(2011) 06 DEL CK 0076

Delhi High Court

Case No: S.T. Ref. No. 2 of 2002

Mohan Hotel P. Ltd.		APPELLANT
	Vs	
Commissioner of Sales Tax		RESPONDENT

Date of Decision: June 3, 2011

Acts Referred:

- Central Sales Tax Act, 1956 - Section 5(1), 9(2A)
- Delhi Sales Tax Act, 1975 - Section 21, 21(1), 21(2), 21(3), 21(5)
- Delhi Sales Tax Rules, 1975 - Rule 21(1), 25
- Sales of Goods Act, 1930 - Section 2(4)

Citation: (2011) 181 DLT 758 : (2011) 42 VST 8

Hon'ble Judges: Sanjay Kishan Kaul, J; Rajiv Shakdher, J

Bench: Division Bench

Advocate: M.S. Syali, Rahul Sateeja and D.V. Kapoor, for the Appellant; H.C. Bhatia, for the Respondent

Judgement

Rajiv Shakdher, J.

This is a reference made on behalf of the Assessee. The captioned reference pertains to the assessment years 1984-1985 to 1989-1990. The Appellate Tribunal, Sales Tax, Delhi (hereinafter, referred to as the Tribunal) has referred to this Court, for adjudication, the following questions of law:

(i). Whether on the facts and under the circumstances of the case, the Tribunal was correct in holding that the "delivery order" issued by the dealer is not a document of title and therefore, the case of the Appellant does not fall under the second limb of Section 5(1) of the Central Sales Tax Act, 1956?

(ii). Whether on the facts and under the circumstances of the case, the Tribunal was correct to hold that the second limb of the aforesaid Section 5(1) pre-supposes foreign destination of the goods?

(iii). If the answer to both the aforesaid questions is in the negative, whether on the facts and under the circumstances of the case the Tribunal was correct in upholding levy of interest u/s 27(1) of the Delhi Sales Tax Act, 1957 read with Section 9(2A) of the Central Sales Tax Act, 1956?

2. The aforementioned questions of law arise in the background of the following facts:

2.1 The Assessee/dealer is engaged in the business of supplying meals, snacks and other eatables to foreign airlines in respect of flights operated by them from India. As per the case set up by the Assessee/dealer before the authorities below, the eatables (hereinafter referred to as "goods") supplied by it to the airlines were not to be consumed by passengers within the territory of India. The Assessee/dealer in this behalf, amongst other documents, had relied upon a delivery order, which contained the following terms and conditions:

1. The goods referred to in this Delivery Order are not meant for consumption in India.

2. This Delivery Order shall be proof of ownership of the goods referred to herein. The consignee and/or any person to whom this order is transferred by endorsement by the consignee shall be entitled to take delivery of the goods from Consignor supply unit at the Airside Tarmac across Air Customs Pool Indira Gandhi International Airport by presentation of this Delivery Order.

3. The consignor is responsible for all consequences of any incorrect or false declaration the consignor shall indemnify the consignee against any liability for detention loss damage, expense or cost suffered on account of dispatch of any contraband or prohibited goods without the requisite licence or permit.

4. Since the Delivery Order is being presented after the goods have cleared all local customs, quarantine and other legal formalities and are ready for delivery at consignor supply unit at the Airside Tarmac across Air Customs Pool Indira Gandhi International Airport the consignee is liable to take delivery of the goods with utmost dispatch and the consignors shall not be liable for any deterioration in the quality of the goods due to delay on consignee''s part in taking delivery of the goods.

5. Notwithstanding the goods referred to herein being damaged and or destroyed the consignee shall be liable to make payment for the same to the consignor and shall be entitled to receive any insurance claim receivable for such goods.

2.2 Based on the above, the Assessee/dealer contended that the goods in issue were exempt from local Sales Tax being sales "in the course of export.

3. An argument was raised that the Assessee''s/dealer''s sale came within the ambit and scope of the second limb of Section 5(1) of the Central Sales Tax Act, 1956

(hereinafter referred to as "CST Act") which reads as follows:

A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India.

(Emphasis is ours)

4. The Assessing Officer for each of the assessment years referred to above, came to the conclusion that the sale took place in Delhi, more specifically at the Delhi Airport, and since delivery was also made at Delhi; sale in issue had to be considered as a local sale. Accordingly, the Assessee was directed to pay sales tax at the rate of 7% even in respect of this transaction.

4.1 Aggrieved by the order, the Assessee/dealer carried the matter in appeal to the Dy. Commissioner (Appeals). The Dy. Commissioner (Appeals) passed two separate orders dated 04.10.1991 and 28.03.1994 in respect of the assessment year 1984-1985 and assessment years 1985-1986 to 1989-1990 respectively. The Dy. Commissioner (Appeals) sustained the view taken by the Assessing Officer by a reasoned order. In coming to the conclusion, which he did, the Dy. Commissioner (Appeals) applied the ratio of the judgment of the Supreme Court in Burmah Shell Oil Storage and Distribution Company (1960) (11) STC 764 and, that of the Andhra Pradesh High Court in the case of M/s. Fairmacs Trading Co. v. State of Andhra Pradesh 36 STC 260 (AP).

4.2 Being aggrieved, the Assessee/dealer carried the matter in a further appeal to the Tribunal. The Tribunal by a common order dated 02.02.2001 dismissed the appeals, being six (6) in number, preferred by the Assessee/dealer. The Tribunal for the reasons contained in the impugned judgment repelled the contention of the Assessee that the case of the Assessee/dealer fell within the second limb of Section 5(1) of the CST Act, which provided that sale or purchase of goods shall be deemed to take place in the course of export of the goods, out of the territory of India, only if the sale or purchase is effected by "transfer of documents of title to the goods after goods have crossed the customs frontiers of India.

4.3 The argument advanced on behalf of the Assessee was that the delivery order, to which we have already made a reference above, is a document of title and that this document of title effects sale by transfer after the goods have crossed the customs frontiers of India. While rejecting this submission, the Tribunal in the impugned judgment has made the following observations on the merits of the Assessee''s/dealer''s contention that its case fell within the scope and ambit of the second limb of Section 5(1) of the CST Act:

8. Sh Kapoor argues that the delivery order is a document of title to goods and since the sale is effected by its transfer after the goods have crossed the customs frontier

of India, it squarely falls within the second limb of Section 5(1), however, we will venture to examine whether the present delivery order can be said to be a "document of title to goods". This expression has been defined under the Sale of Goods Act, 1930. Section 2(4) of this Act reads as under:

Document of title of goods includes a bill of lading, dock warrant, warehouse-keeper''s certificate, wharfinger''s certificate, railway receipt, warranty order for the delivery of goods and any other document used in the ordinary course of business as proof to the possession or control of goods, or purporting to authorize, either by endorsement or by delivery the possessor of the document to transfer or receive goods thereby represented.

9. Document of title to goods has an inclusive definition but in two parts. The first part names certain documents which in their own right have been included as such. The second part includes such of the named documents which "in the ordinary course of business" are used as proof to the possession or control of the goods, or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented. The documents in this class must i) in the ordinary course of business ii) be used as proof of possession or control of the goods iii) authorize the possessor to transfer or receive the goods.

10. There is neither any averment nor any proof that the delivery order of the type pressed into service by the Appellant is treated as proof of possession or control of goods in the ordinary course of business. There is no suggestion that the sale of foods item to airlines has a market where goods are freely bought and sold. Nor there is any suggestion that in the said market goods are bought and sold only on the basis of delivery or endorsement of delivery order. In fact, the food items are so specific to every airline or fight that there is no market as such. Had it been so there was no necessity to so provide by contractual stipulations in the form of the reverse of the so called delivery order. It has been stated in additional submission dated 22.11.1993 that food is not prepared not on general menu but according to the specific order and specification of individual airlines. The whole contract is a package deal for preparation and supply of food and catering and handling services. The contract involved both supply of good and other works and labour. This includes preparation of food, presentation and disposal of trays according to the standards set by each airline, transportation handling etc. This belies the theory of any market or market practice of transfer of goods on documents of title to goods. In fact the entire supply is to only one airlines i.e., Saudi Airlines. Documents of title to goods are the documents which are so recognized by the trade and not those which are created by the parties by specific stipulations or inter-party contracts.

5. The Tribunal having rejected the Assessee/dealer''s contention on merits, proceeded to examine the contention of the Assessee/dealer with regard to payment of interest. It is pertinent to note at this stage the arguments advanced by the Assessee/dealer on the issue of interest. As would be evident from submissions

noted in paragraph 19 of the impugned judgment, that the Assessee/dealer''s stand was that the interest was not leviable since the issue of imposition of local tax on sales of goods in issue to the airlines was a debatable issue.

19. The next question is interest. Sh. Kapoor submitted that since the matter is debatable interest should not be leviable in the light of the Supreme Court in J.K. Synthetics Ltd. v. Commercial Taxes Officer (1994) 94 STC 422 followed in Frick India Ltd. v. State of Haryana (1994) 95 STC 188. It is argued that so long as the dealer pays the tax which according to him is due on the basis of the information supplied in the return filed by him, there would be no default on his part to meet his statutory obligation. The law does not envisage the dealer to predict the final assessment when he files the return and expect him to pay the tax on that basis to avoid the liability to pay interest.

(Emphasis is ours)

5.1 The Tribunal, however, relying upon its own judgment in the case of T.V. Sundram Iyengar and Sons Vs. The State of Madras, which was evidently approved by this Court (the details of which neither the Assessee/dealer nor the revenue have been able to supply), rejected the contention of the Assessee/dealer. In applying the principle as articulated in the judgment of the Supreme Court in J.K. Synthetics Ltd. v. Commercial Taxes Officer (1994) 94 STC 422, it noticed the following facts in paragraph 22 of the impugned judgment. Based on the observations contained therein, the Tribunal, came to the conclusion that the Assessee/ dealer was liable to pay interest u/s 27(1) of the Delhi Sales Tax Act, 1975 (hereinafter referred to as "DST Act") on the ground that it would be difficult to say that the Assessee/dealer had filed a true and complete return under a bonafide belief. The observations made in paragraph 22 being important for purposes of adjudication of the captioned reference are extracted hereinbelow:

22. The Appellant has created a set of documents and built up an ingenious argument thereon. The Bombay High Court case also relates to the Appellant. There is no other dealer who has so convoluted his transactions and raised such disputes. A copy of determination order dated 01.06.1977 in the case of M/s. East India Hotels Ltd. has been placed on the file wherein it was determined by the Ld. CST that the supply of food items to British Airways for their international flights is not an export but a local sale. The Appellant has improvised addition of a delivery order and modification of a few terms in an attempt to come over the effects of the determination and the Burmah Shell, which did not find favour at any stage....

6. The Assessee/dealer not being satisfied with the impugned judgment, filed a review petition with the Tribunal, which was dismissed by an order dated 25.05.2001.

6.1 Being aggrieved, the captioned reference came to be filed, in the aforesaid circumstances.

7. Before we proceed further, it would be important to note that in so far as question Nos. (i) and (ii) are concerned, the same are no longer res-integra as is conceded by the learned Counsel for the Assessee/dealer in view of the judgment of the Division Bench of the Bombay High Court in the Assessee''s/dealer''s own case titled Narang Hotels and Resorts Pvt. v. State of Maharashtra and Ors. (2004) 135 STC 289. This judgment was delivered on 09.10.2003. Against the said judgment, a SLP was filed. On leave being granted, it was converted into a civil appeal bearing No. 1944/2004. The said civil appeal was dismissed as withdrawn vide order dated 03.11.2004. The Assessee/dealer evidently chose to withdraw the civil appeal on the ground that it was desirous of availing benefit of an amnesty scheme introduced by the State of Maharashtra. We have not been told as to whether or not the Assessee/dealer obtained any benefit under the Amnesty Scheme.

8. In view of the aforesaid circumstances, the arguments before us were advanced by both parties only with respect to question No. (iii). We are thus called upon to examine the scope and ambit of Section 27(1) of the DST Act. On behalf of the Assessee, arguments were put forth by Mr. Syali, senior advocate assisted by Mr. Rahul Sateeja and Mr. D.V. Kapoor, advocates, while on behalf of the revenue, submissions were made by Mr. H.C. Bhatia.

8.1 It was submitted by Mr. Syali that no interest could be levied in the circumstances obtaining in the present case as interest was leviable u/s 27(1) only if "tax due" u/s 21(3) of DST Act was not paid. According to Mr. Syali, Section 21(3) mandates payment of tax "according to such return" filed by the Assessee/dealer. The return being true and complete, no interest could be levied by the revenue. It was submitted that tax determined on completion of assessment cannot be equated with tax paid by the Assessee/dealer as per the return filed by him as long as the return filed was true and complete. It was submitted, in this connection, that a perusal of the assessment orders passed would show that in none of the orders passed, the Assessing Officer had made any adverse comments on the return filed; the returns filed were acted upon and accepted; and finally there is no penalty imposed on the Assessee, even as of today, on the ground of either having filed a false or a fraudulent return. In other words, it was submitted that, tax having been paid on the turnover disclosed in the return, no interest could be levied based on the assessed turnover.

8.2. In connection with the above, the learned Counsel took us through the scheme of the Act and in particular referred to the following provisions, apart from provisions of Sections 27(1) and 21(3), to establish the sustainability of his arguments. The provisions referred to were: Section 25, which relates to payment and recovery of tax; Section 55 which pertains to imposition of penalty, interalia, for failure to pay tax u/s 21(3); Section 56(1) which relates to penalty for concealment or furnishing inaccurate particulars; and lastly, Section 50(f) which provides that furnishing false return would be construed as an offence.

8.3. According to Mr. Syali, non-payment of tax as per the return filed by the Assessee would lead to imposition of tax and penalty. If, however, the return filed is found to be false on completion of assessment, it would lead to not only imposition of interest and penalty but also prosecution under the relevant provisions of the DST. The consequences of the infractions, according to him, are distinct and separate and hence, do not overlap.

8.4. Mr. Syali also submitted that if interest is imposed in the manner as contended by the revenue, it would render it penal in character; a construction which is not warranted by the scheme of the DST Act. In support of his submission, reliance was placed on the following judgments: Pratibha Processors and others Vs. Union of India and others, ; and Bhai Jaspal Singh and Another Vs. Assistant Commissioner of Commercial Taxes and Others,

8.5. Apart from the above, it was contended that the facts obtaining in the present case were squarely covered by the judgment of the Supreme Court in the case of J.K. Synthetics (supra) which dealt with pari-materia provisions contained in Section 11(b) of the Rajasthan Sales Tax Act. The learned Counsel laid stress on the observations made by the court at page 438 which read as follows: "it is difficult on the plain language of the section to hold that the law envisages the Assessee to predict the final assessment and expect him to pay the tax on that basis to avoid the liability to pay interest. That would be asking him to do the near impossible."

8.6 In other words, it was contended that interest could not be imposed on the difference obtaining between the assessed and the returned turnover and that too from the date of filing of the return. Interest, if any, could be charged 30 days from the date of assessment/demand. Taking cue from the observations made by the Supreme Court in J.K. Synthetics (supra), reliance was also placed by learned Counsel on the judgment delivered by Justice Bhagwati (as he then was) in the case of Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, . It is important to note that this was a minority view which was upheld by a larger bench of the Supreme Court in J.K. Synthetics (supra). Apart from the above, reliance was also placed on the following judgments: (i). Frick India v. State of Haryana 95 STC 188 Constitution Bench; (ii). EID Parry (India) Ltd. v. Asst. CCT (2005) 141 STC 12 ; and (iii). Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others,

8.6. In addition to the above, the learned Counsel also submitted that the Bombay High Court by an interim order dated 05.12.1988 passed in WP(C) No. 2939/1988, (which as noticed hereinabove, was finally disposed of on 09.10.2003) directed stay on collection and recovery of tax from the Assessee/dealer, in respect of flight kitchen sales, pursuant to assessment orders dated 19.11.1987 and 04.01.1988, and also with regard to levy and collection of tax on Assessee/dealer''s flight kitchen sales to foreign airlines. The learned Counsel submitted that the interim protection continued till 09.10.2003 when, final judgment in the matter was delivered by the

Bombay High Court. It was contended that since the dismissal of the writ petition by the Bombay High Court, the Assessee has been paying local Sales Tax with effect from January, 2004 even on flight kitchen sales made to foreign airlines. This position according to the learned Counsel obtains even with respect to tax imposed pursuant to the aforementioned assessment orders.

9. As against this, Mr. Bhatia who appeared for the revenue submitted that the question that arises for consideration of this Court is: as to whether the Assessee/dealer was liable to pay interest in terms of Section 27(1) of the DST Act on failure of the Assessee/dealer to pay the full amount of tax due in respect of sales made to foreign airlines, which were at every given point in time, local sales. Mr. Bhatia contended that payment of interest got triggered immediately on the failure of the Assessee/dealer to pay tax due as required under Sub-section(3) of Section 21 of the DST Act. Section 21(3) of the DST Act requires payment of full amount of tax due by the Assessee/dealer under the said Act, according to the return filed. The provisions of Section 21(5) of the DST Act read with Rule 21(1) of the Delhi Sales Tax Rules, 1975 (in short, "Rules") require that every return filed should be in the prescribed form being: Form ST-11. The said form of the return requires the Assessee to set out, amongst others, the particulars of its turnover, mandating verification by the Assessee, on solemn affirmation that the particulars contained therein are true and correct to his best knowledge and belief. Therefore, a conjoint reading of Sections 27(1), 21(1) and 21(5) of the DST Act alongwith Rule 21(1) and Form ST-11 make it abundantly clear, according to the learned Counsel, that the tax due required to be deposited by the Assessee/dealer in consonance with the return filed, must be that tax, which is calculated and deposited, on the basis of a return, which is, true and correct. The learned Counsel submitted that if the information submitted in the return was not true and correct, a dealer under the Act cannot be said, to have deposited, the full amount of tax due resulting in the dealer becoming liable for interest. In this regard, the learned Counsel drew our attention to the following observations made by the Supreme Court in the case of J.K. Synthetics (supra):

Therefore, on a conjoint reading of Section 7(1), (2) and (2A), Rule 25, the information to be furnished under form ST 5 and the form of verification, it becomes clear that the dealer must deposit the full amount of tax due on the basis of information furnished, which information must be correct and complete to the best of the dealer''s knowledge and belief without he being guilty of willful omission. If the dealer has furnished full particulars in respect of his business, without willfully omitting or withholding any particular information which has a bearing on the assessment of tax, which he honestly believes to be "correct and complete", it would be difficult to hold that the dealer had not acted bonafide in depositing the tax due on that information before the submission of the return.

9.1. Relying upon the aforesaid observation, Mr. Bhatia thus contended that it could not be said that in the instant case the Assessee/dealer had filed a true and correct return if regard is had to the following facts:

(i). by an order dated 01.06.1977, the Commissioner of Sales Tax in the case of East India Hotels had rendered an advance ruling holding supply of food items by East India Hotels to British Airways Plc was a local sale and not a sale in the course of export;

(ii). the Assessee itself had been paying tax on such sales to Airlines upto Assessment Years 1984-1985; and

(iii). the Assessee in order to give the transaction a colour of an export sale contrived a delivery order knowing fully well that the transaction in issue was otherwise a local sale.

9.2. In support of the aforementioned contentions, the learned Counsel also relied upon the observations made in the impugned judgment of the Tribunal in paragraph 11, 20, 21 and 22 and those made in the judgment of the Bombay High Court in Assessee''s own case in paragraph 113, 114 and 116.

9.3 Mr. Bhatia in order to buttress his submissions relied upon the following judgments:

(i). Calcutta Jute Manufacturing Co. and another Vs. Commercial Tax Officer and others, ; (ii). Commissioner of Trade Tax, U.P. Lucknow v. Manisha Export (2008) 11 VSTC 918 (All.); and (iii). Hindustan Heavy Chemicals Ltd. and Anr. v. Commercial Tax Officer and Ors. (1997) 106 STC 74 (WBTT)

10. Having heard the learned Counsel for the parties and perused the record, it would be important to first, briefly, advert to certain provisions of the Act in so far as they are relevant for the purposes of rendering our opinion qua question (iii) referred to us for adjudication.

10.1 Sub-section (1) of Section 3 of the DST Act interalia provides that every dealer who at the commencement of the Act, is registered or is liable to pay tax under the CST Act, shall be liable to pay tax under the DST Act on all sales effected by him on or after such commencement. Section 3 is the charging section which determines the incidence of the tax. Therefore, ordinarily after the commencement of the DST Act tax is payable on all sales.

10.2 The provisions with regard to filing of returns, assessment, recovery and refund of tax are contained in Section 21.

10.3 Sub-section (1) of Section 21 provides that tax payable under the DST Act shall be paid in the manner hereinafter provided, at such intervals, as may be prescribed. Sub-section (2) requires every "registered dealer" and "every other dealer" who may be so required by the Commissioner by notice served on him to do so furnish "such

returns" of turnover by such dates and to the authority as prescribed. Sub-sections (3) and the relevant portion of Sub-section (5) of Section 21 of the DST Act being crucial to the controversy at hand, we propose to extract the same verbatim to the extent relevant for our purposes:

21(3). Every registered dealer required to furnish returns under Sub-section (2) shall pay into a Government Treasury, or the Reserve Bank of India or in such other manner as may be prescribed, the full amount of tax due from him under this Act according to such return, and shall where such payment is made into a Government Treasury or the Reserve Bank of India furnish along with the return a receipt from such Treasury or bank showing the payment of such amount.

(Emphasis is ours)

21(5). Every return under this section shall be signed and verified....

10.4 At this juncture, it may also be relevant to refer to Rule 21(1). The said Rule reads as follows:

Every registered dealer shall furnish returns in Form ST-11 quarterly, within thirty days from the expiry of each quarter....

10.5 Section of the DST Act interalia provides that no person who is not a registered dealer shall collect any amount by way of tax under the DST Act in respect of sale of goods by him in Delhi. Furthermore, a registered dealer is obliged to collect tax only in accordance with the provisions of the Act and the Rules contained thereunder.

10.6 Section 23 of the DST Act prescribes the mode and manner of the assessment. In particular, Sub-section (2) of Section 23 provides that if the Commissioner is satisfied that the returns furnished in respect of any period are "correct" and "complete", he shall assess the amount of "tax due" from the dealer on the basis of "such return". Sub-section(3)(a) provides that if the Commissioner is not satisfied that the returns furnished in respect of any period are correct and complete, the Commissioner is empowered to issue notice requiring the presence of the dealer and production of evidence in support of the return filed. Under Clause (b) of Sub-section (3) of Section 23, the Commissioner is empowered after considering all evidence which may be produced before him to assess the amount of "tax due" from the dealer. In case where the dealer fails to furnish a return, the Commissioner is empowered, after giving the dealer a reasonable opportunity of being heard, to make a best judgment assessment.

10.7 Where the Commissioner has reasons to believe that a whole or a part of the turnover of the dealer in respect of any period has escaped assessment or has been assessed at a lower rate then the rate at which it is assessable or any deduction has been wrongly made therefrom, he is empowered to serve a notice and proceed to determine the amount of "tax due" from the dealer according to his best judgment u/s 24 of the DST Act, bearing in mind the time frame provided in Clause (a) and (b)

of Sub-section (1) of the said section.

10.8 The payment and recovery of taxes is provided in Section 25.

10.9 Section 27 of the DST Act which provides for levy of interest in certain situations, is extracted hereinafter, to the extent necessary, for the sake of convenience, being directly in issue:

If any dealer fails to pay the tax due as required by Sub-section (3) of Section 21, he shall, in addition to the tax (including any penalty) due, be liable to pay simple interest on the amount so due at one per cent per month from the date immediately following the last date for the submission of the return under Sub-section (2) of the said section for a period of one month, and at one and a half per cent per month thereafter for so long as he continues to make default in such payment or till the date of completion of assessment u/s 23, whichever is earlier.

11. A reading of the aforesaid provisions emphasizes the fact that the Assessee/dealer is required to file a return which is verified and signed by the dealer. Form ST-11 requires the Assessee/dealer to disclose his gross turnover as well as his taxable turnover based on which the calculation of sales tax for the prescribed period is made. The Assessee being a registered dealer is required to pay the "full amount of tax due" from him under the DST Act in accordance with the provisions of Sub-section (3) of Section 21. A perusal of the provisions referred to above also shows that expression "tax due" and "such returns" are used by the legislature to ensure that the concerned Assessee/ dealer files "such return" which is "complete" and "correct". A harmonious reading of provisions of Section 21(3), 23(2) and 27(1) make that abundantly clear.

11.1 The issue which thus arises for consideration is whether the full amount of tax due from the dealer (i.e., the Assessee) according to "such return" would mean any and every return filed by the Assessee.

11.2 The liability to pay interest u/s 27(1) of the DST gets triggered immediately upon the failure of the dealer to pay tax due in accordance with such return under the provisions of Sub-section (3) of Section 21. It is the contention of the learned Counsel for the Assessee that Section 27(1) will get triggered only if tax is not paid by the Assessee/dealer in accordance with turnover disclosed in the return. This argument is buttressed with the submission that there was no finding that the return contained false or incomplete particulars. In other words, the mere failure on the part of the Assessee to include flight kitchen sales made to foreign airlines, did not constitute filing of an incomplete and/or untrue return. As a sequitur to this submission, it was contended that merely because the Bombay High Court had come to a conclusion in Oct. 2003 that flight kitchen sales made to foreign airlines constituted a local sale, its exclusion from the gross turnover in respect of the assessment year in issue could not be construed, as if, the Assessee had filed an incomplete or untrue return. In effect the contention was that interest could not be

imposed on the difference between the assessed and the returned turnover. As noticed above, Mr. Syali in this regard, had placed a reliance on the judgment of the Supreme Court in the case of J.K. Synthetics (supra) which was followed in Frick India and EID Parry (supra).

12. In our view, the contention of the learned Counsel, in the facts and circumstances arising in this case, is misconceived. The reason being that the judgment of the Supreme Court in J.K. Synthetics (supra) dealt with a situation where the court was called upon to consider as to whether interest could be levied on the failure of the Assessee to pay tax on freight which, pursuant to the decision rendered by that court in an earlier round had been declared as forming part of the price of the goods in issue (i.e., cement) and hence, amenable to sales tax. The Supreme Court in the said case has decidedly observed that the dealer is obliged to file a full and complete return. In this regard the Assessee/ dealer is required to make an honest effort to file a "correct" and "complete" return. Therefore, the issue at hand is not whether interest can be levied on the difference between assessed and returned turnover but whether the turnover disclosed in the facts and circumstances of a case is complete and correct. In this regard, each case will turn on its own facts.

13. In the instant case, the facts disclosed clearly demonstrate that the Assessee failed to declare correct and complete particulars in respect of its turnover in the return filed for the relevant assessment years. This is evident from the fact that the Assessee failed to take into account the advance ruling delivered by the Commissioner of Sales Tax on 01.06.1977, in the case of East India Hotel Ltd., and the fact that uptill assessment years 1984-1985, the Assessee had included flight kitchen sales as part of its turnover, and consequently, paid local sales tax on even this part of the transaction.

14.1 Therefore, the mere fact that the Assessee/dealer configured a delivery order (which was a document generated inter-partes only with a view to exclude the flight kitchen sales made to airlines from gross turnover) would not have us hold that the Assessee/dealer furnished full, correct and complete particulars in the return filed for the assessment years in issue. This could not have been more starkly brought out than by the observation made by a Division Bench of the Bombay High Court in the Assessee/dealer''s own case [i.e., Narang Hotels & Resorts (supra)] in paragraph 110, 111, 112, 113 and 114. Some of these observations, being pertinent, are extracted hereinbelow:

110. Having said so, let us turn to another condition, namely, condition No. 5, which reads as under:

5. Notwithstanding the goods referred to herein being damaged and/or destroyed the consignee shall be liable to make payment for the same to the consignor and shall be entitled to receive any insurance claim receivable for such goods.

This condition also clearly reiterates that the title of the goods stands transferred to the foreign airlines when their orders are accepted by the flight kitchen and goods are prepared and/or procured by them.

111. The cumulative reading of the above condition Nos. 4 and 5 would clearly spell out that these are the terms and conditions of the contract between the parties. That the seller is not liable for future loss due to deterioration in quality of the goods and that the goods are being dispatched at the risk of the Petitioners may be through supply unit. Reading of condition 5 further compels us to logically infer that the consignee, namely, the foreign airlines under terms and conditions of the contract between the parties (which are not on record) appears to have taken insurance holding themselves as title holders of the goods so as to entitle them to receive an insurance claim for such a goods in the event of loss or damages to the goods. In other words, the foreign airlines/consignee has also paid premium for policy of insurance. Thus the consignee has treated the goods as its own property so that in the event of loss in transit they can validly set up their claim with the insurance company to get themselves compensated. In the circumstances, it is clear that the title in goods passes in favour of the foreign airlines in the State of Maharashtra.

112. Turning to the other aspect of the matter, relying on the submission of Mr. Sibal that the delivery order is a document of title, let us examine one more factor leading to time fact vis-a-vis operation of the conditions Nos. 4 and 5 extracted hereinabove. These terms and conditions are to be found in the delivery order. The delivery order is to be handed over to the consignee with the delivery of goods. Once the goods are delivered with delivery order, then sale of goods with delivery of goods is complete, in that event, the question of deterioration of quality of goods can hardly arise. No such question can arise once the delivery is accepted by the airlines and the sale is complete. This question would arise only in the event of non-delivery of goods or sale not being complete. In that event there cannot be delivery of delivery order. In absence of delivery order there cannot be a concluded contract enabling the consignor to claim damages even if goods are deteriorated in quality due to delay in taking delivery unless there is some other hidden contract between the parties.

113. We may at this stage observe as stated hereinabove that in the instant case, the deed of contract between the parties is not on record. The original terms and conditions of contract are also not on record. The facts clearly reveal that prior to the impugned transactions of sale the Petitioners were treating the transaction of sales between them and the foreign airlines as the local transactions falling within the sweep of the BST Act and they were paying sales tax on sales effect in favour of foreign airlines. It is not possible for us to conceive that there may not be a written contract between the parties specifying the terms and conditions of the contract. It appears that subsequently, tailor-made terms and conditions of the contract were

prepared and got printed on the back of the delivery order so as to bring the transactions of sale within the purview of Section 5(1) of the CST Act. As a matter of fact, condition Nos. 4 and 5 do suggest existence of written contract between the parties other than the contract sought to be projected in the shape or form of delivery order. The terms of contract could not have been proved by filing affidavit of Mr. Sanjay Narang. Since the Petitioners have invoked jurisdiction u/s 52 of the BST Act, it was obligatory on their part to produce terms of contract on record if they wanted fair adjudication of the issue in their favour....

114. We, therefore, are of the view that the real contract between the Petitioners and airlines is not on record. Had it been on record, it would have gone against the Petitioners. In our view the material is on record is sufficient to justify the findings recorded by the Tribunal. Assuming that we are not right in our view, even then with the delivery of delivery order the sale being at tarmac before the goods having crossed the customs frontiers of India, the sale in question would be a local sale.

(Emphasis is ours)

14.2 Thus the Bombay High Court in the Assessee''s/dealer''s own case recorded findings that the delivery order was "tailor made" to dress-up the transaction as a Section 5(1) (i.e., of the CST Act) transaction under the latter part of the said Section, only to avoid production of a written contract possibly executed with the airlines.

14.3 It is important to note that the Assessee had the benefit of the judgment of the Supreme Court in the case of Burmah Shell (supra). The principle of law with regard to sale in the course of export had been fully articulated in the said judgment. As found by the Tribunal, it was only to get over the judgment of the Supreme Court in the case of Burmah Shell (supra) that the delivery order was generated as between the parties. The argument was novel in the sense that having known that flight kitchen sales would not be construed as sales which occasioned an export, it was sought to be argued that the delivery order was a document of title which effected sale after the goods have crossed the Customs frontiers of India. It was for this and only this reason that the Assessee incorporated Clause 1 in the terms and conditions of the delivery order which reads as follows:

The goods referred to in this Delivery Order are not meant for consumption in India.

14.4 The Tribunal having rightly, in our view, come to the conclusion that the delivery order was not a document of title, the imposition of interest had to logically follow as a matter of course. It is for this very reason that the Assessee sought to argue (as noticed in paragraph 22 of the impugned judgment) that the matter in issue was debatable and hence interest ought not be levied. In our view, the issue whether flight kitchen sales made to foreign airlines were local sales; was not an issue which was debatable. The failure of the Assessee/dealer to include turnover relatable to the said transactions in its gross turnover, in the return filed, rendered it incomplete, incorrect and untrue. The necessary consequences of which, in our

opinion, would be that the full amount of tax due as per Section 27 read with Section 21(3) of the DST Act having not being paid, interest would have to be imposed (See observations made in paragraph 11 of Calcutta Jute Manufacturing (supra). Thus the principle laid down in Pratibha Processor (supra) and Bhai Jaspal Singh (supra) is not applicable in the given fact situation.

15. The Supreme Court in the case of Calcutta Jute Manufacturing case (supra) considered a similar situation. The brief facts of the case were as follows:

15.1 The Assessee had laid a challenge to a new provision [i.e., Section 6B] inserted in the Bengal Finance Sales Tax Act, 1941 (in short the "Bengal act") which, interalia, imposed an obligation on the dealer to pay tax if his annual aggregate gross turnover exceeded Rs. 50 Lakhs.

15.2 The constitutional validity of this provision, was challenged by way of a writ petition filed in the Calcutta High Court.

15.3 In the interregnum, the Government of West Bengal introduced yet another provision in the Bengal Act being: Section 10A which, required interest to be paid at the rate of 2% p.m. on the tax amount payable by the dealer during the period of default. The relevant portion of Section 10A which the court was called upon to consider reads as follows:

Section 10A - Interest payable by dealer - (1) where a registered or certified dealer furnishes a return referred to in Section 10 in respect of any period by the prescribed date or thereafter, but fails to make full payment of tax payable in respect of such period by such prescribed date, he shall pay a simple interest at the rate of two per centum....

(Emphasis is ours)

15.4 Pending adjudication in the writ petition the Calcutta High Court granted an injunction in favour of the Assessee/dealer, whereby the Government of West Bengal was restrained from collecting tax recoverable on insertion of Section 6B in the Bengal Act. The writ petition, however, finally came to be dismissed.

15.5 The question which arose for consideration was whether the Assessee/dealer had furnished a full and accurate return as the tax paid obviously did not take into account the impact of the provisions of Section 6B of the Bengal Act.

15.6 It was argued on behalf of the Assessee/dealer that they had furnished complete and accurate returns and paid full tax as per such returns and hence, were not liable to pay interest u/s 10 A of the Bengal Act. It was also argued that there could be no liability on the Assessee/dealer to pay interest on the tax payable as there was in operation an injunction order granted by the Calcutta High Court.

15.7 The Supreme Court while repelling the submissions made on behalf of the Assessee/dealer made the following crucial observations as contained in paragraphs

6, 7 and 8 of the judgment.

6. The requirement in Sub-section(1) is "to make full payment of the tax payable" after furnishing a return referred to in Section 10 of the Act within the prescribed date. Two obligations are thus implied therein as for a dealer. First is that he should have furnished a return within the prescribed date in accordance with the terms referred to in Section 10. Second is that he should make full payment of the tax payable under law. Sub-section(1) operates in the case of a dealer who had performed the first obligation but failed to perform the second obligation. On the other hand Sub-section(2) would operate in a case where the dealer failed to discharge the first obligation mentioned above.

7. So the initial aspect to be considered is whether the first obligation has been discharged by the Appellants. If a dealer has furnished only a truncated return that cannot be regarded as furnishing the return referred to in Section 10. It must be the full and accurate return. If a dealer makes just a statement by calling it a return it cannot be regarded as the return referred to in Section 10 of the Act. It is a different matter if the dealer would have committed some marginal errors in the return or there were some mistakes of a minor nature.

8. Here it is admitted that the Appellants have not mentioned the amount of turnover or the tax payable thereon in the return filed by them. If that be so the consequence is that they have failed to furnish a return which is "referred to in Section 10". The corollary is that there was failure to furnish the return as envisaged in Sub-section(2). Thus, the liability to pay interest commenced under that Sub-section at the very moment the assessing authority made the assessment u/s 11. Interest thereon would start accruing from the date prescribed for furnishing the correct return in accordance with Section 10.

(Emphasis is ours)

15.8 Furthermore, as is evident on a perusal of the observations made in paragraph 13 of the very same judgment that the Supreme Court in addition also considered the argument of the Assessee/dealer that they could not be mulcted with the liability to pay interest on the tax amount, since they had raised a bonafide dispute with regard to the validity of the provisions of Section 6B of the Bengal Act; an argument which is similar to the one raised in the instant case. The court after considering the ratio of the judgment of the Supreme Court in J.K. Synthetics Ltd. (supra), in paragraph 14 of its judgment, repelled this contention. The observations made by the court, in that regard, are contained in paragraph 15 of the judgment. These being apposite are extracted hereinbelow:

15. But the position here is explicitly distinguishable from the factual situation in M/s. JK Synthetics Ltd. Here, nobody had doubt that if Section 6B of the Act was valid the tax was payable on the turnover. It was the constitutional validity of Section 6B which was challenged by the Appellants in the earlier writ petitions before the

Calcutta High Court and which finally ended up in upholding of its validity. Hence, there was no question of the Assessee waiting for the determination and the turnover as there was no dispute on that aspect. The fact that Appellants questioned the constitutional validity of the charging provision cannot be equated with a dispute whether the freight paid would also form part of the sale amount. It was a highly debated dispute whether price amount would envelope the freight charges paid by the dealer and until the controversy was resolved by the Court in Hindustan Sugar Mills Ltd. v. The State of Rajasthan the dealers were justified in excluding the freight charges from sale price. It was for that reason the Constitution Bench refrained from mulcting the tax payer with liability to pay interest additionally. Appellants in these cases have never disputed that they are liable to pay tax on the turnover u/s 6B of the Act even while they focussed on the vires of that provision.

16. On a reading of judgment of the Supreme Court in Calcutta Jute Manufacturing Company (supra), it is quite clear that any and every challenge to the imposition of tax cannot bring the dispute into an arena of a debatable issue. Each case, as is observed, hereinabove by us, will turn on its own facts. In the instant case, as noticed by us hereinabove, the Assessee was aware of not only the advance ruling rendered by the Commissioner of Sales Tax in the case of East India Hotels Ltd. but had also been paying local sales tax on flight kitchen sales made to foreign airlines till assessment year 1984-1985. The fact that such sales were amenable to tax was also known to the Petitioner in view of the principle laid down by the Supreme Court in the case of Burmah Shell (supra). The Assessee/dealer only to get over the impediment caused by the principle laid down in the judgment of the Supreme Court in the case of Burmah Shell (supra) configured a delivery order so as to contend that the sale of goods was effected by transfer of documents of title in goods only after the goods have crossed the customs frontiers of India.

17. Therefore, in our opinion, interest will be leviable u/s 27(1) of the DST Act read with Section 21(3) if full amount of tax due has not been paid by the dealer/Assessee as per return which is both correct and complete. The correctness and completeness of the return and the bonafide of the Assessee/dealer would have to be ascertained in the facts and circumstances of each case. It is not as if any and every return filed by an Assessee/dealer would result in obviating the liability to pay interest as imposed u/s 27(1) read with Section 21(3) of the DST Act. If it is found, in the facts and in the circumstances of a case that the return filed is not complete and correct, the liability to pay interest on the full amount of tax due will run from the date on which such a return ought to have been filed. The necessary consequences of this will be that even though the liability towards interest is ascertained when tax is assessed, it will run from the date on which such correct and complete return ought to have been filed. In that sense, Mr. Syali''s argument that interest cannot be imposed on the difference between assessed and the returned turnover, is in our opinion, misconceived.

18. The argument of Mr. Syali that since an interim order operated the Assessee/dealer could not be said to have filed an incomplete or incorrect return is misconceived. The court''s final judgment delivered on 09.10.2003 declared the true effect of the document, i.e., the delivery order when it was first generated. The principle is that a judgment would declare the effect of document on the date it got executed. The pronouncement of a judgment by the court relates back to that date unless it is specifically stated to the contrary.

19. We do not propose to burden our judgment with analysis of the ratio laid down in various other cases cited before us, as according to us, the principle laid down in J.K. Synthetics Ltd. (supra) on which great emphasis was laid by both counsel, is the common thread which runs through almost all judgments cited before us. Therefore, in our opinion, while the principle enunciated in J.K. Synthetics Ltd. (supra) is applicable it would not result in saving the Assessee/dealer from its liability qua imposition of interest u/s 27(1) of the DST Act given the fact situation which obtains in the present case.

20. For the foregoing reasons, the question of law is thus answered in the affirmative and against the Assessee.

21. The reference is disposed of accordingly. Costs shall follow the result.