

STATE OF HARYANA

V.

M/S LIBERTY ENTERPRISES

Civil Appeal No 1618 of 2009

MARCH 17, 2009

(S.H. KAPADIA AND H. L. DATTU, JJ)

Haryana Sales Tax Rules, 1975:

rr. 28-A, 28-A(2)(n), 28-A(4) Explanation 1 – “Export sales” – Whether includible in “notional sales tax liability” – Assessee was granted Sales Tax Exemption Certificate w.e.f. 13.3.1995 to 14.3.2002 – From 1.1.1997 assessee switched over to deferment tax payment scheme – Revisional authority assessed ‘Export Sales’ during the period of exemption i.e. from 1.4.1996 to 31.12.1996 for purpose of r.28-A – Since exemption quantum exhausted, excess amount ordered to be recovered – HELD: During the period in question export sales were not included in definition of ‘notional sales tax liability’ as provided in r.28-A(2)(n) – High Court rightly upheld order of Tribunal setting aside order of revisional authority – Haryana General Sales Tax Act, 1973 – s.13-B.

The assessee-respondent in CA No. 1618/09, a manufacturer of shoes in the State of Haryana, was granted Sales Tax Exemption Certificate for an amount of Rs.533 lakhs w.e.f. 15.3.1995 to 14.3.2002 in terms of s.13-B of Haryana General Sales Tax Act, 1973 r/w r.28-A of Haryana General Sales Tax Rules, 1975. The assessee availed the exemption benefit till 31.12.1996 and from 1.1.1997 switched over to the deferment tax payment scheme. The assessing authority allowed the assessee the deduction of Export Sales for the assessment year 1996-97 as per the declaration forms. But the Revisional Authority, on revision assessed the Export Sales during the period of exemption (1.4.1996 to 31.12.1996) at 4% for

A the purpose of r. 28-A of the 1975 Rules. Since the
exempted quantum exhausted, the excess amount was
ordered to be recovered. The Tribunal set aside the order
of the Revisional Authority. The High Court having upheld
the order of the Tribunal, the State Government filed the
B appeals.

The question for consideration before the Court was:
whether Export Sales were includible in “notional tax
liability” of a unit as defined in Rule 28A(2)(n) of the 1975
Rules.

C Dismissing the appeal, the Court

HELD: 1.1 There is a vital difference between the
scheme of deduction and a scheme for exemption. Even
within the scheme of exemption there is a basic difference
D between the “basis” for computation of the quantum of
benefit and the “limit” or ceiling to be placed on that
quantum. There is no dispute that but for exemption
claimed, the assessee was a dealer, who was subject to
incidence of sales tax under the Haryana General Sales
E Tax Act, 1973. Its transactions were liable to be dealt with
in accordance with the provisions of the Act relating to
taxability. What was exempted under the Act and the Rules
was payment of tax by a class of dealers who had been
issued eligibility/exemption certificates.[para 10] [632-A-C]

F 1.2 Under the provisions of Haryana General Sales
Tax Rules, 1975 benefit of exemption from payment of tax
was available for a specified period and *upto the specified
quantum*. Rule 28A provides for calculation of the quantum
of exemption *upto the limit of tax exemption* and, therefore,
G it provides for deduction of the “notional sales tax liability”
from the total exemption limit available to a dealer during
the period of exemption. A perusal of transactions,
included in the “notional sales tax liability”, shows that
r.28A(2)(n) of the 1975 Rules, included sales which were
H otherwise exigible to sales tax, namely, local sales and

inter-State sales and, secondly, the Rule also included branch transfers or consignment sales outside the State and sales made on consignment basis or branch transfers within the State by treating them as deemed sales, which two transactions were otherwise not exigible to sales tax for any other unit not availing the exemption. It is important, however, to note that the "notional sales tax liability" did not include even by a deeming fiction the Export Sale(s). *Export sale(s) was not included in notional sales tax liability by a deeming fiction or otherwise.* [para 10, 12] [632-C, H; 633-A-D]

1.3 The assessee was eligible to avail deductions from its 'gross turnover' for transactions relating to inter-State branch transfers or consignment sales outside the State and sales made on consignment basis or branch transfers within the State. These deductions stood disallowed to a unit allowing exemption for calculating the "notional sales tax liability" as defined in Rule 28A(2)(n), as a condition for grant of exemption. [para 12] [633-C-D]

1.5 A scheme for Exemption has to be interpreted in the strict sense. A scheme for Deduction provides for conditions to be specified for grant of exemption. Export Sales were never sought to be included in the "notional sales tax liability" as defined in r.28A(2)(n). The assessee was not entitled to avail tax incentives beyond the period of exemption. The assessee was not entitled to avail exemption of tax also beyond the maximum limit of tax determined and certified in his eligibility/exemption certificate. *Therefore, the scheme contemplated tax-limit and time-limit.* The notional tax liability was deductible from the total exemption limit available to a dealer during the period of exemption. To the extent the notional tax liability exceeded the total exemption limit, the Department was entitled to order the recovery of the difference. In the instant case, the Department has sought to recover the difference on the ground that the notional tax liability

A exceeded the exempted quantum during the period of exemption. [para 12] [633-E-H]

B 1.6 The instant case relates to the “limit” to be placed on tax exemption/deferment, and for calculating that limit/ceiling one has to take into account the notional sales tax liability of the unit. Therefore, one has to read the proviso in r. 28A(4) with Explanation 1 which states that “for the purposes of arriving at the limit of tax exemption/deferment, the notional sales tax liability of the unit shall be taken into consideration”. It is because of the said C Explanation that notional sales tax liability has been defined in r. 28A(2)(n). Therefore, one has to go strictly by the definition of the words “notional sales tax liability” in r. 28A(2)(n) of the 1975 Rules.[para 14] [634-E-F]

D 1.7 It may be noted that a bare reading of the definition of “notional sales tax liability” under r. 28B(2)(m) incorporated on 16.9.1998, makes it clear that the definition included within its scope “sales made in exports outside India” by deeming it to be a sale in the course of inter-State trade or commerce. Such deeming fiction did not exist in r. 28A(2) (n). Rule 28B(2)(m) is not applicable to the facts of the instant case.[para 15] [635-B-C]

E 1.8 In view of the legal position, during the period in question, Export Sales were not included in the definition of “notional sales tax liability” as defined in r.28A(2)(n) of F the 1975 Rules. [para 18] [635-F]

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G From the Judgement and Order dated 26.05.2006 of the Hon’ble High Court of Punjab & Haryana at Chandigarh, in CWP No. 2558 of 2005.

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Civil Appeal No. 1621 of 2009

Manjit Singh, AAG, Anoop G. Choudhary, Harikesh Singh,
T.V. George, for the Appellants.

Monish Panda, M.P. Devanath, Mohan Pandey, for the
Respondents.

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The Judgement of the Court was delivered by

S. H. KAPADIA, J.

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1. Delay condoned.

2. Leave granted.

Facts in the Lead Matter:

3. For the sake of convenience we state the facts occurring
in *Civil Appeal No. of 2009 – Arising out of S.L.P.(C) No.23970
of 2007 – State of Haryana vs. M/s. Liberty Enterprises.*

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4. M/s. Liberty Enterprises (assessee) is engaged in the
manufacture of shoes in the State of Haryana. They availed
exemption from payment of sales tax under Section 13B of
Haryana General Sales Tax Act, 1973 read with Rule 28A of
Haryana General Sales Tax Rules, 1975 respectively. Assessee
was granted Exemption Certificate No.116 for an amount of
Rs.533 lakhs with effect from 15.3.95 to 14.3.2002 in terms of
Rule 28A of the said 1975 Rules. The assessee availed benefit
of exemption till 31.12.96 and from 1.1.97 the assessee
switched over to the deferment tax payment scheme. Till
31.12.96 the exemption granted to the assessee was for an
amount of Rs.53.94 lakhs. On exercising option of deferment,
an entitlement Certificate No.07 for an amount of Rs.479.06
lakhs effective for the period 1.1.97 to 14.3.2002 was issued to
the assessee in place of earlier Exemption Certificate.

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5. The assessment of the assessee for the year 1996-97
was finalized vide order dated 12.3.01; from the total gross

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A turnover the Assessing Authority allowed the deduction of Export
Sales against the Declaration Forms. However, the assessment
was revised by the Revisional Authority, Karnal, which assessed
the Export Sales made during the period of exemption (1.4.96
to 31.12.96) at 4% for the purpose of Rule 28A of the 1975
B Rules. Since the exempted quantum of the assessee fixed at
Rs.53.94 lakhs stood exhausted, the excess amount was
ordered to be recovered by the Revisional Authority. Against
the said order of the Revisional Authority, the assessee
appealed before the Haryana Tax Tribunal. Vide Order dated
C 13.1.04 the Tribunal set aside the order of the Revisional
Authority which was challenged by the State of Haryana
(Department) by way of civil writ petition before the High Court
of Punjab & Haryana at Chandigarh. By the impugned Order
dated 26.5.06, the High Court dismissed the said writ petition
D in terms of its earlier judgment rendered in the case of *M/s.*
Kagaz Print-N-Pack (India) Pvt. Ltd. v. State of Haryana-
(G.S.T.R.No. 10 of 2004).

ISSUE

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

CONTENTIONS

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

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

Relevant Provisions of Law:

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

"1973 ACT:

Section 2. Definitions: - In this Act, unless there is anything repugnant in the subject or context.-

(e) - "export" means the taking out of goods from the

A State to any place outside it otherwise than by way of sale in the course of inter-State trade or commerce or in the course of export out of the territory of India

B (gg) – “**gross turnover**” means the aggregate of the amounts of sales and purchases and parts of sales and purchases made by any dealer whether as principal, agent or in any other capacity during the given period less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof;

C (p) – “**taxable turnover**” means that part of a dealer’s gross turnover which remains after allowing deductions under Section 27 of the Act.

D **Section 6 – Incidence of Taxation:-**

E (1) Subject to the provisions of Section 15 and 27 of this Act, every dealer whose gross turnover during the year immediately preceding the 27th day of May, 1971 exceeded the taxable quantum, shall from the 27th day of May, 1971 and every other dealer shall, on the expiry of thirty days after the date on which his gross turnover first exceeds the taxable quantum, be liable to pay tax under this Act on the sale or purchase of goods by him in the State at the stage hereinafter provided.-

F (a) to (c) xxx xxx xxx

(i) & (ii) xxx xxx xxx

Provided ... xxx xxx xxx

G Provided further that in the case of a dealer, -

H (a) who imports any goods for sale or for use in manufacturing or processing any goods for sale, the liability to pay tax shall commence from the date on which he imports such goods;

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

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

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

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

(ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India; or

(iii) where such sale or purchase takes place in the course of inter-State trade or commerce. E

Section 13B.- Power to exempt certain class of industries.-

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

Section 27 – Taxable turnover.- G

(1) In this Act, the expression, “*taxable turnover*” means that part of a dealer’s gross turnover during any period which remains after deducting therefrom his turnover during that period – H

A (a) on account of –

(i) to (iii) xxx xxx xxx

(iv) Sale and purchase of goods falling under Section 12:

B ”

“1975 RULES :

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

D (2) For the purposes of this Chapter, unless the context otherwise requires –

(n) “notional sales tax liability” means-

E (i) amount of tax payable on the sales of finished products of the eligible industrial unit under the Local Sales Tax Law but for an exemption computed at the maximum rates specified under the Local Sales Tax Law as applicable from time to time; and

F **Explanation:-** The sales made on consignment basis within the State of Haryana or branch transfer within the State of Haryana shall also be deemed to be sales made within the State and liable to tax;

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

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

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

Rule 28A

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

Rule 28A

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

... ..

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

... ..

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

(emphasis supplied by us) H

A FINDINGS:

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

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

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

12. A perusal of the above transactions, included in the "notional sales tax liability", shows that the said Rule 28A(2)(n) of the 1975 Rules included sales which were otherwise exigible

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

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

B 14. The Department has placed heavy reliance on the proviso in Rule 28A(4)(a), which has been quoted above. The said proviso states that in case of exemption, the benefit shall extend to tax on gross turnover and in case of deferment it shall extend to tax on the taxable turnover of the goods manufactured
C by the unit. We have quoted the definition of the word "gross turnover" which is defined to mean the aggregate of the amount of sales and purchases made by any dealer. The Department placed heavy reliance on this definition of the words "gross turnover" to say that it would include Export Sales, particularly,
D when Rule 28A contains a proviso to the effect that in case of exemption, the benefit shall extend to tax on "gross turnover". There is no dispute on this proposition. However, in this case we are concerned with the "limit" to be placed on tax exemption/deferment and for calculating that limit/ceiling one has to take
E into account the notional sales tax liability of the unit. Therefore, one has to read the proviso in Rule 28A(4) with Explanation 1 which states that "*for the purposes of arriving at the limit of tax exemption/deferment, the notional sales tax liability of the unit shall be taken into consideration*". It is because of the said
F Explanation that notional sales tax liability has been defined in Rule 28A(2)(n). Therefore, one has to go strictly by the definition of the words "notional sales tax liability" in the said Rule 28A(2)(n) of the 1975 Rules.

G 15. There is one more aspect which needs to be considered. For the purpose of granting exemption from payment of sales tax under Section 13B of the 1973 Act, the Legislature incorporated Rule 28B on 16.9.98 providing conditions for availing exemption from payment of sales tax to eligible units. Under the provisions of Rule 28B of the 1975
H Rules, benefit of exemption was available for a specified period

and upto the specified quantum. However, Rule 28B provided that for the purposes of calculating the quantum of exemption availed by the unit upto the limit of tax exemption allowed, the notional sales tax liability shall be taken into consideration. Accordingly, notional sales tax liability stood defined even in Rule 28B(2)(m). On a bare reading of the definition of "notional sales tax liability" under Rule 28B(2)(m) it is clear that the definition included within its scope "sales made in exports outside India" by deeming it to be a sale in the course of inter-State trade or commerce. Such deeming fiction did not exist in Rule 28A(2)(n). Rule 28B(2)(m) is not applicable to the facts of the present case. However, in order to explain the position, we have discussed, by way of analogy, Rule 28B(2)(m) of the 1975 Rules.

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

17. Before concluding learned counsel for the State also raised the question of constitutionality by stating that the Export Sales in any event were not taxable by the State Government in view of Article 286 of the Constitution read with Section 12 of the 1973 Act. We keep this question of law open.

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

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

R.P.

Appeal dismissed.