IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.24230 of 2014
Date of decision:February 24, 2016

Bharat Sanchar Nigam Limited and another
……Petitioners

vs.

State of Punjab and others
…..Respondents

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MRS. JUSTICE RAJ RAHUL GARG

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.Anil Rathee, Advocate for the petitioner.
Ms. Radhika Suri, Addl.A.G. Punjab.

Ajay Kumar Mittal,J.

1. The petitioners pray for quashing the order dated 23.12.2013 passed by respondent No.4 and notice dated 7.11.2014 issued by respondent No.3, Annexures P.13 and P.17 respectively. Further prayer has been made for restraining the respondents from using coercive methods for recovering the amount of tax imposed vide order dated 23.12.2013 and to direct them to decide the appeal on merits without asking for depositing 25% amount as per Section 62(5) of the Punjab Value Added Tax Act, 2005 (in short, "the PVAT Act").

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioners-BSNL sent quarterly return of the stock transfer within and outside the State to the Excise and Taxation authority and on the expiry of the financial year, annual statement i.e. Form No.20 under Rule 40 of the Punjab Value Added Tax Rules, 2005 (in short,"the PVAT Rules") was submitted on 23.11.2010 according to which, gross sales (stock transfer) worked out to the tune of ₹ 80,31,46,712.30 out of which ₹ 30,81,17,766.39 were transferred outside Punjab State and ₹ 49,40,24,545.91 were transferred within the State. There was no sale whereas it was only transfer of stock. Respondent No.3 issued a notice through e-mail on 17.7.2013, Annexure P.4 asking the petitioners to furnish the required statutory declaration forms or deposit the tax failing which its TIN shall be locked. Due to paucity of time, the petitioners requested respondent No.3 to grant one month's time for submission of the forms. The time was extended upto 19.8.2013. The petitioners supplied the required information to the respondent No.3. However, during the assessment, notice framing assessment under section 29 of the PVAT Act and Section 9(2) of Central Sales Tax Act, 1956 for the assessment year 2009-10 was issued by respondent No.3. The petitioners were directed to appear on 30.7.2013, Annexure P.6. The petitioners appeared and submitted details of transactions as required and Form F against the store transfer. However, respondent No.3 issued another notice to the petitioners to appear on 5.11.2013,

Annexure P.7. The petitioners appeared and submitted reply. It was inter alia pleaded that there was no change of ownership in the goods transferred from one unit to another. Merely because for accounting purposes, the transactions were treated as sales, they would not amount to sales in the eyes of law. Respondent No.4 passed order dated 19.11.2013, Annexure P.11 directing the petitioners to pay a sum of ₹ 5,90,89,349/- holding the stock transfer as sale. Thereafter, notice under section 29(8) of the PVAT Act was issued on 9.12.2013, Annexure P.12 to the petitioners directing them to appear on 20.12.2013 for rectification in assessment order. The petitioners appeared and submitted detailed representation. However, respondent No.4 passed order dated 23.12.2013, Annexure P.13 directing the petitioners to pay an amount of ₹ 5,51,38,890/- in place of ₹5,90,89,349/-. The petitioners filed appeal before the Appellate authority under Section 62 of the PVAT Act and prayed that the appeal be heard on merits without deposit of 25% of the amount as per Section 62(5) of the PVAT Act. Respondent No.3 sent a notice dated 9.4.2013, Annexure P.16 directing the petitioners to attach the satisfactory proof of prior minimum payment of 25% of the additional demand as required under Section 62(5) of the PVAT Act and to file an application under Section 64 of the PVAT Act for condonation of delay. In response thereto, the petitioners submitted that in view of the law laid down by the Apex Court, since the authorities had no power to claim 25% as a condition precedent for hearing the appeal, the appeal be heard on merits without demanding the amount. Respondent No.3 again asked the petitioners to deposit the amount vide letter dated 10.9.2014. Thereafter notice dated 7.11.2014, Annexure P.17 was sent by respondent No.3 to the petitioners for depositing the amount otherwise recovery proceedings were to be initiated. The petitioners challenged the orders dated 23.12.2013 and 7.11.2014 by filing CWP No.23759 of 2014 in this Court. Since the petitioners failed to bring on record some material facts, the said writ petition was dismissed as withdrawn vide order dated 20.11.2014, Annexure P.18 with liberty to file fresh one on the same cause of action. Hence the instant writ petition by the petitioners.

3. We have heard learned counsel for the parties.

4. The question that arises for consideration herein relates to the interpretation of Section 62(5) of the PVAT Act. The matter is no longer *res integra.* The issue has already been settled by this Court recently in CWP No.26920 of 2013 (**Punjab State Power Corporation Limited vs. The State of Punjab and others)** decided on 23.12.2015 wherein after considering the relevant statutory provisions and the entire case law on the point, it was concluded as under:-

> "33. It is, thus, concluded that even when no express power has been conferred on the first appellate authority to pass an order of interim injunction/protection, in our opinion, by necessary implication and intendment in view of various pronouncements and legal proposition expounded above

and in the interest of justice, it would essentially be held that the power to grant interim injunction/protection is embedded in Section 62(5) of the PVAT Act. Instead of rushing to the High Court under Article 226 of the Constitution of India, the grievance can be remedied at the stage of first appellate authority. As a sequel, it would follow that the provisions of Section 62(5) of the PVAT Act are directory in nature meaning thereby that the first appellate authority is empowered to partially or completely waive the condition of pre-deposit contained therein in the given facts and circumstances. It is not to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. Only when a strong prima facie case is made out will the first appellate authority consider whether to grant interim protection/injunction or not. Partial or complete waiver will be granted only in deserving and appropriate cases where the first appellate authority is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the condition of pre-deposit to continue as a condition precedent to the hearing of the appeal before it. Therefore, the power to grant interim protection/injunction by the first appellate authority in appropriate cases in case of undue hardship is legal and valid. As a result, question (c) posed is answered accordingly.

34. In some of the petitions, the petitioners had filed an appeal without filing an application for interim injunction/protection which are still pending whereas in other petitions, the first appellate authority had dismissed the appeal for want of pre-deposit and further appeal has

also been dismissed by the Tribunal on the same ground without touching the merits of the controversy. Where the appeals are pending without an application for interim injunction/protection before the first appellate authority, the petitioner may file an application for interim injunction/protection before the appeals are taken up for hearing by first appellate authority and in case such an application is filed, the same shall be decided by the said authority keeping in view all the legal principles enunciated hereinbefore. The other cases where the first appellate authority had dismissed the appeal for want of pre-deposit without touching merits of the controversy or further appeal has been dismissed by the Tribunal, the said orders are set aside and the matter is remitted to the first appellate authority where the petitioners may file an application for interim injunction/protection before the appeals are taken up for hearing by the first appellate authority who shall adjudicate the application for grant of interim injunction/protection to the petitioner in the light of the observations made above. All the cases stand disposed of in the above terms."

5. Additionally, in the present case, learned counsel for the petitioners submitted that during the pendency of the writ petition, the Deputy Excise and Taxation Commissioner (Appeals) [DETC(A)] had dismissed the appeal on 5.12.2014 for want of pre-deposit under section 62(5) of the PVAT Act. A photo copy of the order has been placed on record by the learned counsel for the petitioners. This factual position was not disputed by the learned counsel for the State. Accordingly, notice for recovery Annexure P.17 dated 7.11.2014 and

the order dated 5.12.2014 are set aside and the matter is remanded to respondent No.2, DETC(A) to decide it afresh in view of the observations made in **Punjab State Power Corporation Limited**'s case (supra). The writ petition stands allowed accordingly.

(Ajay Kumar Mittal)
Judge

February 24, 2016 **(Raj Rahul Garg)**
'gs' **Judge**