IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Reserved on:16.07.2024
Pronounced on:26.07.2024

<u>GSTR No. 1 of 2010</u>

Food Corporation of India Panchkula

….Petitioner

vs.

State of Haryana

….Respondent

<u>GSTR No. 2 of 2010</u>

Food Corporation of India Panchkula

….Petitioner

vs.

State of Haryana

….Respondent

<u>GSTR No. 1 of 2011</u>

Food Corporation of India Karnal

….Petitioner

vs.

State of Haryana

….Respondent

<u>GSTR No. 2 of 2011</u>

Food Corporation of India Karnal

….Petitioner

vs.

State of Haryana

….Respondent

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present: Mr. Sandeep Goyal, Advocate
Mr. Nitish Bansal, Advocate and
Ms. Aakriti, Advocate,
for the petitioner(s)
Ms. Mamta Singla Talwar, DAG, Haryana

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JAGMOHAN BANSAL, J.

1. By this common order, GSTR Nos. 1 & 2 of 2010 and 1 & 2 of 2011 are hereby adjudicated as common question has been referred by the Haryana Tax Tribunal at Chandigarh (for short 'Tribunal'). With the consent of both sides, facts are borrowed from GSTR No. 1 of 2010.

2. We have received a reference under Section 42 of Haryana General Sales Tax Act, 1973 (for short' '1973 Act') from the Tribunal whereby a below mentioned question of law has been referred for adjudication:-

> *"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that under the provisions of Section 28A of the Haryana General Sales Tax Act, 1973, it is not necessary for the Assessing Authority to issue the notice for best judgement assessment under section 28(4) of the Act within the period of five years?"*

3. The brief facts which are necessary to have a hang over the issue involved are hereby noticed. The applicant-assessee-Food Corporation of India (for short- 'FCI') is a Central Government Undertaking which is engaged in the procurement and distribution of foodgrain across the country. It was registered in the State of Haryana under 1973 Act as well as Central Sales Tax Act, 1956. FCI filed its quarterly returns during the financial years 1977-78 and 1978-79. It disclosed its turnover Rs. 59,16,20,598.48/- for the year 1978-79. The Assessing Authority, in terms of Sections 28 of 1973 Act, issued notice dated 02.06.1986 for the assessment of financial year 1978-79 whereby FCI was directed to appear before Assessing

Authority on 20.06.1986.

4. The FCI filed its objection dated 17.06.1986 stating that notice is barred by limitation so the same be withdrawn. The Assessing Authority framed *ex parte* assessment vide order dated 28.11.1986 whereby declared turnover was rejected and re-determined to the tune of Rs.16562435/-.

5. The applicant-assessee unsuccessfully preferred appeal before the Assessing Authority. The applicant further filed appeal before the Tribunal assailing appellate order dated 20.06.1989 passed by Joint Excise & Taxation Commissioner (Appeals). The matter came up for hearing before the Tribunal which vide common order dated 06.01.2009 dismissed appeals relating to Assessment Year 1977-78 and 1978-79. The Tribunal held that case is covered within the extended latitude given to Assessing Authority for making best assessment by inserting Section 28A with retrospective effect. There is no doubt that assessment for the year 1978-79 is not hit by limitation prescribed under Section 28(4) of 1973 Act. It is apt to notice here that Section 28(4) of 1973 Act provides limitation of five years to proceed to assess to the best of his judgment where dealer having furnished returns fails to comply with terms of the notice. Section 28A was inserted with effect from 01.04.1965 vide Act No. 5 of 1982. Section 28A provides for dispensation of second notice and further steps.

6. The applicant-assessee after having lost before the Tribunal preferred an application before the Tribunal to refer a question of law before this Court. The Tribunal vide order dated 11.01.2010 has referred aforesaid question of law for our adjudication.

7. Mr. Sandeep Goyal, Advocate submits that Section 28A of 1973 Act was inserted with respect to assessment for the period prior to 01.04.1978. By Section 28A, it was provided that it shall not be necessary for the Assessing Officer to intimate the basis for arriving at best of judgment assessment or to take any other step for proceeding to assess to the best of judgment within the period of five years as specified under Section 28(4) of 1973 Act. The language of Section 28A (ii) of 1973 Act is unambiguous, nevertheless, Revenue as well as Tribunal has misread the same and upheld orders of adjudicating and Appellate Authority.

8. Per contra, Ms. Mamta Singla Talwar, DAG, Haryana submits that from the conjoint reading of Sections 28 and 28A of 1973 Act, it is evident that it was not necessary for the Assessing Authority to issue notice for best judgment assessment, within a period of five years, as contemplated under Section 28(4) of the 1973 Act. Section 28A starts with non-obstante clause. The full effect shall be given to non-obstante clause. As per judgment of Supreme Court in **Indian Aluminium Cables Limited and another vs. The Excise and Taxation Officer and another (1977) 1 Supreme Court Cases 120,** if legislature has not prescribed limitation period, the concept of reasonable period cannot be imported. Section 36 of 1973 Act does not come to rescue of the applicant-dealer because best judgment assessment is framed without books of account. The period of five years prescribed under Section 36 of 1973 Act to maintain books of account is applicable where assessment is made on the basis of books of account produced by dealer. In **Madan Lal Arora vs. The Excise and Taxation Officer, Amritsar 1961 SCC OnLine SC 113,** Supreme Court has

considered Section 11(4) of Punjab General Sales Tax Act, 1948 (for short '1948 Act') and observed that authority could proceed to make best judgment assessment within three years.

9. We have heard counsel for the parties and perused the records with their able assistance.

10. The question of law to be answered centres around reading of Sections 28 and 28A of 1973 Act which are reproduced hereunder:-

> *"28.* ***Assessment of Registered Dealer:***
>
> *(1) If the assessing authority is satisfied without requiring the presence of dealer or the production by him of any evidence 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 returns.*
>
> *(2) If the assessing authority is not satisfied without requiring the presence of the dealer who furnished the returns or production of evidence that the returns furnished in respect of any period are correct and complete, he shall serve on such dealer a notice in the prescribed manner requiring him, on a date and at a place specified therein, either to attend in person or to produce or to cause to be produced any evidence on which such dealer may rely in support of such returns.*
>
> *(3) On the day specified in the notice or as soon afterwards as may be, the assessing authority shall, after hearing such evidence as the dealer may produce and such other evidence as the assessing authority may require on specified points, assess the amount of tax due from the dealer.*
>
> *(4) <u>If a dealer, having furnished returns in respect of a period, fails to comply with the term of a notice issued</u>*

under sub-section (2), the assessing authority shall, within five years after the expiry of such period, proceed to assess to the best of his judgement the amount of the tax due from the dealer.

(5) If a dealer does not furnish returns in respect of any period by the prescribed date, the assessing authority shall, within five years after the expiry of such period, after giving the dealer a reasonable opportunity of being heard proceed to assess, to the best of his judgement, the amount of tax, if any, due from the dealer.

(5A) Omitted

(6) Any assessment made under this section shall be without prejudice to any penalty imposed under this Act.

(7) A dealer who, after grant of registration certificate, is assessed to tax from the date his registration certificate is made operative, shall, on production of the due proof regarding payment of tax to a registered dealer from whom he had made purchases of goods during the period his application for the grant of registration certificate remained under consideration of the assessing authority and delay in the disposal of such application is not wholly attributable to him and who is authorised by his registration certificate to make purchases of such goods without payment of tax to the selling registered dealer, be entitled to get the amount of sales tax so paid to be adjusted against his liability to pay tax.

*28A. **Dispensing with the second notice, etc.** Notwithstanding anything to the contrary contained in this Act or any other law or judgment or order of any court or any authority, in respect of cases relating to assessment for the period prior to the First April, 1979, -*

(i) no second notice shall be required to be issued.

(a) under sub-section (4) or (5) of section 28;

(b) under sub-section (4) or (5) of section 11 of the Punjab General Sales Tax Act, 1948 and

(ii) it shall not be necessary, to intimate the basis for arriving at best of judgment assessment or to take any other step for proceeding to assess to the best of judgement within the period of five years as specified in the provisions mentioned in sub-clauses (a) and (b) above."

[Emphasis supplied]

11. Section 28 prescribes procedure of assessment to be framed by Assessing Authority. As per 1973 Act, every dealer has to file quarterly returns which are followed by annual return. If the Assessing Officer finds that returns furnished in respect of any period are not correct and complete, he shall serve on such dealer a notice in the prescribed manner either to attend in person or to produce or cause to be produced any evidence which such dealer may rely in support of such returns. He after considering the evidence, as the dealer may produce, assess the amount of tax due from the dealer. Sub-section (4) of Section 28 provides that if a dealer, having furnished returns in respect of a period, fails to comply with the terms of notice issued under sub-section (2), the Assessing Authority shall, within five years after the expiry of such period, proceed to assess to the best of his judgment, the amount of tax due from the dealer. It is apt to notice here that Section 28(4) of 1973 Act provides that Assessing Authority shall, within five years after the expiry of **such period** proceed to assess to the best of his judgment. The scope and ambit of expression "such period" has been considered by a Constitution Bench in **Madan Lal Arora (Supra).**

The Court has held that 'such period' is the period in respect of which returns had been furnished by the dealer. The relevant extracts of the judgment are reproduced hereunder:-

> *"The question is, how to compute the three years? The sub-section says "within three years after the expiry of such period". So the three years have to be counted from the expiry of period mentioned. What then is that period? The words are "such period". The period referred therefore is the period mentioned earlier in the sub-section, and that is the period in respect of which returns had been furnished by the dealer."*
>
> [emphasis supplied]

12. From the reading of the marginal note of Section 28A of 1973 Act, it is evident that said section has been inserted to dispense with second notice. It is a settled proposition of law that final conclusion cannot be drawn on the basis of marginal note, however, marginal note of a section is always a guiding factor. Section 28A of 1973 Act commences with non-obstante clause. It provides that assessment for the period prior to 1st April' 1979 shall be made in the manner prescribed in Section 28A of 1973 Act notwithstanding anything contained in the Act or any other law or judgment.

The object of the Section seems to overcome one or another judgment of Court. Thus, it is necessary to find out the mischief which legislature had attempted to cure by way of Section 28A of 1973 Act. A three judge bench of Supreme Court in **Indian Aluminium Cables Limited (supra)** considered the procedure to be followed by an Assessing Authority while framing best judgment assessment. Section 28 of 1973 Act was para materia with Section 11(4) of 1948 Act. While interpreting Section 11(4) of

1948 Act, the Supreme Court held that in case, assessee having furnished a return fails to comply with terms of a notice issued under sub-section (2), the Assessing Authority has to take some effective steps such as issuance of a notice to the dealer intimating to him that he is proceeding to assess to the best of his judgment. He has to further give to the dealer a reasonable opportunity of being heard. The relevant extracts of the judgment are reproduced hereunder:-

> *"7. Sub-section (4) of Section 11 is attracted in a case where a dealer having furnished a return in respect of a period fails to comply with the terms of a notice issued under sub-section (2). In such a case the assessing authority has to take some effective step, such as issuance of a notice to the assessee intimating to him that he is proceeding to assess to the best of his judgment the amount of tax due from the dealer. On failure of a dealer to furnish a return in respect of any period by the prescribed date the assessing authority after giving the dealer a reasonable opportunity of being heard can proceed to assess to the best of his judgment the amount of tax, if any, due from the dealer. In such a case also an effective step such as issuance of a notice to the dealer concerned showing that the assessing authority is proceeding to assess has got to be taken within 5 years of the expiry of the period concerned. Sub- section (6) is attracted in the case of a dealer who being liable to pay tax under the Act has failed to apply for registration. Similar steps as the ones to be taken under sub-section (5) are to be taken under sub- section (6) within a period of 5 years of the expiry of the concerned period. But the legislature advisedly did not fix any period of limitation for taking up of the steps or the passing of the assessment*

order under any of the sub-sections (1), (2) or (3). The reason is obvious. Best-judgment assessments in the circumstances mentioned in any of the sub-sections (4), (5) or (6) could not be allowed to be made after the expiry of a certain reasonable time which the legislature thought was three years previously but made it five years by Punjab Act 28 of 1965. But where a registered dealer has filed the return the assessing authority can pass the assessment order under sub-section (1) and accept the return filed by the dealer as correct and complete. In such a case the formality of passing an order of assessment is to be completed without any further demand of tax from the dealer. For the issuance of a notice under sub- section (2) no time limit has been fixed, but the assessing authority must remain on its guard of taking the steps and completing the assessment as soon as it may be possible to do so. Otherwise, the risk involved may just be pointed out. Take a case where a notice under sub-section (2) is issued after the expiry or just on the verge of expiry of the period of 5 years and the dealer fails to comply with the terms of the notice. In such a case the assessing authority may have to proceed to make the best-judgment assessment under sub-section (4) attracting the bar of limitation of 5 years. But, of course, there may be a case where in spite of the failure of the dealer to comply with the terms of a notice issued under sub-section (2) the assessing authority may be in a position to complete the assessment under sub-section (3), treating the alleged failure of the dealer as not a real failure on his part."

[emphasis supplied]

13. The aforesaid judgment was delivered on 23.09.1976 and Section 28A of 1973 Act came to be inserted by Act No. 5 of 1982. The said

Section is applicable only to assessments relating to the period prior to 01.04.1979 meaning thereby rigour of Section 28A of 1973 Act is not applicable to the assessments for the period from 01.04.1979 onwards.

14. Section 28(4) of 1973 Act provides that if a dealer having furnished returns in respect of a period, fails to comply with the terms of a notice issued under sub-section (2), the Assessing Authority shall within five years, proceed to assess to the best of his judgment. Section 28(4) of 1973 Act carries following ingredients:-

(i) The dealer must have furnished returns for the period in question;

(ii) The Assessing Authority must issue a notice under sub-section (2). The said notice should be in the prescribed manner and require the dealer to produce evidence, on a specified date and place, in support of his returns;

(iii) The dealer has failed to comply with terms of the notice e.g. he does not appear or appears but does not submit documents in support of his returns;

(iv) The Assessing Authority within maximum five years, after the expiry of returned period shall proceed to assess to the best of his judgment, the amount of tax due from the dealer.

14. The Supreme Court in **Indian Aluminium Cables Limited (supra)** interpreting Section 11(4) of 1948 Act which was para materia with Section 28(4) of 1973 Act has held that Assessing Authority shall take

effective steps after serving notice under sub-section (2) in case of best judgment assessment. The Court further clarified that effective steps include notice to dealer intimating him that he is proceeding to assess to the best of his judgment and opportunity of personal hearing.

14.1 In view of judgment of Supreme Court, if a best judgment assessment is framed without issuing notice intimating the dealer that Assessing Authority is going to make assessment to the best of his judgment, the proceedings would be bad in the eye of law. The judgment of Supreme Court makes it mandatory that there should be second notice to the effect that Assessing Authority is going to proceed to assess to the best of his judgment.

15. From the conjoint reading of Section 28A of 1973 Act and judgment of Supreme Court in **Indian Aluminium Cables Limited (supra)**, it is evident that Section 28A of 1973 Act, whereby requirement of second notice prior to proceeding with best judgment assessment and grant of opportunity of personal hearing has been dispensed with, was inserted to overcome judgment of Supreme Court.

16. The State-Revenue has heavily relied upon non-obstante clause of Section 28A of 1973 Act to vindicate its stand that limitation period of five years for best judgment assessment was inapplicable to assessment for the period prior to 01.04.1979. In the light of argument of State, scope and ambit of Section 28A of 1973 Act need to be examined.

17. As per Revenue expression “notwithstanding” i.e. non-obstante clause should be given full effect. The non-obstante clause has laid down that no judgment or order of any Court or any other provision of the 1973

Act which is contrary to Section 28A of 1973 Act shall be considered and liable to be ignored. There is no reason to disapprove argument of Revenue. Section 28A of 1973 Act is having overriding effect and all other provisions of the 1973 Act which are contrary to Section 28A need to be ignored. The opening line of Section 28A makes it clear that if anything in the Act is contrary to Section 28A, should be ignored. The Revenue has attempted to say that period of five years prescribed under Section 28(4) of 1973 Act is contrary to mandate of Section 28A, thus, it should be ignored. We are in agreement with Revenue that anything contrary to Section 28A of 1973 Act should be ignored but it is necessary to find out whether period prescribed under Section 28(4) of 1973 Act is contrary to Section 28A or it is in consonance with Section 28A of 1973 Act.

18. There are two clauses of Section 28A of 1973 Act i.e. Clause (i) and (ii). Clause (i) provides that no second notice shall be required to be issued under sub-sections (4) and (5) of Section 28 of 1973 Act. Section 28(4) of 1973 Act does not provide for second notice. The requirement of second notice arose because of law laid down by Supreme Court in **Indian Aluminium Cables Limited (supra).** It was the judgment of Supreme Court which created requirement of second notice whereas sub-section (4) of Section 28 of 1973 Act was silent about second notice. Thus, Clause (i) has inserted provision in Section 28(4) of 1973 Act to the effect that for making best judgment assessment, there would be no need to issue second notice. It is apt to notice here that there are two sub-clauses of Clause (i) of Section 28A of 1973 Act i.e. (a) and (b). Sub-Clause(b) is not relevant to the issue in hand.

18.1 Clause (ii) provides that it shall not be necessary to intimate the basis for arriving at best of judgment assessment. It also provides that it shall not be necessary to take any other step for proceeding to assess to the best of judgment within a period of five years as specified in the provisions mentioned in sub-clauses (a) and (b) and provisions mentioned in sub-clause (a) are sub-sections (4) and (5) of Section 28 of 1973 Act as well as 11(4) of 1948 Act. At the cost of repetition but for the sake of convenience, Clause (ii) Section 28A of 1973 Act is reproduced as below:-

> *"28A.* ***Dispensing with the second notice, etc.*** *Notwithstanding anything to the contrary contained in this Act or any other law or judgment or order of any court or any authority, in respect of cases relating to assessment for the period prior to the First April, 1979, -*
>
> *(i) xxxx xxxx xxxx*
>
> *(ii) it shall not be necessary, to intimate the basis for arriving at best of judgment assessment or to take any other step for proceeding to assess to the best of judgement within the period of five years as specified in the provisions mentioned in sub-clauses (a) and (b) above."*

18.2 The following are ingredients of aforesaid Clause:

(i) It shall not be necessary to intimate the basis of arriving at best of judgment assessment;

(ii) It shall not be necessary to take any other step for proceeding to assess to the best of judgment assessment;

(iii) For proceeding to assess within the period of five years as specified in sub-sections (4) or (5) of Section 28 of 1973 Act.

18.3. From the reading of aforesaid Clause, it is evident that Assessing Authority before proceeding to frame best judgment assessment is not required to intimate the basis for arriving at best of judgment assessment or to take any other step for proceeding to assess. The Assessing Authority after issuing first notice may proceed to assess the best of judgment without second notice, without taking any other step, without intimating basis for arriving at best of judgment assessment, however, Assessing Authority is bound to proceed within the period of five years which has been specified under Section 28(4) of 1973 Act. The aforesaid clause is not mandating that it shall not be necessary to proceed within five years as specified in Section 28(4) of 1973 Act. Section 28A of 1973 Act has dispensed with requirement of second notice, opportunity of hearing, disclosure of basis for arriving at best of judgment assessment, however, it has not dispensed with requirement of proceeding within five years period as prescribed under Section 28(4) of 1973 Act. Any other reading would amount to violence to aforesaid Section. The language of Section is clear and unambiguous. The intent and purport of legislature to insert aforesaid Section was to dispense with requirement of second notice as well as opportunity of hearing. There was no intention of legislature to dispense with requirement to proceed within five years period as prescribed under Section 28(4) of 1973 Act. If contention of State is accepted, it would amount to substitution of word "for" used in between the words "step" and "proceeding" by expression "or". If word "for" is substituted by word "or", the stand of Revenue would be vindicated. The legislature has used word "for" which makes it clear that for proceeding to assess to the best of judgment within five years, it shall not be necessary to intimate the basis for arriving at best of judgment or to take any other step.

19. We are called upon to interpret a statutory provision. Though, we are supposed to read and interpret the section as such, yet, to resolve the controversy, we deem it fit to observe another aspect of the matter. Section 28(4) of 1973 Act has created a cap of five years to proceed to best of judgment assessment. There is no outer limit to pass final order. Thus, an assessment order, subject to reasonable period, may be passed at any time if Assessing Authority proceeds to assess within five years. As per Revenue, the period of limitation prescribed under Section 28(4) of 1973 Act should be ignored and Assessing Authority could proceed at any time. Five years period, in any case, was reasonable period to proceed. It is not the period to frame assessment. Section 28A of 1973 Act is applicable to assessment framed for the period prior to 01.04.1979. It is inapplicable to subsequent period. It means Assessing Authority could proceed to assess best of judgment, at any time, if assessment related to period prior to 01.04.1979 but within five years for subsequent years.

20. In the wake of above discussion and findings, we are of the considered opinion that Section 28A of 1973 Act has not obliterated requirement to proceed for best of judgment assessment within five years period as specified in Section 28(4) of 1973 Act. Accordingly, the reference made by Tribunal is answered as below:-

> " **The Assessing Authority is bound to issue notice within five years period prescribed under Section 28(4) of 1973 Act**

for best judgment assessment."

21. The reference is answered in above terms and matter is remitted back to Tribunal to pass appropriate orders.

(SANJEEV PRAKASH SHARMA)
JUDGE

(JAGMOHAN BANSAL)
JUDGE

26.07.2024
paramjit

Whether speaking/reasoned:	Yes	
Whether reportable:	Yes	