(2008) 08 SC CK 0101

Supreme Court of India

Case No: Civil Appeal No''s. 5386 of 2002 and 676 of 2005 and Civil Appeal No. 5149 of 2008 (Arising out of SLP (C) No. 26523 of 2004)

State of Haryana and Others		APPELLANT
	Vs	
A.S. Fuels Pvt. Ltd. and Another		RESPONDENT

Date of Decision: Aug. 20, 2008

Acts Referred:

- Haryana General Sales Tax Rules, 1975 - Rule 11, 28A, 28A(10), 28A(11(1)), 28A(11)

Citation: (2008) 9 JT 281 : (2008) 11 SCALE 586 : (2008) 9 SCC 230 : (2008) 2 UJ 1114 : (2008) 16 VST 546

Hon'ble Judges: P. Sathasivam, J; Arijit Pasayat, J

Bench: Division Bench

Advocate: Anoop G. Choudhary, Manjit Singh, Rupansh Purohit, T.V. George, Rajeev Agnihotry and Praveen Kumar, for the Appellant; J.K. Sibal Sumesh Dhawan, Shriti Ranjan, P.N. Puri, Nikhil Nayyar, Dayan Krishnan, Gautam Narayan, Ankit Singhal, TVS Raghvendra Sreyas, Samrat Singh and Ashwani Kumar, for the Respondent

Final Decision: Disposed Of

Judgement

Arijit Pasayat, J.
Leave granted in SLP (C) No. 26523 of 2004.

2. Challenge in these appeals is to the order of a Division Bench of the Punjab and Haryana High Court holding that the cancellation of exemption certificate after its validity period was over on 30.6.1997 did not attract the provisions of Clause (v) of Sub rule 10 of Rule 28 (A) of the Haryana General Sales Tax Rules, 1975 (hereinafter referred to as the `Rules''). According to the High Court, it was clearly not a case of cancellation of exemption certificate because it was done after expiry of the period. In that view of the matter, it was held that the Deputy Excise and Taxation Commissioner (in short the `DETC'') was not justified in directing the respondent to

deposit an amount of Rs. 40,45,324/- in respect of the exemption availed of by it for the period up to 30th June, 1997. The High Court did not think it necessary to examine whether Sub rule 10(v) of Rule 28(A) in so far as it empowers the department to withdraw the tax exemption certificate was valid or not. However, liberty was granted to the present appellants, if there was a case for withdrawal of the eligibility certificate under Sub-rule (8) of Rule 28A of the Rules, to proceed in accordance with law.

3. The State of Haryana has filed the appeals in respect of orders of the High Court in writ petition filed by the respondent in each case. The first judgment was rendered in case of M/s A.S. Fuels Pvt. Ltd. The judgment in that case was the primary foundation for decision in the other cases.

4. Background facts in Civil Appeal No. 5386 of 2002 are essentially as follows:

Under Rule 28A appearing in Chapter IVA certain class of industrial units are entitled to exemption/deferment from payment of tax for a specified period and subject to fulfillment of certain conditions. The benefit of sales tax exemption was granted for the period from 13.12.1994 to 12.12.2003. Necessary eligibility certificate entitling the respondent to avail the sales tax exemption for a period of nine years was granted. On the basis of the eligibility certificate unit was granted exemption certification for the period ending 30th June, 1995, The same was renewed at the first instance till 30.6.1996 and thereafter till 30.6.1997. An application for further renewal of the exemption certificate was filed on 31.7.1997. This was rejected by order dated 15.12.1997 on the ground that the same was not complete in certain respects and despite grant of opportunities the respondent failed to furnish the necessary documents. While processing the application for renewal, the DETC noticed that the unit of the respondent was out of production since January, 1997 and as such the exemption certificate was also liable to be cancelled under Sub rule 9(1) of Rule 28A of the Rules. Therefore, a show cause notice was issued on 5.12.1997 fixing the date for submission of explanation on 15.12.1997. Respondent neither appeared nor furnished any explanation. Therefore, the DETC cancelled the exemption certificate by order dated 14.1.1998. In appeal the matter was remanded to the Prohibition Excise and Transport Commissioner, Haryana. During assessment proceedings, it was again found that the Industrial unit was non-functional since January, 1997 and almost the entire plant and machinery had been removed from the factory premises and taken to some other places out of Haryana without any information to the Department. Even the factory shed and other structures were found to be dismantled and business was totally closed. By order dated 30.6.1998 again an application for renewal was rejected and the exemption certificate already granted was cancelled by invoking Sub rule 9(i) of Rule 28(A). The respondent was directed to deposit the tax in respect of the exemption as has already been availed and also to pay the interest. Stand of the present respondent in the writ petition was that since the unit had remained closed on account of non-availability of coal which

was a factor beyond its control there was no question of any non-renewal. It was contended that even if the cancellation of the exemption certificate was to be upheld under Sub-rule 9(i) of Rule 28 (A) the same cannot operate retrospectively and the respondent cannot be asked to deposit the amount. This amount pertains to the period when the industrial unit was in production.

Stand of the State, which is the appellant in this appeal, was that since there is no production since January, 1997 the exemption certificate was liable to be cancelled in terms of Sub rule ((i) of Rule 28(A). There was no exceptional circumstances provided under which consequence could be availed. It was pointed out that after the eligibility certificate is granted, the dealer is required to obtain an exemption certificate which is valid up to a certain date. Thereafter the exemption certificate is required to be renewed on year to year basis as per the procedure provided in Sub-rule (7) of Rule 28A. Reference was also made to Sub rule (9) which provides the circumstances under which exemption certificate granted was liable to be cancelled. It was therefore argued that once the exemption certificate is cancelled it necessarily follows that the exemption of tax already availed would be without authority of law and was liable to be recovered. Reference was made in this context to Clause (v) of Sub rule (10) of the Rules.

The High Court was of the view that the exemption certificate has rightly been cancelled under Sub-rule (9) of Rule 28A of the Rules. It, however, did not accept the Revenue''s stand that there was provision for consequential action. Reference was made to Sub rule 10(v) of Rule 28A. On a comparative reading of Sub rules (8) & (9) it was held that if a unit discontinues its business or closes it down for a period of six months, action can be taken under both the provisions. Under Sub-rule (8) the eligibility certificate can be withdrawn whereas under Sub rule (9) the exemption/entitlement certificate can be cancelled. It was observed that there are no exceptions provided in Sub-rule 9(1)(i) which is the position in Clause (ii) of Sub rule 8(a). Accordingly it was held that the cancellation of exemption/entitlement certificate can relate only to the year in respect of which the said certificate is still to expire and it is only the benefit of tax exemption availed by the dealer, for that year alone which becomes payable in lump sum. It was held that if after the expiry of an exemption/entitlement certificate it is found that unit had dis- continued its business or closed it down for a period of exceeding six months, the department is not without remedy. It can always take action for withdrawal of the eligibility certificate as provided in Sub-rule (8) of the Rule 28(A) of the Rules. The High Court held that once the eligibility certificate has been withdrawn, without there being any recourse to the procedure laid down under Rule (8) of Rule 28A of the Rules, the same is impermissible. It was however held that if the authorities have a case for withdrawal of the liability certificate under Sub-rule (8) of Rule 28A of the Rules they shall be free to proceed in accordance with law and nothing observed in the judgment of the High Court shall prejudice their rights under that provision.

5. Learned Counsel for the appellant-State submitted that after having held that the cancellation was right, High Court was not correct to say that it can only be withdrawn for the period concerned. Reference is made to Sub-rule (11). It provides that the benefit of tax exemption/deferment after it is availed shall continue for the next five years. Sub-rule 10(v) deals with currency of the certificate and Sub rule 11(1)(b) proviso that DETC has the authority to ask for deposit of the amount in respect of which exemption has been availed if there is violation of any of the conditions stipulated.

6. Learned Counsel for the respondents on the other hand submitted that once certificate has lost its currency and the application was made after the expiry of the period, there could not have been any cancellation and there was also no question of any renewal. It is also pointed out that pursuant to the directions of the High Court, the eligibility certificate has been withdrawn by the concerned authority and the eligibility certificate has been cancelled with effect from 27.6.2007, an appeal has already been dismissed on 8.6.2006 and the writ petition was pending.

7. Rule 28(A) so far as relevant reads as follows:

28(A) - Class of industries, period and other conditions for exemption/deferment from payment of tax- (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.

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(6). (a) An eligible industrial unit which has been issued with an eligibility certificate (hereinafter referred to as the applicant unit), shall, within sixty days of its receipt make an application for the grant of exemption or entitlement certificate as the case may be, in Form S.T. 71 to the Deputy Excise and Taxation Commissioner of the District in which his unit is located. The application shall be accompanied with an attested copy of the eligibility certificate and other documents mentioned in the application.

No application shall be entertained if not received within time. An application with incomplete or incorrect particulars including the documents required to be attached therewith shall be deemed as having been not made if the applicant fails to complete it on an opportunity afforded to him in this behalf. On receipt of application, the Deputy Excise and Taxation Commissioner shall ask the applicant unit seeking benefit of:

(i) tax deferment to either execute a mortgage deed in Form S.T. 74 creating a pari-passu first charge alongwith financial institutions/banks on the assets of the unit, or to furnish a bank guarantee for 15% of the total benefit to be availed of in a year, and a surety bond in Form S.T. 50 for the balance amount of 85%. The mortgage deed/agreement or-bank guarantee shall be valid till the recovery of the

entire deferred amount of tax. The bank guarantee, if expiring early or if furnished, on annual basis shall be renewed two months before the date of expiry failing which the unsecured deferred tax shall become due for payment immediately;

(ii) tax exemption, to either execute a surety bond in Form S.T. 50 equivalent to 15% of the amount of notional sales tax liability sought to be exempted for a bank guarantee for that amount in a year, which shall be valid for the period extending to five year, which shall be valid for the period extending to five years after the expiry of total period of tax exemption;

(b) The Deputy Excise and Taxation Commissioner shall after satisfying himself that the applicant unit is holding a genuine and valid eligibility certificate, has furnished adequate security and that his application is in order will issue him the exemption/entitlement certificate as the case may be within thirty days of the receipt of the application. One copy of the certificate shall be sent to the Director of Industries or The General Manager, District Industries Centre as the case may be and one copy shall be retained in the record. The certificate issued shall he valid unless cancelled or withdrawn from the date of commercial production or from the date of issue of entitlement/ exemption certificate as the case may be to the 30th June next or when notion sales tax liability first exceeds the quantum of tax exemption/deferment fixed for the unit, whichever is earlier.

Note:-- The agreement or the mortgage deed or the bank guarantee, as the case may be, is an important document and shall be entered in a register to be maintained in Form S.T. 75 by the Deputy Excise and Taxation Commissioner concerned in his personal custody. At the time of transfer of the charge of his office, the Deputy Excise and Taxation Commissioner shall hand over the register as well as the documents to his successor personally against proper receipt and shall send a certified copy of the same to the Excise and Taxation Commissioner by name who will acknowledge its receipt to both the officers.

(7)(a) The exemption certificate or the entitlement certificate as the case may be, shall be renewed from year to year for which the industrial unit shall make an application to the Deputy Excise and Taxation Commissioner incharge of the District by the 31st May in Form S.T. 71. The application shall be accompanied with exemption/entitlement certificate, additional security as specified in Sub clauses (i) and (ii) of Clause (a) of Sub-rule (6) equal to fifteen per cent of the declared notional sales tax liability of the current year and the difference between the actual and the declared notional sales tax liability of the previous year in the case of sales tax exemption and equivalent to the extent of estimated tax liability of the current year and difference between actual and estimated tax liability of previous year in case of tax deferment, as also other documents mentioned in the application.

The Deputy Excise and Taxation Commissioner after making such enquiries as are necessary, and after satisfying himself that the applicant is a bonafide industrial unit

and has not misused the exemption/entitlement certificate, shall renew the exemption/ entitlement certificate within 30 days of the making of the application for renewal failing which the certificate shall remain valid until the renewal is refused or the certificate otherwise expires. The exemption/ entitlement certificate on renewal shall unless cancelled or withdrawn be valid from lst of July of the year in which the application is made if it is in time or otherwise from the date of application to 30th June, next or when the eligibility certificate expires or the cumulative notional sales tax liability first exceeds the quantum of tax exemption/deferment fixed for the unit, whichever is earlier.

(b) If the Deputy Excise and Taxation Commissioner incharge of the district finds that the application for renewal of exemption/ entitlement certificate is not in order or the particulars contained in the application are not correct and complete or the applicant is not a bonafide industrial unit or has misused exemption/entitlement certificate or has note complied with any of the directions given to it by him within the specified time; he may reject the application after giving the applicant an opportunity of being heard.

(c) An appeal against the order passed by the Deputy Excise and Taxation Commissioner under Clause (b) of this sub-rule shall lie to the Excise and Taxation Commissioner, Haryana, if preferred within thirty days of the communication of the order appealed against.

(8)(a) The eligibility certificate granted to an industrial unit shall be liable to be withdrawn at any time during its currency by the appropriate screening committee, in the following circumstances

(i) if it is discovered that it has been obtained by fraud, deceit, misrepresentation, mis-statement or concealment of material facts;

(ii) discontinuance of its business by the unit or closing down of its business for a continuous period exceeding six months except in case of fire, flood and other natural calamities, riots, strike or lock-out which in the opinion of the committee concerned is beyond the control of the unit;

(iii) disposal or transfer by the unit of any off its fixed assets adversely affecting its manufacturing or production capacity:

Provided that no order of withdrawal of the eligibility certificate shall be made without affording a reasonable opportunity of being heard to the affected unit.

(b) When the eligibility certificate is withdrawn, the exemption/entitlement certificate shall be deemed to have been withdrawn from the 1st day of its validity and the unit shall be liable to payment of tax, interest or penalty under the Act as if no entitlement certificate had ever been granted to it.

(9) The exemption/entitlement certificate granted to an eligible industrial unit shall be liable to be cancelled by the Deputy Excise and Taxation Commissioner concerned in the following circumstances, after affording an opportunity of being heard to the unit:

(i) discontinuance of its business by the unit at any time for a period exceeding six months or closing down of its business during the period of exemption/deferment.

(ii) disposal by the unit of any of its fixed assets mortgaged with the Government in the Excise and Taxation Department;

(iii) failure to furnish adequate security by the unit as required under the rules;

(iv) failure of the unit to make payment of the deferred amount on the date of payment;

(v) contravention of any of the provisions of the Act and/or the rule, or conditions of the eligibility certificate or the exemption/ entitlement certificate by the unit;

(vi) when the appropriate committee, which sanctions eligibility certificate recommends that the exemption /entitlement, certificate of the unit be cancelled for reasons to be recorded in writing.

(10) (i) The eligible industrial unit shall continue to be liable to file the returns in the manner prescribed under the Act, and the rules and its failure to do so shall expose it to penalty as provided in the Act;

(ii) The assessment of an eligible industrial unit holding exemption/entitlement certificate shall be framed in accordance with the provisions of the Act and Rules framed thereunder as early as possible and shall be completed by the 31st December, in respect of the assessment year immediately preceding thereto and the additional demand so determined, if any, shall be paid as per the provisions of the Act and the Rules;

(iii) The State Government may appoint special assessing authority for framing assessment of units mentioned in the preceding clause;

(iv) Notwithstanding the provisions relating to payment of tax due, according to returns, the eligible industrial unit which has availed of the benefit of sales tax deferment shall make payment of the deferred amount after the expiry of a period of five years to the extent of the amount deferred, every quarter or month, as the case may be, within the period specified in the rules:

(v) On cancellation eligibility certificate or exemption/entitlement certificate before it is due for expiry, the entire amount of tax exempted/deferred shall become payable immediately, in lump sum, and the provisions relating to recovery of -tax, interest and imposition of penalty shall be applicable in such cases.

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 or 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 an 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.

8. As the scheme of Rule 28A shows that there are two certificates provided for. One is the eligibility certificate and the other is the exemption certificate. Clause 4(a) deals with the benefit of tax exemption or deferment to an eligible industrial unit holding exemption or entitlement certificate. In Clauses 2 (j), (k) & (l) the certificates are defined:

(j) "eligibility certificate" means a certificate granted in Form S.T. 72 by the appropriate Screening Committee to an eligible industrial unit for the purpose of grant of exemption/deferment.

(k) "exemption certificate" means a certificate granted in Form S.T. 73 by the Deputy Excise and Taxation Commissioner of the District to the eligible industrial unit holding eligibility certificate which entitles the unit to avail of exemption from the payment of sales or purchase tax or both, as the case may be;

(l) "entitlement certificate" a certificate granted in Form S.T. 72 by the Deputy Excise and Taxation Commissioner of the district to the eligible industrial unit holding eligibility certificate which entitles it to get deferment of sales tax;

9. The eligibility certificate is issued by the appropriate screening committee while the exemption certificate and the entitlement certificate are issued by the DETC in Forms 73 and 72 respectively. As the High Court has rightly observed, that there is scope for automatic cancellation in view of the fact that after January, 1997 there was no production. Sub rule (8) deals with the withdrawal of the eligibility certificate. Under Sub-rule 8(b) when the eligibility certificate is withdrawn, the exemption/entitlement certificate is also deemed to have been withdrawn from the

first day of its validity and the unit shall be liable to payment of tax, interest or penalty under the Act as if no entitlement certificate had been ever granted to it. The only other question which is required to be examined is the benefit of Rule 11(a). A bare reading of the same shows that the benefit of tax exemption/deferment under the Rule shall be subject to the condition that the beneficiary/industrial unit after having availed all the benefit shall continue its production for at least next five years not below the average production for the preceding five years. Clause (b) of the sub rule is of considerable significance; it shows that 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 the 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. The proviso is also of significance. It provides that the provisions of Clause (b) shall not come into play if the loss in production is explained to the satisfaction of the DETC concerned as being due to reasons beyond the control of the unit. Thus there are several conditions which are relevant; firstly there is a requirement of continuing the production of at least next five years; secondly consequences flowing in case of violation of the conditions laid down in Clause (a). In other words, in case of non-continuance of production for next five years, the result is that it shall be deemed as if there was no tax exemption/entitlement available to it. The proviso permits to the dealers to explain satisfactorily to the DETC that the loss in production was because of the reasons beyond the control of the unit. The materials have to be placed in this regard by the party. The High Court seems to have completely lost sight of Rule 11(b). In any event, we find that the High Court had permitted the authorities to go before the Screening Committee to get the eligibility certificate cancelled. Undisputedly that has been done, and the appeal against cancellation has been dismissed.

10. It is stated that a writ petition is pending before the High Court. As in the instant case the writ petition filed by the respondent has been allowed without examining effect of Rule 11, the order of the High Court cannot be maintained. It is to be noted that in terms of Clause (b) of Rule11 if the conditions stipulated in Clause (a) are not fulfilled, it shall be deemed that exemption/entitlement was not ever availed. Therefore, the High Court was not justified in its view that demand cannot be maintained. In view of the conclusions, Civil Appeal No. 676 of 2005 is without merit and is dismissed, while the other appeals are allowed.