

GST/CST & VAT : Haryana VAT - Where appeal of assessee was heard by Bench of Five Members and order was reserved and in meantime one of members of Bench retired and thereafter remaining four members passed order and pronounced it, impugned order was without authority of law

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[2018] 92 taxmann.com 320 (Punjab & Haryana)

HIGH COURT OF PUNJAB AND HARYANA

Excel Crop Care Ltd.

v.

State of Haryana*

S.J. VAZIFDAR, CJ.

AND AVNEESH JHINGAN, JJ.

VAT APPEAL NO. 16 OF 2017 (O & M)

MARCH 22, 2018

Section [109](#) of the Central Goods and Services Tax Act, 2017/Section [57](#), read with section [56](#), of the Haryana Value Added Tax Act, 2003 - Appellate Tribunal - Appeals to - Against an order passed by State Government under section 56(3), assessee filed appeal before Tribunal - Said appeal was heard by Bench of five members and order was reserved - Before order could be pronounced, one of members of Bench retired - Thereafter remaining four members passed order and pronounced it - Whether impugned order passed by four members of Tribunal was without authority of law - Held, yes [Para 13] [In favour of assessee/Matter remanded]

FACTS

- The State Government, on an application made by the assessee under section 56(3), held that the product Aluminium Phosphide known as Celphos was not covered under Entry No. 38B of Schedule B of the Haryana value Added Tax Act, 2003.
- Against the impugned order, the assessee filed an appeal before the Tribunal.
- The appeal was heard by Bench of Five Members. The judgment was reserved. On 23-1-2013 one of the members retired. The remaining four members passed the order dated 25-4-2013 dismissing the appeal.
- On appeal to High Court:

HELD

- As per section 57, the State Government may constitute a Tribunal which consists of three or more odd number of members including the Chairman. The functions of the Tribunal may be discharged by the members sitting in Benches of two or more members, as determined by the Chairman. [Para 6]
- It is not disputed that present Tribunal consisted of five members including the Chairman. The Tribunal was duly constituted. It is also admitted that the appeal was heard by the Tribunal so constituted viz. by the Bench of Five Members. The order

was reserved. Before the order could be pronounced, one of the members of the Bench retired on 23-1-2013. Thereafter the remaining four members pronounced the order. The question is whether they could have done so. [Para 7]

- Under section 57(1), the State Government constitutes a Tribunal 'for the purpose of performing such functions and exercising such powers as may be assigned to or conferred on, the Tribunal by or under this Act'. Under the Act, the Tribunal *inter alia* hears and decides appeals including appeal against clarification issued by the Government. As per section 57, the Tribunal is to be constituted of three or more odd number of members including the Chairman. [Para 8]
- When a matter is heard by a Bench of a Court or a Tribunal, the members of the Bench discharge their functions as a composite body functioning together. The members discuss the matter with each other. They exchange views and make suggestions. They express their reservations. They often changed their views after discussing the matter with the other members. At times they don't. Each member must indeed decide the matter independently. Their decisions, however, are decisions as members of the Bench. Thus, till the last moment, namely, till the decision is pronounced it is always open to a member to change his view. One of the circumstances in which a view can be changed at any given point of time is after discussions with the other members of the Bench. If, therefore, at the time of pronouncement, one of the members ceases to be a member of the Tribunal, the opportunity to do so also ceases. It is axiomatic that if at the time of pronouncement all the members of the Bench are not available, on account of any of them having demitted office, the Bench as constituted and the Bench that heard the matter does not exist and cannot, therefore, pronounce the judgment. [Para 9]
- The decision may be unanimous or a split decision that will not mean that apart from the majority members other members may not even decide the matter. [Para 10]
- This view is supported by the decision of the Supreme Court rendered in case of *Surendra Singh v. State of Uttar Pradesh* AIR 1954 SC 194. The judgment though in a criminal matter applies to all matters. The judgment did not turn merely on the fact that the decision was rendered in a criminal matter. [Para 11]
- In view of the aforesaid, the impugned order passed by the four members of the Tribunal is without authority of law. [Para 12]
- Therefore, the impugned order is set aside. The matter is remitted to the Tribunal for deciding the matter afresh in accordance with the provisions of the Haryana VAT Act. [Para 14]

CASE REVIEW

Surendra Singh v. State of Uttar Pradesh AIR 1954 SC 194 (SC) (para 11) *followed*.

Bharat Bijlee Ltd. v. CTT [\[2016\] 66 taxmann.com 298/54 GST 651 \(Delhi\)](#) (para 12) *distinguished*.

CASES REFERRED TO

Surendra Singh v. State of Uttar Pradesh AIR 1954 SC 194 (para 11) and *Bharat Bijlee Ltd. v. CTT* [\[2016\] 66 taxmann.com 298/54 GST 651 \(Delhi\)](#) (para 12).

Sandeep Goyal, Adv. *for the Appellant*. **Ms. Mamta Singla Talwar**, Dy. Adv. General *for the Respondent*.

ORDER

Avneesh Jhingan, J. - This appeal has been filed against the order dated 24.04.2013 passed by Haryana Tax Tribunal, Chandigarh, (for short 'the Tribunal') dismissing the appellant's appeal, holding that Aluminium Phosphide known as Celphos is not covered under entry 38B of Schedule-B appended to the Haryana VAT Act, 2003. The net result was that the product was not a tax free item.

2. The appellant has raised the following substantial questions of law:

- "(i) Whether on the facts and in the circumstances of the case, the Id. Tribunal was justified in holding that item in question, i.e. Aluminum Phosphide (commonly known as Celphos) is not pesticide used for protection of plants and thus, not covered by Entry 38B of Schedule-B appended to Haryana VAT Act 2003?
- (ii) Whether on the facts and in the circumstances of the case, the impugned order passed by the 4 members of the Tribunal is without authority of law as the matter has not been heard by the requisite number of members, as required under law?"

3. The appeal is admitted on the substantial questions of law in paragraph-(ii). Having answered it in the appellant's favour, it is not necessary to consider question (i).

4. The bare facts necessary for adjudication of the present appeal are that the appellant was a registered dealer under the Haryana Value Added Tax Act, 2003 (hereinafter referred to as 'the Haryana VAT Act') and was engaged in the business of trading in Aluminium Phosphide (Celphos) and other products.

An application was moved under Section 56 of the Haryana VAT Act seeking a clarification whether Aluminium Phosphide (Celphos) was covered under entry 38B of Schedule-B appended to the Haryana VAT Act i.e. "Pesticides, weedicides, insecticides used for plants only". Schedule 'B' deals with tax free goods. The State Government on 03.09.2012 held that Celphos is not covered under Entry 38B of Schedule- B. The order was challenged in appeal before the Haryana Tax Tribunal.

5. For the purpose of this appeal, what is relevant is that the appeal was heard by a five member Bench. The judgment was reserved. On 23.01.2013 one of the members retired. The remaining four members passed the order dated 25.04.2013 dismissing the appeal. The appellants review application before the Tribunal was also dismissed vide order dated 31.01.2017 passed by the said four members only the fifth having retired by then.

The question No.2 is whether the impugned order passed by only four members of the Tribunal is without authority of law.

6. Section 57 of the Haryana VAT Act reads as under:—

"57. (1) The State Government may constitute a Tribunal to be called the Haryana Tax Tribunal consisting of three or more odd number of members including the Chairman as the State Government may appoint for the purpose of performing such functions and exercising such powers as may be assigned to, or conferred on, the Tribunal by or under this Act.

(2) The functions of the Tribunal may be discharged by the members sitting in Benches of two or more members, as may be determined by the Chairman."

As per Section 57 State Government may constitute a Tribunal which consists of three or more odd number of members including the Chairman. The functions of the Tribunal may be discharged by the members sitting in Benches of two or more members, as determined by the Chairman.

7. It is not disputed that present Tribunal consisted of five members including the Chairman. The Tribunal was duly constituted. It is not contended otherwise. It is also admitted that the appeal was heard by the Tribunal so constituted viz. by the Bench of five members. The order was reserved. Before the order could be pronounced, one of the members of the Bench retired on 23.01.2013. Thereafter the remaining four members pronounced the order. The question is whether they could have done so. We have answered the question in the negative.

8. Under section 57(1), the State Government constitutes a Tribunal "for the purpose of performing such functions and exercising such powers as may be assigned to or conferred on, the Tribunal by under this Act". Under the Act, the Tribunal inter-alia hears and decides appeals including appeal against clarification issued by the Government. In this regard, a reference to Section 56 is sufficient.

'56 (3) The State Government may, if it considers it necessary or expedient so to do, for the purpose of maintaining uniformity in the levy, assessment and collection of tax or for the removal of any doubt, *suo motu* or on an application made to it in the prescribed form and manner on payment of the prescribed fee by a dealer or a body of dealers, issue an order clarifying any point relating to levy, assessment and collection of tax and all persons employed in the administration of this Act except an appellate authority, and all dealers affected there by shall observe and follow such order.

(4) Every order issued under sub-section (3) shall be publicized simultaneously by uploading on the website www.haryanatax.com under the head "VAT orders".

(5) If any person feels aggrieved by an order publicized under sub-section (4), he may at any time prefer an appeal against such order to the Tribunal and for this purpose the order shall be deemed to be an order passed under this Act:

Provided that where an appeal is preferred against such order to the Tribunal, it shall be heard and decided by the full- member Tribunal.'

As per Section 57, the Tribunal is to be constituted of three or more odd number of members including the Chairman.

9. When a matter is heard by a Bench of a Court or a Tribunal, the members of the Bench discharge their functions as a composite body functioning together. The members discuss the matter with each other. They exchange views and make suggestions. They express their reservations. They often changed their views after discussing the matter with the other members. At times they don't. Each member must indeed decide the matter independently. Their decisions, however, are decisions as members of the Bench. Thus till the last moment, namely, till the decision is pronounced it is always open to a member to change his view. One of the circumstances in which a view can be changed at any given point of time is after discussions with the other members of the Bench. If, therefore, at the time of pronouncement, one of the members ceases to be a member of the Tribunal, the opportunity to do so also ceases. It is axiomatic that if at the time of pronouncement all the members of the Bench are not available, on account of any of them having demitted office, the Bench as constituted and the Bench that heard the matter does not exist and cannot, therefore, pronounce the judgment.

10. The decision may be unanimous or a split decision that will not mean that apart from the majority members other members may not even decide the matter.

11. This view is supported by the decision of the Supreme Court in case of *Surendra Singh v. State of Uttar Pradesh* AIR 1954 SC 194 where it was held as under:

"11. An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We

lay no stress on the mode or manner of delivery, as that is not of the essence, except to say that it must be done in a judicial way in open court. But however it is done it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything else upto then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the "judgment".

12. Now up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of *locus poenitentiae*, and indeed last minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the court. Only then does it crystallise into a full fledged judgment and become operative. It follows that the Judge who "delivers" the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery. But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture; also, a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometimes a signed draft, to a brother Judge who also heard the case. This may be merely for his information, or for consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a Judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light dawn upon him before the delivery of judgment.

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14. As soon as the judgment is delivered, that becomes the operative pronouncement of the court. The law then provides for the manner in which it is to be authenticated and made certain. The rules regarding this differ but they do not form the essence of the matter and if there is irregularity in carrying them out it is curable. Thus, if a judgment happens not to be signed and is inadvertently acted on and executed, the proceedings consequent on it would be valid because the judgment, if it can be shown to have been validly delivered, would stand good despite defects in the mode of its subsequent authentication.(Emphasis Supplied)".

The judgment though in a criminal matter applies to all matters. The judgment did not turn merely on the fact that the decision was rendered in a criminal matter.

12. The decision of Delhi High Court in case of *Bharat Bijlee Ltd. v. CTT* [2016] 66 taxmann.com 298/54 GST 651 is clearly distinguishable. There the matter was heard by one member and decided by the same member and on a reading of the provisions of Delhi VAT Act, 2004, it was held that even if one member remains by virtue of the others being removed from office, the sole member being otherwise qualified can validly function as the Appellate Tribunal. The mere absence of a notification

did not alter this position.

13. Question No.2 is answered in favour of the appellant.

14. The order dated 25.04.2013 is set aside. The matter is remitted to the Tribunal for deciding the matter afresh in accordance with the provisions of Section 56 of the Haryana VAT Act.

s.k. jain

*In favour of assessee/Matter remanded.