

High Court of Jammu and Kashmir at Jammu

OWP No. 526/2014

CMA No. 686/2014

Date of decision: 30.04.2015

National Cooperative Dairy Federation of India Ltd. and ors.

vs.

State of J&K and others

Coram:

Hon'ble Mr. Justice Bansi Lal Bhat, Judge

Hon'ble Mr. Justice Janak Raj Kotwal, Judge

Appearing counsel:

For petitioner(s):	Mr. Pranav Kohli, Adv.
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For respondent(s):	Mr. M. A. Bhat, Adv.
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Whether to be reported in

Digest/Journal	:	Yes/No
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Per Kotwal-J

1. Petitioner No. 1 is the National Cooperative Dairy Federation of India Ltd. (hereinafter to be referred as the petitioner-Federation). It has been registered under the Multi-State Cooperative Societies Act, 2002 with the object *inter alia* to promote the dairy industry and the oil seeds, vegetable/edible oils and Vanaspati Industry in the Country and to coordinate, help, develop and facilitate the working of the dairy, vegetable/edible seeds, fruits and vegetable growers' cooperatives and affiliated organizations. Petitioner-Federation claims that it has sixteen regular members, eleven associate members and National Dairy Development Board as Institutional member. Petitioner No. 2 is a Cooperative Society registered in the State of Gujarat and likewise petitioner No. 3 is also a Cooperative Society registered in the State of Rajasthan. Petitioner Nos. 2 and 3 claim

to be engaged in manufacture of pasteurized milk and milk products including UHT/Tetra Pack Milk in their Units located in their respective States.

2. Petitioner-Federation claims, which is not disputed, that it is the Apex Dairy Federation associated with Ministry of Defence (MoD)/respondent No. 4 for supply of milk. The MoD procures milk and milk products only from the petitioner-Federation/Member Cooperatives against negotiated contracts and in this behalf the petitioner-Federation acts as a single window approach for the MoD in regard to the procurement of milk and milk products for the Armed Forces all over India. The arrangement inter se the petitioners and MoD is governed by virtue of a policy decision. It is averred that petitioner Nos. 2 and 3 and three more member societies of petitioner-Federation, namely, Punjab State Cooperative Milk Producers Federation Ltd, Shree Warana Sahkari Doodh Utpadak Prakriya Sangh Ltd and Kolar Chikkaballapur District Cooperative Milk Producers Societies Union Ltd are engaged in making the supply of Tetra Pack Milk to about 70 Defence Units in Eastern, Western, Northern and Southern Commands of the Indian Army.
3. It is averred by the petitioners, which is not disputed, that as per the Policy Decision (supra) tenders for supply of milk products are floated by the concerned Army Command and manufacturing societies participate in the tendering process. The tenders

submitted by petitioner Nos. 2 and 3 were approved by the Northern Command and supply orders for supply of Tetra Pack Milk for the period from 04.10.2013 to 30.09.2014 were issued in their favour.

4. Petitioners' case is that the member societies of the petitioner-Federation have entered into contract on concluded rates on FOR basis with Ministry of Defence. In terms of the said contract, the consignments of goods, that is, Tetra Pack Milk are to be supplied through the petitioners at the destinations under the Northern Command in the State of Jammu and Kashmir and in order to do so their stocks have to pass through Lakhanpur Check Post, which is the entry point of the State of Jammu and Kashmir.
5. Petitioners' grievance is that supplies made by the member societies of the petitioner-Federation are intercepted at Lakhanpur Check Post and petitioners are asked to procure registration with Commercial Taxes Department of the State of Jammu and Kashmir and route the stocks through local offices for further supplies to different depots of the Defence Forces so that manufactures become liable to pay the local tax and sales are routed through the State of Jammu and Kashmir. Petitioners have produced copies of communications No. CTL/2506 dated 29.12.2013 and No. CTL/2381 dated 20.12.2013, whereby the Deputy Commissioner, Commercial Taxes Check Post, Lakhanpur directed Kolar Chikkaballapur Milk Union

Ltd. and the Punjab State Cooperative Milk Producers Federation Ltd. respectively to get registered with the Commercial Taxes Department of Jammu and Kashmir State for further supply to different depots of Defence Forces. It is stated that petitioner No. 3 even has been forced to furnish a bank guarantee for the tax liability even though no tax under J&K Value Added Tax Act, 2005 is leviable. Contextually, it is averred by the petitioners that in view of the communications of respondent No. 3, petitioner Nos. 2 and 3 in order to avoid threat of detaining their vehicles containing perishable goods had no option but to seek registration as dealers under the Jammu and Kashmir Value Added Tax Act, 2005.

6. Petitioners have thus filed this petition under Article 226 of the Constitution of India read with section 103 of the Constitution of Jammu and Kashmir for issuance of writ in the nature of:

- i) **Prohibition** detaining respondent Nos. 1 to 3 from restraining the trucks/vehicles carrying UHT/Tetra Pack Milk being supplied by petitioner Nos. 2 and 3 to the Army Units under Northern Command in the State of Jammu and Kashmir.
- ii) **Mandamus** commanding respondent Nos. 1 and 3 not to compel the petitioners to transfer the stock of UHT/Tetra Pack Milk and impose/levy any tax on such goods under the J&K VAT Act, 2005.
- iii) Prohibition prohibiting respondent No. 3 from charging any VAT from the petitioners on the aforementioned consignments of Tetra Pack Milk and,

- iv) **Prohibition** restraining respondent Nos. 1 to 3 from en-cashing the Bank Guarantee dated 17.01.2014 drawn on Oriental Bank of Commerce, JLN Marg Branch, Jaipur (Rajasthan) for recovery of tax on UHT/Tetra Pack Milk being supplied by the petitioners.

7. Heard. We have perused the record.
8. Petitioners' case primarily and mainly is that they are not carrying out any business activity much less making any sale in the State of Jammu and Kashmir and therefore, they neither are liable to pay any Value Added Tax (for short the VAT) under the J&K Value Added Tax Act, 2005 (for short the Act) nor are they required to seek registration under the Act. It is averred in the petition that supplies of the stocks to the Army Command (Northern Command) is for direct consumption for defence and the movement of goods, that is, Tetra Pack Milk from the manufacturing units of petitioner Nos. 2 and 3 to various destinations of Northern Command in the State of Jammu and Kashmir is in the course of and incidental to an inter-state trade which is not subject to payment of VAT in the state of Jammu and Kashmir under the Act and falls under the purview of the Central Sales Tax Act, 1956 (for short the CST Act). It is averred further that since the movement of goods is in the course of an inter-state trade, the petitioners/manufacturing units are registered as dealers in their respective States under the provisions of the CST Act and the respective Value Added Tax Act. The petitioners Nos. 2 and 3 are liable to

pay VAT in States of Gujarat and Rajasthan but exemption has been granted by both the states. Contextually, it is contended that the coercive registration foisted on petitioner Nos. 2 and 3 by respondent Nos. 1 and 3 would not make them liable to pay the VAT in the State of Jammu and Kashmir as the transaction basically is an inter-state trade transaction.

9. Respondent Nos. 1, 2 and 3 have opposed the writ petition. They have admitted that consignments 'imported' by respondent No. 3 were intercepted at Lakhanpur as they were found liable to furnish security in terms of section 67(10) of the Act. While denying that movement of the goods was in the course of inter-state trade, respondents 1 to 3 have contended that entire transaction takes place in the State of Jammu and Kashmir and supplies to Army Units are made in the State of Jammu and Kashmir so the petitioners are required to get themselves registered as dealers in the State of Jammu and Kashmir under the Act and are liable to furnish security in terms of section 67(10) until they get themselves do registered. It is, however, important to note and needs to be emphasized that respondents in their reply, while contending more than once that petitioners are required to get themselves registered in the State of Jammu and Kashmir under the Act and are liable to furnish security till they obtain registration, have not

clearly stated as to whether the transaction in question is liable to levy and payment of VAT or not.

10. Primary question raised for consideration in this writ petition is; whether the sale/supply of the Tetra Pack Milk by the petitioner Nos. 2 and 3 to the Northern Command of the Army in the State of Jammu and Kashmir is a sale in the course of inter-state trade. Connected question would be; whether the members of petitioner-Federation like petitioner Nos. 2 and 3 are liable to pay VAT and should register themselves as dealers under the Act for the said sale/supply.
11. On the strength of averments in the petition, Mr. Pranav Kohli, learned counsel for the petitioners argued vehemently that movement of goods, that is, Tetra Pack Milk into the State of Jammu and Kashmir is in the course of inter-state trade as the goods are meant for consumption by the troops in the State. Mr. Kohli painstakingly sought to explain that movement of goods is incidental to sale that takes place in the State where the manufacturing units of the petitioners are located and their transportation to and delivery to the Army locations in the State of Jammu and Kashmir is incidental to the said sale as the goods are to be consumed in the State of Jammu and Kashmir. Mr. Kohli relied upon Division Bench of Punjab and Haryana High Court in *Osaw Agro Industries Private Limited v State of Punjab and others*, (2007) 4 RCR (Civil) 121(DB). Mr. Kohli thus, concluded that the sale

being an inter-state sale is not liable to tax under the Act as the same is covered under the CST Act.

12. Per contra, Mr. M. A. Bhat, learned counsel for respondents 1 to 3, on the strength of averments made in the objections filed on behalf of respondents 1 to 3 would say that the petitioners are making supplies in the State of Jammu and Kashmir on FOR basis, property of the goods is transferred and sale is completed in the State of Jammu and Kashmir so the sale cannot be taken as inter-state sale and is leviable to VAT under the Act.
13. The Act provides for levy and collection of VAT on the sale and purchase of goods in the State of Jammu and Kashmir. The CST Act provides *inter alia* for levy, collection and determination of taxes on sale of goods in the course of inter-state trade or commerce. Having regard to the question raised for determination in this writ petition, we may first refer to relevant provisions of the two Acts:
 - 13(a) Under section 13 read with section 12 of the Act every dealer is liable to pay VAT on his taxable turnover of sales. Section 27 of the Act mandates registration for a dealer leviable to pay tax under the Act by imposing restriction on carrying on the business as a dealer unless he has been registered and possesses a certificate of registration. Section 47, however, exempts certain sales from levy of VAT. It reads:

“47. Sales not liable to tax

- (1) Notwithstanding anything contained in the Act, a value added tax shall not be imposed under the Act-
 - (i) where such sale or purchase takes place outside the State;
 - (ii) where such sale or purchase takes place in the course of inter-state trade and commerce; or
 - (iii) where such sale or purchase takes place in the course of import of goods into the territory of India or export of goods out of the territory of India.
- (2) For the purpose of this section whether a sale or purchase takes place,-
 - (i) outside the State;
 - (ii) in the course of inter-state trade and commerce; or
 - (iii) in the course of import of goods into the territory of India or export of goods out of the territory of India,

shall be determined in accordance with the provisions of section 3, section 4 and section 5 of the Central Sales Tax Act, 1956”.

(underlining by us)

13(b). Contextually, sub section (2) of section 13 of the Act provides for deduction from gross turnover of sale of goods of a dealer for commuting his taxable turnover of sales. Sub section (2) of section 13 reads:

“13. Tax on Sales

(1)----

- (2) The taxable turnover of sales in relation to a dealer liable to pay tax on sale of goods under sub section (1) of section 12 shall be the gross turnover of sales during any period,

which remains after deducting there from:-

- (a) turnover of sales of goods declared as exempt from tax in Schedule A'; and
- (b) turnover of sales of goods which are shown to the satisfaction of the Assessing Authority to have taken place-
 - (i) in the course of inter-state, trade or commerce;
 - (ii) outside the State of Jammu and Kashmir; or
 - (iii) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation:-...."

(underlining by us)

13(c) Section 3 of the CST Act provides for as to when a sale or purchase of goods is said to take place in the course of inter-state trade or commerce. It reads:

"3. **When is a sale or purchase of goods said to take place in the course of inter-state trade or commerce.** -A sale or purchase of goods shall be deemed to take place in the course of inter-state trade or commerce if the sale or purchase-

- (a) Occasions the movement of goods from one State to another; or
- (b) is effected by a transfer of documents of title to the goods during their movement from one State to another.

Explanation (1)-----

Explanation (2)-----"

(underlining by us)

14. Reading of the aforementioned provisions of the Act and the CST Act in juxtaposition, as they should be, makes it clear that no VAT shall be levied on the turnover from sale of goods which takes place in the

course of inter-state trade or commerce. We may say that the VAT under the Act shall not be imposed when a sale takes place in the course of inter-state trade or commerce and tax on such sale shall be governed by the CST Act. On plain reading of section 3 (a) of the CST Act, a sale or purchase can be said to have taken place in the course of inter-state trade if two conditions are fulfilled viz (i) a transaction of sale or purchase of goods and (ii) movement/transportation of those goods from one State to another pursuant to the sale or purchase. It should be evident from the sale transaction that the buyer has purchased the goods in one State with the intention of using/consuming them in another State. The movement of goods from one State to another should be incidental to the sale/purchase of those goods.

15. In *Tata Iron and Steel Co. v S. R. Sarkar*, AIR 1961 SC 65, Their Lordships of the Constitution Bench of the Supreme Court have held that clause (a) of section 3 of the CST Act includes those sales in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale between the seller and the buyer.
16. In *Union of India and another v M/S. K. G. Khosla and Co. Ltd. and others* (1979) 2 SCC 242 contracts of sale were finalized at head office of the seller at Delhi and in pursuance of that contract specified

goods were manufactured in the factory of the seller at Faridabad, Haryana. The goods were dispatched from the factory to head office of the seller at Delhi for being forwarded to the respective customers. In this case Their Lordships of a three-Judge Bench of the Supreme Court have interpreted section 3(a) of the CST Act and, while referring to the Constitution Bench judgement in *S. R. Sarkar (supra)* and other judgments, held in para 14 of the reporting that if a contract of sale contains a stipulation of movement of goods from one state to another, the sale, would be, of course an inter-state sale. But it can also be an inter-state sale, even if, the contract of sale does not itself provide for the movement of the goods from one State to another but such movement is the result of a covenant in the contract of sale or is an incident of that contract.

17. In *CST UP and others v M/s Bhakhtawar Lal Kailash Chand Areti and others*, AIR 1992 SC 1952, Their Lordships of the Supreme Court have held that to be called an inter-state sale or purchase it is immaterial whether a completed sale precedes movement of goods or follows the movements of goods, or for that matter, takes place while the goods are in transit. What is important is that the movement of goods and sale must be inseparable.
18. In *State of Andhra Pradesh v National Thermal Power Corporation Limited*, (2002) 5 SCC 203 Their

Lordships of the Constitution Bench in para 24 of the reporting have mentioned three essential ingredients of an inter-state sale, which reads:

- “(i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-state movement of goods;
- (ii) the goods must actually move from one State to another, pursuant to such contract of sale, the sale being the proximate cause of movement; and
- (iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which may take place independently of a contract of sale would not fall within the meaning of inter-state sale.”

19. The Division Bench Judgement of Punjab and Haryana High Court in *Osaw Agro Industries Private Limited (supra)* relied upon by learned petitioners’ counsel is also useful on the question under consideration as fact situation in that case can be said to be similar to the fact situation of the case on hand. Petitioner in that case was a registered dealer under Haryana Value Added Tax Act, 2003 having its factory at Amballa (Haryana) and was registered under the CST Act. Petitioner’s quotation for supply of Agrosaw Specific Gravity Separator to Punjab Agriculture University, Ludhiana was accepted and petitioner was asked for supply of the machines. Accordingly, petitioner sold the machines to the University and pursuant to section 3 of the CST Act

petitioner paid Central Sales Tax. The goods were loaded in a truck for delivery from Amballa to Ludhiana. The truck was detained by the Excise and Taxation Officer/Detaining Officer and it was alleged that petitioner since is not registered under Punjab Value Added Tax Act, 2005 and therefore, violated section 21(1) thereof. Petitioner took the plea that it was inter-state sale and the CST Act has been charged as per law. Learned Division Bench of the Punjab and Haryana High Court relied upon K.G. Khosla (supra) and National Thermal Power Corporation Limited (supra) and held that 'all the ingredients of inter-state sale stand fulfilled in the present case and the sale in question has to be so held'.

20. We have accorded our consideration to fact situation involved in this case in light of the aforementioned principles and having done so, we are of the considered view that the sale/supply of goods viz. the Tetra Pack Milk by petitioner Nos. 2 and 3 from their manufacturing units in the States of Gujarat and Rajasthan to Army locations of the Northern Command in the State of Jammu and Kashmir is a sale in the course of inter-state trade and, therefore, not subject to levy and collection of VAT under the Act in the State of Jammu and Kashmir for the reasons to follow:

21. As per the petitioners, which is not disputed, rates

quoted by the petitioner Nos. 2 and 3 in response to the tenders floated by the Northern Command of the Army were accepted and pursuant thereto supply orders were issued in their favour. The identical supply orders dated 04.10.2013 issued by the Offg. MG Northern Command for and on behalf of the President of India were addressed to the petitioners in the States of Gujarat and Rajasthan respectively. Petitioner No. 2 is required to make supply worth Rs. 2,26,82,294/ of Tetra Pack Milk at Field Supply Depot, ASC Narian in the State of Jammu and Kashmir and likewise, petitioner No. 3 is required to make supply worth Rs. 2,80,40,700/ at supply Point of ASC, Bandipora in the State of Jammu and Kashmir. It has been made clear in the supply orders that the tendered rates shall include transportation charges and all taxes. It admits of no doubt that the goods viz. Tetra Pack Milk have been sold at the manufacturing units of petitioners 1 and 2 in the States of Gujarat and Rajasthan for their consumption by the troops in the State of Jammu and Kashmir and their transportation/movement from respective manufacturing units to the places of their consumption in the State of Jammu and Kashmir is inherent in the transaction of the sale/purchase and covenanted in the supply orders. It is, therefore, a distinguishing example of sale in inter-state trade, which is subject to levy and collection of tax under the CST Act and not to VAT

under the Act.

22. Having regard to the manner in which respondents intercepted the trucks transporting the consignment of the petitioners at Lakhanpur Check Post and the stand taken by the respondents in this case, we visualise the necessity of giving, briefly, the Constitutional background of the tax regime in relation to inter-state sale or purchase in this country.
23. India is a union of States. Structure of the Government is federal in nature. Article 265 of our Constitution prohibits levying or collection of any tax except by authority of law. Tax can be levied and collected only in accordance with law enacted by the Parliament or a State Legislature. Article 246 of the Constitution indicates bifurcation of powers to make laws, between Union Government and State Government. Parliament has exclusive power to make laws in relation to matters given in List-I of Seventh Schedule of the Constitution (Called Union List). List-II (State List) contains entries under jurisdiction of States. List-III (Concurrent List) contains entries where both Union and State Governments can exercise power. As per the scheme of taxation envisaged under the Constitution, levy and collection of tax on the sale or purchase of goods where such sale or purchase takes place in the course of inter-state trade or commerce

is in the domain of the Central Government. This aspect is mentioned at Entry No. 92 A of List-I. Besides, Article 269 empowers the Government of India (Union Government) *inter alia* to levy tax on sale or purchase of goods when such sale or purchase takes place in the course of inter-state trade or commerce. It further empowers the Parliament to enact a law formulating principles for determining when a sale or purchase of goods takes place in the course of inter-state trade or commerce. Parliament has thus enacted the CST Act to formulate principles for determining *inter alia* when a sale or purchase of goods takes place in the course of inter-state trade or commerce. Section 6(1) of CST Act is charging section, which provides that every dealer shall be liable to pay tax under that Act for sale of goods (other than electrical energy) effected by him in the course of inter-state trade or commerce. Section 3 provides as to when a sale or purchase can be said to have taken place in the course of inter-state trade or commerce. In keeping with the Constitutional scheme the J and K VAT Act unmistakably excludes the sales having taken place in the course of inter-state trade or commerce from levy and collection of VAT.

24. We lay emphasis to point out that not to levy and collect tax on sale or purchase when such sale or purchase has taken place in the course of inter-state trade or commerce and not to take steps in this

regard and not to create hurdles on that score is a constitutional obligation of a State Government and not a discretion or mere concession. The Authorities of a State Government have to show due caution and sensitivity while dealing with the matter and not to act arbitrarily. Stand taken by the respondents that the petitioners are making the supplies on FOR basis has no substance in relation to their liability to pay VAT. Supply on FOR (Free on Rail/Road) basis rather would show that the transportation/movement of the sold goods is a covenant of and pursuant to the contracts of the sale between the Army and petitioner Nos. 2 and 3 and the contracts shall not be said to have been executed until supply of goods at specified delivery points in the State of Jammu and Kashmir is made by the petitioners. Stand taken by the respondents, we may say, is without any basis and repugnant to constitutional scheme. We therefore, reject the stand taken by the respondents.

25. We would thus hold that the sale/supply of the goods viz. Tetra Pack Milk by petitioner Nos. 2 and 3 to the Northern Command of the Indian Army in the State of Jammu and Kashmir pursuant to aforementioned supply orders fulfills all the ingredients of a sale is in the course of inter-state trade and, therefore, is not liable to levy and collection of VAT under the Act on entry of the goods in the State of Jammu and Kashmir. We also

hold that petitioners are not required to get registered as dealers under the Act for aforementioned sales.

26. For aforementioned, this writ petition has merit and is accepted. By issue of **writ of prohibition** respondents are restrained from detaining trucks/vehicles carrying Tetra Pack Milk being transported by petitioner Nos. 2 and 3 pursuant to aforementioned supply orders for delivery at the specified delivery points of the Northern Command of the Army in the State of Jammu and Kashmir for enforcing payment of VAT under the Act and by a **writ of mandamus** respondents are directed to undo all the steps taken by them in this behalf and to release the Bank Guarantee(s) furnished by the petitioners.

27. Disposed of.

(Janak Raj Kotwal)
Judge

(Bansi Lal Bhat)
Judge

Jammu:
30.04.2015
Rakesh