINGS:

10. At the outset, we may state that there is a vital difference between REPORTABLE the scheme of Deduction and a scheme for Exemption. Even within the scheme of exemption there is a basic difference between the "Basis" for computation of the quantum of benefit and the "Limit" or ceiling to be placed on that quantum. There is no dispute that but for exemption claimed, the assessee was a dealer, who was subject to incidence of sales tax under the 1973 Act. Its transactions were liable to be dealt with in accordance with the provisions of the Act relating to taxability. What was exempted under the Act and the Rules was payment of tax by a class of dealers who had been issued eligibility/exemption certificates. This is not in dispute. Under the provisions of 1975 Rules benefit of exemption from payment of tax was available for a specified period and upto the specified quantum. Rule 28A provides for calculation of the quantum of exemption upto the limit of tax exemption and, therefore, it provides for deduction of the "notional sales tax liability" from the total exemption limit available to a dealer during the period of exemption.

11. Rule 28A(2)(n) included in its purview the following transactions:

“(a) amount of tax payable under the local sales tax law;

(b) sales made on consignment basis within the State or the branch transfers within the State;

(c) amount of tax payable under the *Central Sales Tax Act, 1956* on the sales made in the course of inter-State trade or commerce; and (d) branch transfers or consignment sales outside the State.”

12. A perusal of the above transactions, included in the "notional sales REPORTABLE tax liability", shows that the said Rule 28A(2)(n) of the 1975 Rules included sales which were otherwise exigible to sales tax, namely, local sales and inter-State sales and secondly the Rule also included branch transfers or consignment sales outside the State and sales made on consignment basis or branch transfers within the State by treating them as deemed sales, which two transactions were otherwise not exigible to sales tax for any other unit not availing the exemption. In other words, a unit availing exemption from payment of sales tax under Rule 28A had been disallowed certain deductions which were otherwise available to an assessee if it would have been a case of normal assessment. The assessee was eligible to avail deductions from its `gross turnover' for transactions relating to inter-State branch transfers or consignment sales outside the State and sales made on consignment basis or branch transfers within the State. These deductions stood disallowed to a unit allowing exemption for calculating the "notional sales tax liability" as defined in Rule 28A(2)(n), as a condition for grant of exemption. It is important, however, to note that the "notional sales tax liability" apart from the above referred to transactions did not include even by a deeming fiction the Export Sale(s). Export Sale(s) was not included in `notional tax liability' by a deeming fiction or otherwise. A scheme for Exemption has to be interpreted in the strict sense. A scheme for Deduction provides for conditions to be specified for grant of exemption. Export Sales were never sought to be included in the "notional sales tax liability" as defined in Rule 28A(2)(n). The assessee was not entitled to avail tax incentives beyond the period of exemption. The assessee was not entitled to REPORTABLE avail exemption of tax also beyond the maximum limit of tax determined and certified in his eligibility/exemption certificate. Therefore, the scheme contemplated tax-limit and time-limit. The notional tax liability was deductible from the total exemption limit available to a dealer during the period of exemption. To the extent the notional tax liability exceeded the total exemption limit, the Department was entitled to order the recovery of the difference. In the present case, the Department has sought to recover the difference on the ground that the notional tax liability exceeded the exempted quantum during the period of exemption.

13. Rule 28A deals with computation of the quantum of tax incentive available to a dealer in whose favour eligibility certificate is issued. In order to regulate the exemption scheme the concept of "notional sales tax liability" stood incorporated vide Rule 28A(2)(n) of the 1975 Rules.

14. The Department has placed heavy reliance on the proviso in Rule 28A(4)(a), which has been quoted above. The said proviso states that in case of exemption, the benefit shall extend to tax on gross turnover and in case of deferment it shall extend to tax on the taxable turnover of the goods manufactured by the unit. We have quoted the definition of the word "gross

turnover" which is defined to mean the aggregate of the amount of sales and purchases made by any dealer. The Department placed heavy reliance on this definition of the words "gross turnover" to say that it would include Export Sales, particularly, when Rule 28A contains a proviso to the effect REPORTABLE that in case of exemption, the benefit shall extend to tax on "gross turnover".

“There is no dispute on this proposition. However, in this case we are concerned with the "limit" to be placed on tax exemption/deferment and for calculating that limit/ceiling one has to take into account the notional sales tax liability of the unit. Therefore, one has to read the proviso in Rule 28A(4) with Explanation 1 which states that "for the purposes of arriving at the limit of tax exemption/deferment, the notional sales tax liability of the unit shall be taken into consideration". It is because of the said Explanation that notional sales tax liability has been defined in Rule 28A(2)(n). Therefore, one has to go strictly by the definition of the words "notional sales tax liability" in the said Rule 28A(2)(n) of the 1975 Rules.”

15. There is one more aspect which needs to be considered. For the purpose of granting exemption from payment of sales tax under Section 13B of the 1973 Act, the Legislature incorporated Rule 28B on 16.9.98 providing conditions for availing exemption from payment of sales tax to eligible units.

“Under the provisions of Rule 28B of the 1975 Rules, benefit of exemption was available for a specified period and upto the specified quantum.

However, Rule 28B provided that for the purposes of calculating the quantum of exemption availed by the unit upto the limit of tax exemption allowed, the notional sales tax liability shall be taken into consideration.

Accordingly, notional sales tax liability stood defined even in Rule 28B(2)(m).

On a bare reading of the definition of "notional sales tax liability" under Rule 28B(2)(m) it is clear that the definition included within its scope "sales made REPORTABLE in exports outside India" by deeming it to be a sale in the course of inter- State trade or commerce. Such deeming fiction did not exist in Rule 28A(2) (n). Rule 28B(2)(m) is not applicable to the facts of the present case.

However, in order to explain the position, we have discussed, by way of analogy, Rule 28B(2)(m) of the 1975 Rules.”

16. For the aforesaid reasons, we hold that Export Sales were not includible in the matter of calculation of "notional tax liability" during the period in question.

17. Before concluding learned counsel for the State also raised the question of constitutionality by stating that the Export Sales in any event were not taxable by the State

Government in view of Article 286 of the Constitution read with Section 12 of the 1973 Act. We keep this question of law open.

18. Suffice it to state that Export Sales were not included in the definition of "notional sales tax liability" as defined in Rule 28A(2)(n) of the 1975 Rules. On this point alone the assessee succeeds.

19. For the aforesaid reasons, the civil appeals filed by the Department are accordingly dismissed with no order as to costs.