

(2001) 02 P&H CK 0115

High Court Of Punjab And Haryana At Chandigarh**Case No:** Civil Writ Petition No. 1800 of 2000

R.S. Industries

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision: Feb. 20, 2001**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Haryana General Sales Tax Act, 1973 - Section 39(1), 39(2), 39(5)
- Punjab General Sales Tax Act, 1948 - Section 20(5)

Citation: (2006) 143 STC 689**Hon'ble Judges:** Nirmal Singh, J; G.S. Singhvi, J**Bench:** Division Bench**Advocate:** Avneesh Jhingan, for the Appellant; Jaswant Singh, Deputy Advocate-General, for the Respondent**Final Decision:** Dismissed

Judgement

G.S. Singhvi, J.

This is a petition for modification of the order dated November 2, 1999 passed by the Sales Tax Tribunal, Haryana (for short, "the Tribunal") and for issuance of mandamus to the Joint Excise and Taxation Commissioner (Appeals), Faridabad (respondent No. 3) to hear and decide the appeal filed by the petitioner u/s 39(1) of the Haryana General Sales Tax Act, 1973 (for short, "the Act") without insisting on pre-deposit of tax.

2. The petitioner is a registered dealer under the Act. It is engaged in the manufacture and sale of paraffin wax. Vide orders dated January 29, 1999 and April 2, 1999, the Excise and Taxation Officer (Enforcement)-cum-Assessing Authority created an additional demand of Rs. 11,13,372 against the petitioner towards the tax and penalty, who challenged the same by filing an appeal u/s 39(1) of the Act along with an application for exemption from payment of tax in terms of Section

39(5). By an order dated September 6, 1999, respondent No. 3 partly accepted the petitioner's request for hearing the appeal without insisting on pre-deposit of tax subject to the condition of payment of Rs. 2,78,343 representing 25 per cent of the disputed demand in two monthly instalments and furnishing of surety for the balance amount of Rs. 8,35,029 to the satisfaction of the Assessing Authority. This did not satisfy the petitioner and, therefore, it filed an appeal u/s 39(2) of the Act before the Tribunal with the prayer for grant of total exemption from payment of tax. By an order dated November 2, 1999, the Tribunal disposed of the appeal with the direction to the appellant (petitioner herein) to pay rupees one lakh out of Rs. 2,78,343 and furnish surety bond for the balance amount as a condition precedent to the hearing of the appeal.

3. The petitioner has now invoked writ jurisdiction of this Court under Article 226 of the Constitution of India for directing respondent No. 3 to hear the appeal without pre-deposit of the amount specified in the order of the Tribunal. It has averred that the orders passed by respondent No. 3 and the Tribunal are vitiated by an error of law because neither of them has properly considered its plea of financial weakness.

4. The respondents have controverted the petitioner's assertion about its weak financial condition. According to them, the petitioner's unit is still functional and, therefore, respondent No. 3 and the Tribunal have rightly asked it to deposit a part of the amount of additional demand as a condition precedent to the hearing of the appeal.

5. We have heard learned counsel for the parties. The ambit and scope of Section 39(5) of the Act and a similar provision contained in Section 20(5) of the Punjab General Sales Tax Act, 1948 was considered by a Full Bench of this Court in *Emerald International Ltd. v. State of Punjab* ST [2001] 122 382 ; (1997) (2) 116 PLR 797. After a comprehensive analysis of the relevant provisions and reference to the judicial precedents on the subject, the Full Bench culled out the following propositions :

(a) The appeal is a creation of a statute and in case a person wants to avail of the right of appeal, he has to accept the conditions imposed by the statute.

(b) The right of appeal being a creature of statute, the Legislature could impose conditions for exercise of such a right. Neither there is a constitutional nor legal impediment for imposition of such a condition.

(c) The right of appeal is neither natural nor inherent attaching to a litigation and such a right neither exists nor can be assumed unless expressly given by the statute.

(d) Even if, this Court was to interpret the bare provisions of two statutes, i.e., the Punjab General Sales Tax Act, 1948 and the Haryana General Sales Tax Act, 1973, it could safely be held that there is a complete bar to the entertainment of an appeal by the appellate authority without the payment of tax amount unless the authority is satisfied that the dealer is unable to pay the amount so assessed and only in that

situation the appellate authority for the reasons to be recorded in writing can entertain the appeal without deposit of the payment of such amount.

(e) Neither on the wording nor in view of the spirit of the Punjab and Haryana Acts it is possible to hold that the appellate authority should see the prima facie nature of the case while hearing the stay matter.

(f) The factum of tax assessed being illegal cannot be a relevant consideration for grant of stay by an appellate authority.

(g) The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India in rarest of the rare cases in the given facts and circumstances, can grant stay and waive the condition of pre-deposit of tax and the existing alternative remedy in such circumstances would be no ground to refuse interference.

6. The aforementioned propositions have been approved by the Supreme Court in [State of Haryana Vs. M/s. Maruti Udyog Ltd. Ors.](#), with the slight modification that while considering the application u/s 39(5) for exemption from payment of tax, the appellate authority/Tribunal cannot delve into the merits of the challenge to the order passed by the Assessing Authority and/or appellate authority.

7. In the light of the above, we have to determine whether the orders dated September 6, 1999 and November 2, 1999 passed by respondent No. 3 and the Tribunal are vitiated by any such error of law which may justify issue of a writ of certiorari. A perusal of the order dated September 6, 1999 shows that after considering the averments made in the application filed by the petitioner, respondent No. 3 directed it to pay Rs. 2,78,343. For the sake of convenience, the extract of that order is reproduced below :

The bare facts are that aggregate additional demand of Rs. 11,13,372 has been raised against the appellant, vide the impugned orders dated January 29, 1999 and April 2, 1999. Whole of the additional demand is disputed. The appellant has paid nil. The appellant states that there was an accident in the factory in June, 1999 ; in which part of the machinery was damaged and there are no sales since June, 1999 ; the firm incurred losses since beginning; repayment of HFC loans are also in arrears and there is no money to pay. An affidavit and balance sheet as on March 31, 1999 are filed in support. The balance sheet shows security deposits of Rs. 1,00,000, cash in hand Rs. 16,718 and with bank Rs. 1,307, deposited with Central Excise Rs. 2,73,441 and closing stock Rs. 15,23,946. After taking into consideration aforesaid facts of the case the appeals are entertained subject to the conditions that the appellant shall make payment of Rs. 2,78,34 (25 per cent of the disputed demand) by two equal monthly instalments beginning from September, 1999 payable by the last day of each month and shall also furnish security to the satisfaction of the Assessing Authority by the last day of September, 1999 for the balance amount of Rs. 8,35,029, recovery of which is stayed. The appellant shall meet the above conditions strictly in time and shall keep on making the payment by instalments regularly without delay

or default till the final hearing so long as the dues are outstanding and shall intimate the compliance thereof on each date of hearing. Should the appellant fail for any reason to comply with the aforesaid directions his appeals shall be liable to be dismissed in default.

8. The Tribunal modified the order passed by respondent No. 3 and considerably reduced the amount payable by the petitioner. This is clearly borne out from the perusal of the order dated November 2, 1999, paragraphs 3, 4 and 5 of which read as under :

3. Arguing on stay application, the counsel for the appellant submitted that the appellant-firm suffered heavy losses during 1998-99. Due to accident in the factory, machinery was damaged and the unit was closed down in June, 1999. There are no orders for the product manufactured and due to financial crisis, the machinery could not be replaced. So, the unit continues to be out of production and there are no chances of revival. The HSIDC is pressing hard for the repayment of loan and has threatened to take possession of the unit.

4. Shri M.K. Dutta, Joint Director (Legal) appearing on behalf of the State pleaded that it is admitted that the firm is closed but the weak financial position had already acknowledged by Joint Excise and Taxation Commissioner (Appeal). The appellant was directed to deposit only 25 per cent of disputed demand in two equal instalments after taking into consideration all factors, i.e., closing stocks, securities, cash in hand, etc. The order passed by the first appellate authority is fair and reasonable order and calls for no interference.

5. I have heard the arguments of both the sides and have also gone through the facts on record. In view of the weak financial position of the unit, the appellant deserves some relief. Accordingly, the appellant is directed to pay Rs. 1 lakh out of Rs. 2,78,343 and surety bonds for the balance amount within one month from the date of receiving the order and thereafter the appeal shall be heard by the Joint Excise and Taxation Commissioner (Appeal), Faridabad on merits.

In our opinion, the reasons assigned by respondent No. 3 for indirectly declining the prayer of the petitioner for total exemption, are quite germane to the exercise of the power under proviso to Section 39(5) of the Act and we do not find any valid ground to interfere with the discretion exercised by him and the Tribunal more so because the petitioner has not controverted the fact that it had closing stock of Rs. 15,23,946 which can be utilised for defraying its liability.

For the reasons mentioned above, the writ petition is dismissed. However, we accept the oral request made by Shri Avneesh Jhingan for grant of some time to the petitioner to deposit the amount in terms of the order dated November 2, 1999 and direct that if the said amount is deposited within four weeks from today, the appeal filed by the petitioner u/s 39(1) of the Act shall be heard and decided by respondent No. 3 on merits. If the petitioner fails to comply with this condition, the appeal filed

by it shall stand dismissed automatically.