

(2006) 05 P&H CK 0161

High Court Of Punjab And Haryana At Chandigarh

Case No: C.W.P. No. 8431 of 2006

Goel Spinning and
Weaving Mills

APPELLANT

Vs

State of Haryana and
Others

RESPONDENT

Date of Decision: May 30, 2006

Acts Referred:

- Haryana General Sales Tax Act, 1973 - Section 42 , 42(1)
- Haryana General Sales Tax Rules, 1975 - Rule 28A, 28A(11)
- Haryana Value Added Tax Act, 2003 - Section 57, 57(1), 57(3)

Citation: (2006) 147 STC 664

Hon'ble Judges: Rajesh Bindal, J; Adarsh Kumar Goel, J

Bench: Division Bench

Advocate: Krishnan Venugopal, Seema Bengani, Rajeev Agnihotri and Girish Agnihotri, for the Appellant; Ritu Bahri, D.A.G., for the Respondent

Judgement

1. The petitioner has approached this court praying for the following reliefs:

(a) An appropriate writ in the nature of certiorari to quash and set aside the order passed by the Haryana Sales Tax Tribunal dated May 24, 2005 in S. T. A. No. 847 of 2003-04 and S. T. A. No. 26 of 2004-05 and remand the matter back to the Tribunal for a fresh hearing:

(b) In the alternative, declare that the Sales Tax Department cannot withdraw the benefits of the sales tax exemption enjoyed by the petitioner for its unit II up to April 11, 2000 :
(sic)

2. The facts stated in the petition are that the petitioner is a proprietorship concern engaged in manufacturing of yarn since 1970. The petitioner set up another unit called

Unit II in 1993. For the investment made in Unit II, the petitioner was granted exemption from payment of tax under the provisions of the Haryana General Sales Tax Act, 1973 (for short, "the Act") read with Haryana General Sales Tax Rules, 1975 (for short, "the Rules") with effect from April 12, 1993 to April 11, 2000. In the year 1995, the petitioner carried out expansion in Unit II by creating additional capacity for manufacturing of the same product (hereinafter referred to as "the expanded unit"). The expanded unit was also granted exemption from payment of tax for the period January 17, 1996 to January 16, 2003 in terms of the provisions of the Act and the Rules. The petitioner availed of the entire benefit admissible to him for Unit II up to April 11, 2000. In terms of provisions of Sub-rule (11) of Rule 28-A of the Rules, a unit, after availing the benefit of exemption from payment of tax, is required to continue in production for at least five years thereafter with the same average level of production. The above referred Sub-rule extracted below :

Rule 28A...

(11) (a) The benefit of tax exemption/deferment under this rule shall be subject to the condition that the beneficiary/industrial unit after having availed of the benefit,--

(i) shall continue its production at least for the next five years not below the level of average production for the preceding five years ; and

(ii) shall not make sales outside the State for next five years by way of transfer of consignment of goods manufactured by it.

(b) In case the unit violates any of the conditions laid down in Clause (a), it shall be liable to make, in addition to the full amount of tax benefit availed of by it during the period of exemption/deferment, payment of interest chargeable under the Act as if no tax exemption/deferment was ever available to it:

Provided that the provisions of this clause shall not come into play if the loss in production is explained to the satisfaction of the Deputy Excise and Taxation Commissioner concerned as being due to the reasons beyond the control of the unit:

Provided further that a unit shall not be called upon to pay any sum under this clause without having been given reasonable opportunity of being heard.

3. The controversy in the present case arose in 2001 when, because of fire in the factory of the petitioner, unit II was substantially destroyed, with the result the production in that unit was not possible any further. The petitioner accordingly made an insurance claim with the insurance company, which, though was sanctioned and granted to the petitioner but not to the extent the loss was there. Further, the case of the petitioner is that since the insurance claim was granted in two installments and secondly it was not sufficient to restart unit II, which was destroyed in the fire, the petitioner invested the amount received from insurance claim in the expanded unit, with the result the production thereof was increased substantially. The quantum of production in the expanded unit after the period

of exemption was over was to such an extent that it was able to comply with the condition of minimum level of production for the expanded unit as well as for the original unit II. To show that the petitioner has placed on record a chart of production of Unit II (original), Unit II (expansion) and also turnover of Unit II (expansion) after the period of exemption was over. The same is extracted below:

Average Production Requirement Chart

Year	Amount in lacs	SON/IV/6540 Unit No.2	Average Turnover required per year	Total average of Year both Units
1995-96	1000.16			
1996-97	703.42			
1997-98	597.86			
1998-99	307.61			
1999-00	451.53			
	3060.58		612.12	

Year	Amount in lacs	SON/IV/7412 Unit No. 2 (1st Exp.)	Average turnover required per year
1997-98	167.94		
1998-99	494.78		
1999-00	574.02		
2000-01	1139.77		
2001-02	999.44		
	3370.95	674.19	1286.31
2002-03	1467.07		
2003-04	1643.94		
2004-05	1724.83		
2005-06	1318.67		
(up to 31-12-05)	6154.51	1641.20	1641.20

Total average sale in SON/IV/6540 Unit No. II and SON/IV/7412 Unit No. II (1st Expansion) is Rs. 612.12 and Rs. 674.19 lacs respectively, i.e., total Rs. 1286.31 lacs whereas after exemption and installing new machine in unit No. SON/IV/7412-II (1st Expansion) the average turnover is Rs. 1641.20 lacs, (sic)

4. Since, in the opinion of the Deputy Excise and Taxation Commissioner, the loss in production of unit II, after it had availed of the benefit of exemption from payment of tax, was in violation of the provisions of Sub-rule (11) of Rule 28 of the Rules, a show cause notice dated January 15, 2003 was issued to the petitioner. The same was replied to by the petitioner vide his letter dated February 20, 2003, raising the plea that the closure of the unit after the fire broke out in the factory of the petitioner, was for reasons beyond the

control of the petitioner. Hence, there was no violation of the provisions of Sub-rule (11) of Rule 28-A of the Rules. However, the Deputy Excise and Taxation Commissioner vide his order dated March 10, 2003 ordered that the petitioner was liable to make the payment of the entire amount of tax exemption availed of by him along with interest thereon.

5. Aggrieved against the order dated March 10, 2003, the petitioner preferred an appeal before the Joint Excise and Taxation Commissioner (Appeals), who considering the fact that the plea of the petitioner, regarding closure of the unit for the reasons beyond his control, i.e., the fire in the factory, had not been dealt with by the DETC, remanded the case back for reconsideration.

6. On remand vide his order dated August 20, 2003 the DETC again decided the issue against the petitioner. Still aggrieved, the petitioner preferred an appeal before the Joint Excise and Taxation Commissioner (A) who rejected the same vide his order dated January 18, 2004. Even the review, filed by the petitioner against the order dated January 19, 2004 was dismissed by the JETC (A) vide order dated March 22, 2004.

7. Aggrieved against the order passed by JETC (A), in original and also in review, the petitioner preferred appeals before the Haryana Tax Tribunal. These appeals were heard by a two-Member Bench of the Tribunal consisting of the honourable Chairman and another learned Member. The honourable Chairman vide his order dated September 13, 2004 ordered the dismissal of appeals whereas learned Member vide his separate order dated October 8 2004 held that appeals filed by the petitioner were liable to be accepted. Since, the Members of the Bench were equally divided on the issue, the procedure as envisaged u/s 57 of the Haryana Value Added Tax Act, 2003 (for short, "the VAT Act") was required to be followed. The relevant part of Section 57 of the VAT Act is extracted below:

Section 57. Tribunal,-(1) The State Government may constitute a Tribunal to be called the Haryana Tax Tribunal consisting of three or more odd number of Members including the Chairman as the State Government may appoint for the purpose of performing such functions and exercising such powers as may be assigned to, or conferred on, the Tribunal by or under this Act.

(2) The functions of the Tribunal may be discharged by the Members sitting in Benches of two or more Members, as may be determined by the Chairman.

(3) If the Members of a Bench are divided over some matter, the decision shall be the decision of the majority, if there be a majority, but if the Members are equally divided they shall state the point or points on which they differ, and the case shall be heard by the Full Member Tribunal and such point or points shall be decided according to the decision of majority of the Members of the Tribunal.

8. As is evident from undisputed facts on record, after the Members of the Bench were equally divided on the issue the matter was considered by the third Member of the Tribunal, who vide his separate order dated May 16, 2005 formed an opinion favouring dismissal of the appeals. Thereafter on May 24, 2005, copy annexure P 10, the Full Member Tribunal, keeping in view the majority of opinions, ordered for dismissal of the appeals filed by the petitioner by passing the following order:

Vide order dated September 13, 2004 authorised by me (Chairman), I have ordered the dismissal of these appeals. Vide order dated October 8, 2004 authorised by Shri B.S. Suhag learned Member, Haryana Tax Tribunal, has differed with me and has ordered the acceptance of these appeals. In this situation the matter came to be put up before the Full Member Tribunal. Vide order dated May 16, 2005 authorised by Shri D.R. Yadav, the other learned Member of Haryana Tax Tribunal, he has agreed with me that the appeals be dismissed. Both these appeals as such are dismissed. All these orders as also this order be communicated to both the parties (sic)

9. Thereafter, the petitioner moved application u/s 42 of the Act seeking reference of questions of law arising out of order passed by the Tribunal. The same is still pending consideration before the Tribunal.

10. We have heard counsel for the parties and with their assistance have perused the relevant record.

11. Limited issue for consideration by this court in the present petition is purely legal, i.e., true import of Section 57 of the VAT Act.

12. It is undisputed that the appeals filed by the petitioner before the Tribunal were initially heard by a two-Member Bench consisting of honourable Chairman and a learned Member, who differed in their opinion. Question arose at this stage, as to whether under the provisions of Section 57(3) of the VAT Act, it was incumbent upon the Members of the Bench to have stated the point or points on which two Members had difference of opinion, to be heard by a Full Member Tribunal. As is evident from the record, firstly, the point or points of difference between the two Members who heard the matter initially were not framed to be considered by the Full Member Tribunal. Instead, the appeals were put up before the Third Member, who heard the same again and passed a separate order for dismissal of the appeals. After this order was passed by the Third Member on May 16, 2005, the Full Member Tribunal took up the matter on May 24, 2005 and in view of separate orders of majority of Members, ordered dismissal of appeals. It is not disputed that there is no order passed by any of the Members, who constituted the Bench initially, after the case was required to be heard by the Full Member Tribunal of the Bench.

13. The submission of the petitioner is that the procedure as envisaged u/s 57(3) of the VAT Act, was not at all followed, rather was violated blatantly. It is submitted by the counsel for the petitioner that if some procedure has been laid down in the statute, the

same is required to be followed in its entirety and in its true letter and spirit. If an act is required to be done under a statute in a particular manner, that can be done only and only in that manner and other manners of doing the same are impliedly barred.

14. Learned counsel for the State could not dispute the fact that the procedure followed by the Tribunal while hearing the appeals of the petitioner was not strictly in conformity with the provisions of the VAT Act. However, she submitted that the petitioner having not raised this objection at the time of hearing of appeals by the third Member, this amounted to waiver of this plea. Second contention raised by the counsel for the State is that the present petition having been filed nearly after one year from the order of the Tribunal passed on May 24, 2005 should be dismissed on account of delay and laches.

15. She has further submitted that the writ petition could not be entertained at this stage when the petitioner is already in the process of availing remedies available to it u/s 42 of the Act seeking reference of question of law arising out of order of the Tribunal.

16. Counsel for the petitioner first adverting to objection of the State regarding delay in filing of writ, submitted that the delay in filing of the petition in the facts and circumstances of the present case is not fatal for the reason that the petitioner as per legal advice chose the remedies available to it by filing a petition u/s 42 of the Act. However, during the process of hearing of the application, it transpired that as per requirement of Section 42(1) of the Act, the question of law, which can be referred to this court for opinion, should arise from the order of the Tribunal. In the present case, it cannot be disputed that the order of the Tribunal a Full Member order of the Tribunal passed on May 24, 2005, the full text of which has already been extracted above. What to talk of recording of any facts or the legal position, it only contains that during the three separate orders, two Members have taken a particular view and that should be the order of the majority.

17. Still further the counsel explained the difficulties which arose in the process of framing the questions of law, i.e., that since all the three Members constituting the Full Member Tribunal recorded their separate orders, without joint hearing. The facts in all the three orders had been recorded differently. Even in two orders which opined for dismissal of appeals, the facts are recorded differently. The questions of law can be framed and considered by this court only in the light of facts found by the Tribunal. When the facts found in different orders by all the three Members are recorded differently, it was not possible either to frame or refer question of law to this court to opine thereon. To substantiate his plea, the petitioner referred to the discrepancies in recording of facts in all the three different orders of three Members of the Tribunal in his petition which are extracted below:

(vi) The learned Chairman of the Haryana Tax Tribunal in his order dated September 13, 2004 has held as follows:

it was submitted that the dealer has failed to advance proof regarding effort, if any made for the revival of the unit. Instead he disposed of its assets and surrendered sales tax registration certification for cancellation in August 5, 2002 ...it was submitted that this shows that the dealer was not keen to rehabilitate the unit It was submitted that with the funds received from the insurance company revival of unit No. 2 was possible. No effort was, however, made in that direction. Rather the funds were diverted towards unit No. 1.... In this case the dealer has not made any effort to revive unit No. 2. Dealer has not shown whether with the amount of compensation given to it by the insurance company, no purchase of any machinery was possible. . . . For the reasons given above, it emerges that the Deputy Excise and Taxation Commissioner, Sonapat, was justified in withdrawing the benefit of tax exemption...Both these appeals are accordingly dismissed".

(vii) The Second member of the Tribunal who disagreed with the learned Chairman's opinion held in his order dated October 8, 2004 as follows:

We have heard the arguments of both the parties and have also gone through the case law referred to by the counsel for the appellant. It has not been disputed even by both the lower authorities, i.e., Deputy Excise and Taxation Commissioner, Sonapat, and the Joint Excise and Taxation Commissioner (A), Rohtak, that a major fire broke out in the unit and its main machines were totally gutted in the said fire. As per the report of loss assessor of the insurance company, the damage to the machines were beyond repairs and experts in the field were of the opinion that cost of repairs could be more than the cost of new machines and proper functioning of the repaired machines could be still doubtful ... it is not disputed that the appellant purchased machinery with the insurance claim amount and was installed in the other unit leading to more than two-fold increase in production of the expanded unit fetching more revenue to the State. All these facts go to show the bona fide intentions of the appellant.... I am of the opinion that the appellant-unit is fully entitled to shelter provided in proviso attached to Rule 28-A(II)(a).... I am fully convinced that the unit was closed down due to major fire and this reason is beyond the control of the appellant.

(viii) The order dated May 16, 2005 of the Third Member of the Tribunal records the following findings of fact:

Before parting with the matter it will not be out of place to mention here that the appellant concealed before the first appellate authority, the fact of the appellant's unit in question being insured much less divulging the receipt of Rs. 43.97 lacs as the amount of compensation received by way of insurance. This fact has not been even mentioned in the grounds of appeal in question. Of course, the learned Counsel for the appellant has very frankly and gracefully but rightly pointed this fact of the appellant having received the said compensation of loss of fire dated April 13, 2001 and he tried to justify that the reason for the appellant closing the unit in question was beyond his control for the purpose of justifying that the loss in production In fact, the facts and circumstances as discussed above the case of the appellant is a clear case of intentional violation of

provisions of rules ... because the appellant could possibly continue its production for next 5 years after having availed a huge benefit.... In that view of matter, I agree with the view taken by the honourable learned Chairman.

18. In this view of the matter, neither delay nor the process of availing alternative remedy u/s 42 of the Act was fatal in the filing of the present petition.

19. We have perused Section 57(3) of the VAT Act and also other provisions of the VAT Act as well as the Act. We are of the view that the procedure as laid down u/s 57(3) of the VAT Act provides for reference of a matter to be heard by Full Member Tribunal by stating points of difference, is mandatory in nature. Whenever point or points will be referred to be heard by Full Member Tribunal, it is inbuilt in the provision that such reference order will contain facts of the case in brief and thereafter state the point or points in issue, which are required to be considered by the Full Member Tribunal. This certainly has an object to be achieved in the scheme of the Act. The questions of law arising out of order passed by the Tribunal will be considered by this court only on the facts found by the Tribunal in an order out of which the question of law is referred to this court. If the facts itself are recorded differently in different orders passed by the learned Member constituting Bench, it will not be possible to either frame the question of law properly or to consider the same at the appropriate stage.

20. Further a bare perusal of Section 57(1) of the VAT Act shows that the Tribunal can be consisted of three or more odd number of Members including the Chairman, meaning thereby the Tribunal can consist of 3:5:7 numbers of members. Section 57(3) of the VAT Act provides that in case of difference of opinion amongst the members of the Bench, where they are equally divided, the case shall be heard by the Full Member Tribunal on the point or points of difference referred to for hearing by the Full Member Tribunal. This Full Member Tribunal necessarily means the total strength of the Tribunal at the relevant time. Merely because at the relevant time there was only three Members of the Tribunal including the Chairman so it was thought appropriate that the matter be heard by the third Member who was other than two Members who constituted a Bench, will not be in consonance with the provisions of the VAT Act. In case there are more than three Members constituting the Tribunal at a particular time, then it is not possible to follow this procedure at all. The word "shall" used in Section 57(3) of the VAT Act is also clearly suggestive of the intention of the Legislature that the only course open, on a reference in case of difference of opinion, is that the matter should be heard by the Full Member Tribunal and not by any other Member(s) who earlier was/were not Member(s) of the Bench. The provision of law cannot be operated differently merely because the number of Members constituting the Tribunal may be different at different times.

21. We have further been informed that the Tribunal invariably, is following the procedure of hearing the case by a third Member individually in cases where the Members of the Bench earlier hearing the appeal were differing in their views. Keeping this also in view it was considered appropriate to interfere in this matter at this stage, so that the mandatory

procedure as laid down u/s 57(3) of the VAT Act is followed in its true letter and spirit.

22. As far as the plea of estoppel or waiver raised by the State counsel is concerned, it would be suffice to add that once we have formed an opinion that the provision of Section 57(3) of the VAT Act are mandatory in nature, it is settled principle of law that there is no estoppel in a statute. In our opinion, in the facts and circumstances of the case and the procedure followed by the Tribunal, which is not in consonance with the provision of Section 57(3) of the VAT Act, has certainly caused prejudice to the petitioner.

23. Further, in our view the principle as enunciated by the honourable Supreme Court of India in [Babu Verghese and Others Vs. Bar Council of Kerala and Others](#), would also be helpful in the present case. The relevant part of which is as under:

31. It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor [1875] 1 Ch.D 426 which was followed by Lord Roche in AIR 1936 253 (Privy Council) who stated as under:

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.

32. This rule has since been approved by this court in [Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh](#), and again in [Deep Chand Vs. The State of Rajasthan](#), . These cases were considered by a three-Judge Bench of this court in [State of Uttar Pradesh Vs. Singhara Singh and Others](#), and the rule laid down in AIR 1936 253 (Privy Council) was again upheld. The rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law.

24. In view of our above discussions, we allow the writ petition, set aside the impugned order passed by the Full Member Tribunal dated May 24, 2005 and direct the Tribunal to hear and decide the appeals of the petitioner, keeping in view the observations made above and in accordance with law. Parties will appear before the Tribunal on July 26, 2006.

25. Since we have set aside the order dated May 24, 2005 passed by the Full Member Tribunal, reference application filed u/s 42 of the Act against that order, which is stated to be pending before the Tribunal, shall be deemed to have become infructuous at this stage.

26. It is made clear that we have not expressed any opinion on merits of the controversy in the present case. The Tribunal will consider the matter on its own merits.

27. The petitioner herein shall be bound by whatever conditions were laid down for entertainment of his appeals. It is further directed that whatever amount has already been

paid by the petitioner the same shall abide by the final order passed by the Tribunal and will not be refundable during the pendency of the appeals before the Tribunal.

28. The writ petition is disposed of in the manner indicated above. No costs.