

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

VATAP No.47 of 2013 (O&M)

Date of decision: 27.04.2023

M/s Patiala Distillers and Manufacturers Ltd.

.....Appellant

Versus

State of Punjab and another

.....Respondents

**CORAM:HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA**

Present: Ms. Vidisha Swarup, Advocate,
for the appellant.

Mr. Saurabh Kapoor, Addl. A.G., Punjab.

Ritu Bahri, J.

The instant appeal, under Section 68 of the Punjab Value Added Tax Act, 2005, has been filed against the order dated 03.09.2012 (Annexure A-6) passed by the Value Added Tax Tribunal, Punjab (for short 'The Tribunal) in Appeal (VAT) No.90 of 2012, whereby appeal filed by the present appellant against the order dated 30.11.2011 passed by the Deputy Excise and Taxation Commissioner (Appeals), Patiala, has been dismissed.

The present appeal was admitted on 10.01.2014 for determination of the following substantial questions of law:-

“(i) Whether on the facts and in the circumstances of the case, the Ld. Tribunal was justified in holding that the sales of old cars by the appellant is taxable, incidental & ancillary to the business of the appellant-assessee and covered under the definition of ‘business’ as defined under Section 2 (c) of Punjab VAT Act, 2005?

(ii) Whether on the facts and in the circumstances of the case, the Ld. Tribunal was justified in upholding the imposition of

penalty without proving any *mens-rea* on the part of the appellant?

(iii) Whether on the facts and in the circumstances of the case, the Ld. Tribunal was justified in upholding the charging of interest when there is no *mens-rea* on the part of the appellant and tax has been paid as per returns?

Brief facts of the case are that the assessment of the appellant- assessee for the year 2006-07 was framed by the Designated Officer vide order dated 28.07.2010 creating an additional demand of Rs.29,64,583/- on the following grounds:-

“(i) levying tax on sale of old cars.

(ii) Disallowance of ITC availed on sundry items i.e. machinery repair, generator repair, computer repair, fans for office, stationery items, which were purchased against cash memo/retail invoices.

(iii) non inclusion of freight in GTO and avoidance of payment of tax.

(iv) non reversal of ITC on account of losses or pilferage.”

Against the said order, the appellant filed an appeal before the Deputy Excise and Taxation Commissioner (Appeals), Patiala, which was dismissed vide order dated 20.12.2010. This order was challenged by the appellant before the Tribunal. Vide order dated 12.09.2011, the Tribunal remanded the case to the Deputy Excise and Taxation Commissioner (Appeals), Patiala with a direction to decide the matter afresh within two months from the appearance of the appellant by assigning specific reasons for agreeing/disagreeing with the contentions raised on behalf of the parties. After hearing learned counsel for the parties, the Deputy Excise and Taxation Commissioner (Appeals), Patiala, again dismissed the appeal vide her order dated 30.11.2011. Against the said order, appellant again went in appeal before the Tribunal.

The Tribunal was examining the issue, ‘whether the sale of old car

and freight received through Transport Union, can be added to the taxable turnover of the assessee.’

While deciding the appeal, the Tribunal held that the appellant- assessee was entitled to claim ITC on the goods lost/pilfered for the obvious and simple reason that the raw material was used in manufacturing of liquor. Consequently, it was held that the Designated Officer was not justified in taking into consideration the amount of Rs.13,86,500/- during assessment. This benefit was extended keeping in view the provisions of Section 13 of 2005 Act, which are reproduced as under:-

“Section 13: Input Tax Credit;

(1) A taxable person shall be entitled to the input tax credit, in such manner and subject to such conditions, as may be prescribed, in respect of input tax on taxable goods, including capital goods, purchased by him from a taxable person within the State during the tax period.

PROVIDED THAT such goods are for sale in the State or in the course of inter-State trade or commerce or in the course of export or for use in the manufacture, processing or packing of taxable goods for sale within the State or in the course of inter-State trade or commerce or in the course of Export.”

The Tribunal upheld the levy of tax on account of sale of old cars and made following additions to the turnover declared by the appellant in his returns:-

“(i) Addition of Rs.25,62,000/- in respect of cars sold during the period under reference,

(ii) Addition of Rs.4,88,940/- has been made in respect of transportation charges earned by the appellant as transporter.”

The Tribunal has based its decision on adding the above said income to the sale of old cars to the income of the assessee on the ground that it was as per entry at serial No.66 of the list of Tax Free Goods

(Schedule B of PVAT Act, 2005).

Learned counsel for the appellant has argued that the Tribunal has ignored the definition of “business” as given in Section 2 (c) of the Punjab VAT Act, 2005 and has wrongly relied upon notification No. SO 50/PA.8/2005/S.8/2006 by which, sale of “Pre-owned Cars” was made taxable. He has further argued that at the time of purchase of old cars, the appellant had suffered sale tax, which the assessee as a buyer was bound to pay. The old cars were never held by the assessee for the purpose of sale or purchase, but they were for used for carrying out his business transactions. The sale was carried to get rid of the old vehicles having regard to lapse of time and their wear and tear. As per Entry No.60 in Schedule B, the intent of the legislature was to tax persons, who are exclusively dealing in the sale of old cars only. He has referred to the judgments passed in **State of Gujarat vs. Raipur Manufacturing Co. Ltd.**, (1967) 19 STC 1; **M/s Moraji Brothers (Import & Export) P. Ltd. vs. State of Maharashtra**, (1955) 99 STC 117 and **M/s Panacea Biotech vs. Commissioner Trade Tax**, (2013) 44 PHT 166 (Del). In **Panacea Biotech Ltd.’s** case (supra), the writ petitioner was a public limited company and was engaged in the business of manufacturing and sale of pharmaceutical products registered with the Department of Trade and Taxes. It used to purchase cars for use of company employees and executives for office purposes. At the stage of purchase, they had suffered sales tax, which the assessee, as buyer, was bound to pay. However, after using those cars, having regard to lapse of time and their wear and tear, the assessee decided to replace them. Thus, the assessee had sold those cars. The Income Tax Department treating the sale of old cars as incidental and ancillary to its business, demanded the tax, which was disputed by the assessee. Finally, the said petition was allowed by observing that the vehicles had already been taxed once under the first point tax regime, then in

cases of transactions, which were redundant and could not be considered under the definition of “business” as they were aimed mainly to get rid of old vehicles, which were carried on by persons in normal course of their lives. While deciding the above said petition, reference was made to the judgment passed by Hon’ble the Supreme Court in **Raipur Manufacturing Co. Ltd.’s** case (supra). That case had arisen under the Bombay Sales Tax Act, 1953, where the disposal by a company carrying on the business of manufacturing and selling cotton textiles of its miscellaneous old and discarded items such as cans, boxes, cotton ropes, rags etc., was held by the Court not to be carrying on the business of selling these items of goods. In that case, Hon’ble the Supreme Court held as under:-

“But the question is of intention to carry on business of selling any particular class of goods. Undoubtedly, from the frequency, volume, continuity and regularity of transactions carried on with a profit motive, an inference that it was intended to carry on business in the commodity may arise. But, it does not arise merely because the price received by sale of discarded goods enters the accounts of the trader and may on an overall view enhance his total profit, or indirectly reduce the cost of production of goods in the business of selling in which he is engaged. An attempt to realize price by sale of surplus unserviceable or discarded goods does not necessarily lead to an inference that business is intended to be carried on in those goods, and the fact that unserviceable goods are sold and not stored so that badly needed space is available for the business of the assessee also does not lead to inference that business is intended to be carried on in selling those goods. The contention on behalf of the State in respect of the first part of the turnover for 1964-65 therefore fails.

With respect to the second part of the turnover the question, whether the amendments in 1964 to the definition of “business” and “casual trader” are directly applicable has to be considered. It will be observed that under the definition of “business” even commercial transactions carried on without a motive to make gain or profit, or whether or not any profit accrues from such activity are included in that definition.

The amended sub clause (ii) also includes with that definition transaction in connection with or incidental or ancillary to such trade, manufacture or adventure or concern. The question is, whether the word “such” in sub-clause

(ii) of clause (d) of Section 2 refers to the trade etc. defined in sub-clause (i). It was contended before the Madras High Court that it is not so and that incidental or ancillary activity must partake the nature of 'business in its generic sense. In Dy. Commr. of Commercial Taxes V. Thirumangal Mills Ltd. (supra), a Bench of that Court had held that notwithstanding the amendment the presence or absence of profit will not make any difference. According to it what has to be considered is that the activity should be of a commercial character and in the course of trade or commerce and accordingly, the definition of 'business' in the second clause was still one invested with commercial character inasmuch as the reference was to "any transaction in connection with or incidental or ancillary to any trade, commerce, manufacture, adventure or concern'. It was observed that unless the transaction is connected with trade that is to say, it has something to do with trade or has the incidence or elements of trade or commerce, it will not come within the definition."

In the above said case, it was held that sale of discarded and unserviceable items was intended only for reduction of the space and to save accommodation. The said sale was not integrated with (or connected with) the main business even, if, the same was of considerable volume and frequency.

Hence, keeping in view the judgment passed by the Delhi High Court in **Panacea Biotech Ltd.'s** case (supra), first question of law is answered in favour of the assessee that the amount received from the sale of old cars cannot be included in the taxable income of the assessee.

With regard to tax on Carbon Dioxide, the Tribunal has examined this issue and observed that the dealer had paid tax at the rate of 4% on the sale of CO₂ i.e. Carbon Dioxide. In view of specific entry 49 in the list of 'Industrial Inputs and Packing Materials', appended to Schedule 'B', Carbon Dioxide falls under "**Heading No.2811.00.00 other inorganic acids and other inorganic oxygen compounds of non-metals**" and as per this entry, it is liable to tax at 4% instead of 12.5%. The Designated Officer had appeared before the Tribunal and had recorded her inability to justify it in

any manner. Hence, in respect of charging 12.4% on Carbon Dioxide, the appeal was allowed by the Tribunal. Thereafter, penalty of Rs.16,02,484/- was imposed under Section 56 of the Act and amount of Rs.5,52,857/- had been charged as interest under Section 32 of the Act.

Before the Tribunal, learned counsel for the assessee-appellant had stated that he had wrongly claimed ITC on items bearing Nos.41 to 59 as mentioned in Form VAT-24 and customer-wise summary. In view of the said fact, the appellant was not held entitled to claim ITC on the said items. Once, the assessee had himself admitted his mistake, whether penalty of Rs.16,02,484/- under Section 56 of the Act can be imposed along with interest of Rs.5,52,857/-.

On this issue, reference can be made to a judgment passed by in **Commissioner of Income Tax, Ahmedabad vs. Reliance Petroproducts Private Limited**, (2010) 11 Supreme Court Cases 762, wherein, Hon'ble the Supreme Court was examining a case of imposition of penalty under Section 271 (1) (c) of the Income Tax Act. The assessee had claimed incorrect expenditure in his return. In that case, it was observed as under:-

“9. As against this, Learned Counsel appearing on behalf of the respondent pointed out that the language of [Section 271\(1\)\(c\)](#) had to be strictly construed, this being a taxing statute and more particularly the one providing for penalty. It was pointed out that unless the wording directly covered the assessee and the fact situation herein, there could not be any penalty under the Act. It was pointed out that there was no concealment or any inaccurate particulars regarding the income were submitted in the Return.

10. [Section 271\(1\)\(c\)](#) is as under:- "271(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person-

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income."

A glance at this provision would suggest that in order to be covered, there has to be concealment of the particulars of the income of the assessee. Secondly,

the assessee must have furnished inaccurate particulars of his income. Present is not the case of concealment of the income. That is not the case of the Revenue either. However, the Learned Counsel for Revenue suggested that by making incorrect claim for the expenditure on interest, the assessee has furnished inaccurate particulars of the income. As per Law Lexicon, the meaning of the word "particular" is a detail or details (in plural sense); the details of a claim, or the separate items of an account. Therefore, the word "particulars" used in the [Section 271\(1\)\(c\)](#) would embrace the meaning of the details of the claim made. It is an admitted position in the present case that no information given in the Return was found to be incorrect or inaccurate. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars."

17. We are not concerned in the present case with the mens rea. However, we have to only see as to whether in this case, as a matter of fact, the assessee has given inaccurate particulars. In Webster's Dictionary, the word "inaccurate" has been defined as:-

"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript".

We have already seen the meaning of the word "particulars" in the earlier part of this judgment. Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous."

Ratio of the aforesaid judgment is directly applicable on the facts of the present case. Before the Tribunal, learned counsel for the assessee had conceded that the appellant had wrongly claimed ITC on items bearing Nos.41 to 59 as mentioned in Form VAT-24. The benefit of this ITC was never granted by the revenue. Hence, it was not a case, where wrong information was given. Only a claim was made, which was ultimately rejected. This would not amount to an intention to claim wrong relief and attract imposition of penalty. The appeal to the extent of imposition of penalty and interest is also liable to be allowed.

In view of the above discussion, it is held that the amount received from the sale of old cars cannot be included in the taxable income of the assessee. It is further held that the appellant-assessee is not liable to be

penalized on claiming ITC on item Nos.41 to 59. To that extent, the impugned order dated 03.09.2012 (Annexure A-6) is set aside.

Appeal stands allowed accordingly.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

27.04.2023
ajp

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No