**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

**VATAP No.44 of 2016(O&M)**
**Date of decision: 11.02.2019**

**The Fazilka Cooperative Sugar Mill Limited, Fazilka, District Fazilka through its General Manager Shri Jasbir Singh**

**……Appellant**

**Vs.**

**State of Punjab through Financial Commissioner Excise and Taxation Punjab Civil Secretariat, Chandigarh and others**

**…..Respondents**

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL**
**HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL**

Present: Mr. M.R.Sharma, Advocate for the appellant(s).

None for the appellants in VATAP Nos. 30, 31 and 40 of 2016.

Mr. Pankaj Gupta, Additional Advocate General, Punjab.

**Ajay Kumar Mittal,J.**

1. This order shall dispose of a bunch of 19 appeals bearing VATAP Nos. 44, 30, 31, 40, 42, 45, 46, 51, 54, 55, 56, 57, 59, 60, 61, 62, 63, 80 and 82 of 2016, as learned counsel for the parties are agreed that the issues involved in all these appeals are similar. However, the facts are being extracted from VATAP No.44 of 2016.

2. VATAP No.44 of 2016 has been preferred by the appellant-assessee The Fazilka Cooperative Sugar Mill Limited under Section 68 of the Punjab Value Added Tax Act, 2005 (In short, "the PVAT Act") against the order dated 5.11.2015, Annexure A.3 passed by the Chairman VAT Tribunal, Punjab, Chandigarh (in short, "the Tribunal") in Appeal No.299 of 2005-06 for the assessment year 1999-2000, claiming following substantial questions of law:-

"i) Whether in the facts and in the circumstances of the case, the orders Annexure A.1, Annexure A.2 and Annexure A.3 are legally sustainable in law?

ii) Whether in the facts and in the circumstances of the case, the VAT Tribunal, Punjab, Chandigarh has grossly erred in upholding the order of the Assessing Officer now known as Notified Authority cum Excise and Taxation Officer as upheld by the Deputy Excise and Taxation Commissioner (Appeals) Patiala more so by following the judgment of this Hon'ble Court which is still a matter under challenge before the Hon'ble Supreme Court of India and wherein leave has been granted?

iii) Whether in the facts and in the circumstances of the case, the VAT Tribunal, Punjab, Chandigarh has grossly erred in upholding the order of the Assessing Officer now known as Notified Authority cum Excise and Taxation Officer as upheld by the Deputy Excise and Taxation Commissioner (Appeals) Patiala has grossly erred in upholding the order as within limitation which is stated to have been passed on 14.3.2003 and could be passed upto 30.4.2003 i.e. within three years although the same has been served on the appellant on 17.5.2003. The Chairman VAT Tribunal has not passed speaking order on this issue as is evident from the perusal of the order passed, Annexure A.3?

iv) Whether in the facts and in the circumstances of the case, the order levying tax under section 4B on gunny bags being an essential packing material for sugar passed by respondent No.4 as upheld by the VAT Tribunal which were purchased from outside the State of Punjab and have already suffered tax is correct in law in view of the various pronouncements in this behalf?

v) Whether in the facts and in the circumstances, the order levying tax under Section 4B on consumable stores used in the manufacturing of both taxable and tax free goods more so when no separate accounts for the same are available being the appellant a composite dealer passed by the respondent No.4 as upheld by the VAT Tribunal is correct in law in view of the various pronouncements in this behalf?

vi) Whether in the facts and in the circumstances of the case, the VAT Tribunal, Punjab Chandigarh has grossly erred in upholding the order of the Assessing Officer now known as Notified Authority cum Excise and Taxation Officer as upheld by the Deputy Excise and Taxation Commissioner (Appeals) Patiala has grossly erred in levying purchase tax under Section 4B of the Punjab General Sales Tax Act on the State Advised Price instead of SMP paid by the appellant as per order of assessment, Annexure A.1?

vii) Whether in the facts and in the circumstances of the case, VAT Tribunal, Punjab, Chandigarh has erred in law in upholding the order of the Assessing Officer dated 17.10.2003 passed in reassessment proceedings levying purchase tax on Sugarcane @ 8.8% for the period from 25.1.2000 to 31.3.2000 without there being any notification of the rate of tax which levied instead of the rate of 2.2% earlier levied in the original order of assessment dated 14.3.2003 on the basis of notification dated 28.8.1998?"

3. A few facts relevant for the decision of the controversy involved as narrated in VATAP No.44 of 2016 may be noticed. The appellant-assessee is a cooperative society duly registered under the Punjab Cooperative Societies Act, 1961 and is also a registered dealer under the Punjab General Sales Tax Act, 1948 (in short, "the 1948 Act") and the Central Sales Tax Act, 1956 (in short, "the CST Act"). The appellant is engaged in manufacturing of sugar, molasses, press mud and bagasse. It is authorized to purchase different kind of raw material for use in the manufacture of these goods. The sugarcane being the main raw material is being purchased from the members who are farmers and owner/tiller of land.

The goods produced i.e. sugar, molasses are mainly sold under the government control orders. The rate of raw material purchased i.e. sugarcane is also fixed by the Government of India from time to time. The Government of India enacted an Act named Additional Duties of Excise (Goods of Special Importance) Act, 1957, whereby additional duties of excise were imposed on certain goods including sugar. The appellant filed its quarterly returns as per provisions of Section 10 of the 1948 Act within the stipulated time. The case was taken up for scrutiny assessment under Section 11 of the 1948 Act by issue of notice to the assessee. The Assessing officer while completing the assessment determined the purchase price of sugarcane for the purpose of levy of purchase tax at ₹ 19,43,71,455/-. The appellant had declared the purchase price which had not been accepted by the Assessing Authority being the statutory minimum price fixed by the Government of India for the year under consideration. The Assessing Officer levied purchase tax @ 2% of the value of purchase price. The Assessing Officer also charged additional tax @ 10% on the purchase tax worked out at ₹ 38,87,429/-. The Assessing Officer relied upon the provisions of Section 4B of the 1948 Act with regard to the levy of purchase tax and additional tax. The Assistant Excise and Taxation Commissioner-cum-Assessing Authority created an additional demand of ₹ 3,442/- (Annexure A.1). Aggrieved by the order, the assessee filed appeal before the Deputy Excise and Taxation Commissioner (Appeals) [DETC(A)]. Vide order dated 11.7.2005, Annexure A.2, the DETC(A) dismissed the appeal. Still not satisfied, the assessee filed appeal before the Tribunal which also met the same fate vide order dated 5.11.2015, Annexure A.3. The Tribunal relied upon the order passed by this court dated 15.7.2015 in the case of ***M/s A.B.Sugar Limited vs. State of Punjab,*** VATAP No. 176 of 2013 decided on 15.07.2015. According to the assessee, the Government of Punjab vide notification dated 2.12.1982 specified various items in the different schedules appended to the 1948 Act wherein sugarcane was not added and hence the same falls within the ambit of general category. Vide notification dated 28.8.1998, Annexure A.5, the sugarcane was added as item No.16 to schedule 'C' of 1948 Act. The notification provided for rate of tax on sugarcane at the rate of 2% besides the surcharge leviable under the said Act. Thereafter, the Government of Punjab vide notification dated 22.3.2001, Annexure A.6 provided for placing sugarcane as Entry No.3 to schedule 'A' in category 'I' thereby making sugarcane liable to tax at the rate of 1% besides surcharge as leviable under the provisions of the repealed Act. According to the assessee, while completing the assessment, respondent No.4 levied tax on the gunny bags purchased by the appellant and used as a packing material for sugar. The appellant asserts that regarding the taxability of bardana in the case of sugar, there is no tax applicable and as such no tax rate shall be applicable for the packing material also. The appellant sells sugar and not gunny bags. Hence the instant appeals by the appellant.

4. We have heard learned counsel for the parties.

5. It was not disputed by learned counsel for the parties that Question No. (i) is legal and formal. Question Nos. (ii) and (vi) are covered against the assessee by the judgment of this Court in ***M/s A.B.Sugars Limited***'s case (supra). Answered accordingly. Question No.(iii) was not pressed by the learned counsel for the appellant. Question No.(v) does not arise for consideration.

6. With regard to question No.(iv) qua levy of tax on the packing material of sugar under Section 4B of the 1948 Act, the assessee claimed that the gunny bags purchased by the appellant sugar mill and used as packing material for sugar, there was no tax applicable as the assessee sells

sugar and not gunny bags. It was urged that no separate price was charged for the packing material which is essential for selling and stocking sugar. Support was gathered from the decision of the Apex Court in ***Raj Sheel and others Vs. State of A.P. and others***, (1989) 3 SCC 262 and of this Court in ***Punjab Breweries Limited Vs. State of Punjab and others***, (1998) 120 PLR 423.

7. In ***Raj Sheel's*** case (supra), the Apex Court held that where sale is a composite transaction of sale of goods only, component sale of packing material cannot be treated separately for determining turn over. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on its own footing. The relevant observations read thus:-

> "9. It is, therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing, but where any packing material is of significant value it may imply an intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents are sold independently, the packing material is liable to tax on its own footing. Whether a transaction for sale of packing material is an independent transaction will depend upon several factors, some of them being:
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> "1. The packing material is a commodity having its own identity and is separately classified in the Schedule;
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> 2. There is no change, chemical or physical, in the packing either at the time of packing or at the time of using the content;

> 3. The packing is capable of being reused after the contents have been consumed;
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> 4. The packing is used for convenience of transport and the quantity of the goods as such is not dependent on packing:
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> 5. The mere fact that the consideration for the packing is merged with the consideration for the product would not make the sale of packing an integrated part of the sale of the product."
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> In one case**, *Punjab Distilling Industries Ltd. v. CIT*** AIR 1959 SC 346 where the bottles were sold by the assessee under a buy-back scheme, the security deposit for the return of the bottles was held to be merely in the nature of an incentive to the buyer to return the bottles."

8. In ***Punjab Breweries Limited's*** case (supra), the issue before this court was whether the bottles sold alongwith beer could be subjected to higher rate of tax. It was held that the respondents could not levy tax at different rates on the bottles and the beer. What was sold by the petitioner was bottled beer and not bear alone or bottles alone. The agreement between the petitioner and the licensees involved sale of bottled beer. Therefore, there could be no justification to charge tax on the bottles at higher rate. The relevant observations read thus:-

> "36. The second question which deserves to be examined in these cases is whether the bottles sold along with beer can be subjected to higher 31/39 rate of tax, i.e., at the rate of 10 per cent as against 4 per cent tax levied on the beer. Shri Jhingan argued that the view taken by the Assessing Authority, the Appellate Authority and the Tribunal on the issue of levy of tax at the rate of 10 per cent is against the settled principles of law. He submitted that in view of their finding that the bottles in which beer was sold formed an integral part of transaction of the sale of goods, the respondents could not have charged tax on the price of bottles at the rate of 10 per cent. 'Shri Jhingan relied on State of Orissa v. Habib Rahimutulla & Co. [1982] 51 STC 403 (Ori) Raj Sheel v. State of Andhra Pradesh Malva

Vanaspati & Chemicals Co. Ltd. v. Commercial Taxes Officer, Special Circle, Jaipur State of Tamil Nadu v. V. V. Vanniaperumal & Co. [1990] 76 STC 203 (Mad.) and Premier Breweries v. State of Kerala : (1998)1SCC641 . Mrs. Charu Tuli countered the submissions of Shri Jhingan and argued that if the petitioner wanted to avail the concessional rate of tax on bottles, then it should have submitted separate 'C' forms before the Assessing Authority in respect of bottles. 37. Having thoughtfully considered the respective submissions, we find merit in the argument of Shri Jhingan that the respondents cannot levy tax at different rates on the bottles and the beer. Admittedly, what was sold by the petitioner was bottled beer and not beer alone or bottles alone. The agreement between the petitioner and the licensees involved sale of bottled beer. Even as per the provisions of statute, the petitioner was required to sell beer in sealed bottles. This means that the bottles were sold along with beer. In fact, this is also the finding of fact recorded by the Assessing Authority, the Appellate Authority and the Tribunal. Therefore, there can be no justification to charge tax on the bottles at a rate higher than 4 per cent and the failure of the petitioner to separately furnish 'C' forms for bottles cannot be a valid ground to charge tax at the higher rate."

9. Learned counsel for the respondent was unable to controvert the ratio of the decisions relied upon by the learned counsel for the appellant. However, in the absence of any categorical record based finding regarding the terms of agreement relating to price of the gunny bags viz-a-viz the price charged for sugar sold, for which the Tribunal is the final fact finding authority, it is considered appropriate to remand this issue to the Tribunal to decide afresh after considering the case law on the point and also in the background of the factual matrix involved in the case. Accordingly, question No. (iv) as claimed by the assessee is decided in the manner indicated above and the issue is remitted to the Tribunal to decide the same afresh in accordance with law.

10. As regards question No.(vii), the Assessing Officer charged purchase tax at the rate of 8.8% for the period from 25.01.2000 to 31.03.2000 during the year 1999-2000 which had been assailed by the appellant-assessee. It was claimed that rate of purchase tax on sugarcane for the aforesaid period should be 2.2% on the basis of notification dated August 28, 1998. The claim of the assessee was rejected by the assessing authority and the appellate authority i.e. Deputy Excise and Taxation Commissioner (Appeals), [DETC (A)]. The relevant findings recorded by the DETC (A) in this regard read thus:-

> **Rate of tax from 25.01.2000 to 31.03.2000**
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> "The Assessing Authority has rightly charged purchase tax at the rate of 8.8% for the period from 25.01.2000 to 31.03.2000 during the year 1999-2000 and there is no ambiguity regarding the same. Prior to 25.01.2000 i.e. till 24.01.2000 the rate of tax was 2.2%. However, on 25.01.2000 the sugarcane was not mentioned in any of the schedule, meaning thereby that it was to be charged at the general rate of 8.8%. However, w.e.f. 23.01.2001 the rate of tax on sugarcane was again specified @ 1%. It is thus abundantly clear that from 25.01.2000 till 22.01.2001 sugarcane was taxed at the rate of 8.8.%. The dealer himself admits that the has moved the Government for making necessary notification for the intervening period. In the absence of any specific notification for the period mentioned above, I see no reason to differ with the reassessment order."

11. The Tribunal recorded findings on this question to the effect that in response to the submission of the appellant that tax at the rate of 8.8.% could not be levied on sugarcane for the period w.e.f. 25.01.2000 to 31.03.2000 in the light of notification dated 28.08.1998 was not acceptable. No such notification had been brought on the record to gain the benefit. Further the said plea was not raised by the appellant before the authorities

below. Therefore, the appellant was stopped from raising such plea for the first time before the Tribunal.

12. According to the learned counsel for the appellant-assessee, the rate of purchase tax on sugarcane for the period from 25.01.2000 to 31.01.2000 should be 2.2% instead of 8.8% on the basis of notification dated 28.08.1998. It was claimed that as per the said notification, sugarcane was included in Schedule 'C' of the 1948 Act on which purchase tax was leviable at the rate of 2.2% alongwith surcharge. On the other hand, it was contended by learned State counsel that though the assessee had not raised any such plea before the authorities below, still there is no merit in the claim of the assessee-appellant. It was submitted that vide notification dated August 28, 1998, the sugarcane was included in Schedule 'C' of the 1948 Act on which purchase tax was leviable @ 2.2% alongwith surcharge. However, as per Punjab General Sales Tax (Second Amendment), Ordinance 2000 (in short, "Ordinance No.3 of 2000") issued on 25.01.2000, sugarcane was not included in any of the Schedules of the 1948 Act. According to the Category VII of Schedule 'A', the goods not specified elsewhere were taxable at the rate of 8.8% alongwith surcharge. The aforesaid Ordinance No.3 of 2000 was replaced by the Punjab General Sales Tax (Second Amendment) and Validation Act, 2000 (for brevity, "Amendment Act, 2000") which was notified on 10.04.2000. As per Section 5 of the Amendment Act, 2000, Ordinance No.3 of 2000 stood repealed. However, anything done or any action taken under the 1948 Act as amended by the Ordinance No.3 of 2000 was deemed to have been done or taken under 1948 Act as amended by Amendment Act, 2000. Accordingly, in terms of Ordinance No.3 of 2000 read with Amendment Act, 2000, the rate of purchase tax on sugarcane from January 25, 2000 was chargeable at the rate

of 8.8%. alongwith surcharge. It was pointed out that vide notification dated 22.03.2001, the sugarcane was included in Category -I of Schedule 'A' of the 1948 Act and, thus, the rate of tax for items in the said Category including sugarcane is 1%. According to the learned State counsel, since the dispute in the present case, relates to the rate of purchase tax on sugarcane w.e.f. January 25, 2000 to March 31, 2000, as per Ordinance No.3 of 2000 read with Amendment Act, 2000, the rate of purchase tax on sugarcane for the said period will be 8.8.%. In view of the above, learned counsel for the State urged that in the absence of any challenge to the Ordinance No.3 of 2000 and Amendment Act, 2000, the appellant-assessee cannot rely upon the proceedings dated September 9, 2005 on the issues of Cooperative Sugar Mills in the State of Punjab and especially agenda Item No.6, (Annexure A.8) relating to the charging of purchase tax for the period from 25.01.2000 to 31.03.2000, as the requisite decision was required to be taken by the Government after clearance from the Council of Ministers. However, no decision had been taken by the Government with regard to charging of purchase tax at the rate of 2.2% for the period from 25.01.2000 to 21.03.2001.

13. We find force in the submission of learned counsel for the State. In the absence of the learned counsel for the appellant to show that any final decision had been taken by the Government with regard to charging of purchase tax at the rate of 2.2% for the period from 25.01.2000 to 21.03.2001, the assessee cannot derive any benefit from the proceedings dated 9th September, 2005 on the issues of Co-operative Sugar Mills as recorded in Annexure A.8. Accordingly, we are not convinced that for the period 25.01.2000 to 31.03.2000, the rate of purchase tax was to be 2.2%

instead of 8.8%. Accordingly, question No. (vii) is answered against the assessee-appellant.

14. No other point was urged before this Court.

15. In view of the above, the appeals are disposed of in the manner indicated above.

**(Ajay Kumar Mittal)**
**Judge**

**February 11, 2019** **(Manjari Nehru Kaul)**
**'gs'** **Judge**

Whether speaking/reasoned **Yes**
Whether reportable **Yes**