Before Ajay Tewari, Avneesh Jhingan & Pankaj Jain, JJJ.

EXCISE AND TAXATION COMMISSIONER, HARYANA—
Appellant

versus

M/S GUPTA BROTHER, BHIWANI AND OTHERS—
Respondents

VATAP No. 242 of 2018 and Connected Matters

March 14, 2022

Haryana Value Added Tax Act, 2003—Entries 1, 2, 5 of Schedule –E—Excise and Taxation Commissioner filed appeals against orders of Haryana Tax Tribunal—Tribunal held that dealers were entitled to Input Tax Credit ['ITC'] on evaporation loss of Petrol and High Speed Diesel ['HSD']—Division Bench referred the matter to larger Bench by framing the question:- "Whether in the facts and circumstances of the case the assessee is entitled to ITC under the provisions of the Act on evaporation/handling losses of the petroleum products?" Full Bench answered in favour of dealer i.e. assessee—Held entitled to ITC on evaporation of Petroleum products Ministry of Petroleum allows evaporation losses—Circumstances mentioned against Entry 5—Not applicable to petroleum products and natural gas—State's appeals dismissed.

Held that**,** It is admitted position that considering the nature of petrol and HSD, the Ministry of Petroleum allows evaporation losses to the extent of 0.6% in case of motor spirit and 0.2% in case of HSD.

(Para 11)

Further held that, we may hasten to add that we are dealing with the cases where handling or evaporation losses are within the prescribed limits.

(Para 12)

Further held that, As per provisions of Act, the tax paid to the State by the oilcompanies on the goods sold, would be ITC available to the purchasing dealers. There would be no ITC for tax paid on the goods specified in Schedule E when used or disposed of in the circumstances mentioned against those goods. The circumstances mentioned in Schedule E against petroleum products and natural gas are that when used as fuel or exported out of the State. Entry 5 of

schedule E is not dealing with the items mentioned at Entries 1 and 2. In other words, circumstances mentioned against Entry 5 are not applicable to petroleum products and natural gas.

(Para 13)

Further held that, the contention raised by learned counsel for the State/appellant has a fallacy, it is based upon circumstances mentioned against Entry 5 i.e. when the goods are disposed of otherwise than by way of sale. If the contention is accepted, it would result in adding circumstance in Entry 1 of Schedule E. Suffice to say no such condition finds mention against Entry 1.

(Para 14)

Further held that, the question is answered in favour of the dealer i.e. assessee shall be entitled to ITC on evaporation of the petroleum products.

(Para 19)

Samarth Sagar, Additional Advocate General, Haryana
for the appellant.

Sandeep Goyal, Advocate
for the respondents.

AVNEESH JHINGAN, J.

(1) Excise and Taxation Commissioner, Haryana has filed these appeals against the orders of Haryana Tax Tribunal, Chandigarh [hereinafter referred to as 'Tribunal']. Tribunal accepted the appeals and held that dealers were entitled to Input Tax Credit [for brevity 'ITC'] on evaporation loss of Petrol and High Speed Diesel [for brevity 'HSD']. The issue canvassed in appeals is based on the decision of Division Bench of this Court in ***All Haryana Petroleum Dealers Association, Bhiwani*** versus ***The State of Haryana and others***[1]**.** While dealing with present appeals, considering that in the decision relied upon by appellant Entry 1 of Schedule E of Haryana Value Added Tax Act, 2003 [for short 'the Act'] was not dealt with and ITC was taken as liability instead of credit, the Division Bench referred the matter to the largerBench by framing following question :-

"Whether in the facts and circumstances of the case the assessee is entitled to ITC under the provisions of the Act on evaporation/

[1] 2014(42) R.C.R. (Civil) 811

handling losses of the petroleum products?"

(2) For the sake of convenience, the facts from VATAP-242-2018 are being extracted. Respondent No. 1 is the dealer running a petrol pump and engaged in purchase and sale of petroleum products. For the assessment year 2010-11 [for short 'A.Y.'], assessment was finalized by Excise and Taxation Officer-cum-Assessing Authority, Bhiwani on 23rd December, 2013 allowing the claim of ITC. Revisional Authority revised the assessment vide order dated 19th August, 2016. ITC for evaporation losses was reversed. The Tribunal accepted the contention of the dealer and allowed the appeal on 3rd July, 2017. It was held that Assessing Authority rightly allowed the claim of ITC on evaporation. The review application filed by the State was dismissed by the Tribunal on 4th May, 2018.

(3) Mr. Samarth Sagar, Additional Advocate General, Haryana appearing for the State/Appellant argued that disposal of evaporated Petrol and HSD was otherwise than by way of sale hence the dealer was not entitled to ITC as per Entry 5 of Schedule E of the Act. It is contended that issue is covered in favour of appellant by the decision of Division Bench of this Court in ***All Haryana Petroleum Dealers Association's case (supra).***

(4) Mr. Sandeep Goyal, Advocate appearing for the dealers defended the order of the Tribunal. He contended that Entry 5 of Schedule E does not deal with petroleum products. It is argued that reversal of ITC for evaporated petrol and HSD was not the issue before the High Court in ***All Haryana Petroleum Dealers Association's case (supra).*** He raised anargument that considering the nature of the goods involved, it cannot be held that goods were disposed of otherwise than by way of sale.

(5) For convenience, Section 2(1)(w), Section 2(1)(zg), explanation (v) to Section 2(1)(zg), Section 8 and Schedule E of the Act during relevant A.Y. and Rule 40 of the Haryana Value Added Tax Rules,2003 are reproduced:-

- **Section 2(1)(w) of the Act :**

"Input tax" means the amount of tax paid to the State in respect of goods sold to a VAT dealer, which such dealer is allowed to take credit of as payment of tax by him, calculated in accordance with the provisions of section 8;

- **Section 2 (1)(zg) of the Act :**

"sale price" means the amount payable to a dealer asconsideration for the sale of any goods, less any sum allowed at thetime of sale as cash or trade discount according to the practice, normally prevailing in the trade, but inclusive of any sum charged for anything done by the dealer in respect of the goods at the time of or before the delivery thereof and the expression "purchase price" shall be construed accordingly;

- **Explanation (v) to Section 2(1)(zg) of the Act:**

The amount received or receivable by oil companies for the sale of diesel or petrol to the retail outlet in the state shall be deemed tobe equivalent to the price on which the retail outlets sell these commodities to the consumers.

- **Section 8 of the Act :**

(1) Input tax in respect of any goods purchased by a VAT dealer shall be the amount of tax paid to the State on the sale of such goods to him and shall, in case of a dealer who is liable to pay tax under sub-section(1) of section 3 or, as the case may be, makes an application for registration in time under sub- section(2) of section 11, include the tax paid under this Act and the Act of 1973 in respect of goods (except capital goods) held in stock by him on the day he becomes liable to pay tax but shall not include tax paid in respect of goods specified in Schedule E used or disposed of in the circumstances mentioned against such goods:

Provided that where the goods purchased in the State are used or disposed of partly in the circumstances mentioned in Schedule E and partly otherwise, the input tax in respect of such goods shall be computed pro rata:

Provided further that if input tax in respect of any goods purchased in the State has been availed of but such goods are subsequently used or disposed of in the circumstances mentioned in Schedule E, the input tax in respect of such goods shall be reversed.

(2) A tax invoice issued to a VAT dealer showing the tax charged to him on the sale of invoiced goods shall, subject to the provisions of subsection (3), be sufficient proof of the tax paid on such goods for the purpose of sub-section (1).

(3) Where any claim of input tax in respect of any goods sold to a dealer is called into question in any proceeding under this Act, the authority conducting such proceeding may require such dealer to produce before it in addition to the tax invoice issued to him by the selling dealer in respect of the sale of the goods, a certificate furnished to him in the prescribed form and manner by the selling dealer; and such authority shall allow the claim only if it is satisfied after making such inquiry as it may deem necessary that the particulars contained in the certificate produced before it are true and correct.

(4) The State Government may, from time to time, frame rules consistent with the provisions of this Act for computation of input tax and when such rules are framed, no input tax shall be computed except in accordance with such rules.

- **Schedule E of the Act :**

Schedule E
Goods not eligible for Input Tax Credit
(See sub-section (1) of section 8)

	Description ofGoods	**Circumstances in which inputtax shall be nil**
1	2	3
1.	Petroleum products and natural gas. Subs. Vide SO 93, dated 08-07-2003 w.e.f. 01-08-2003	(i) When used as fuel (ii) When exported out of State
	Petroleum basedfuels and natural gas w.e.f. 01-04-2003 to31-07-2003	Except when re-sold
2.	Capital goods	(i) When intended to be used mainly in the manufacture of exempted goods or in the telecommunications network or mining or the generation and distribution of electric energy or other form of power; or (ii) When forming part of gross block on the date of cancellationof the registration certificate.

3.	Omitted w.e.f. 30.06.2005	
4.	Omitted w.e.f.30.06.2005	
5.	All goods except those mentioned atSerial Nos. 1 and 2.	(i) When used in the telecommunications network, inmining, or in the generation and distribution of electricity or other form of power, (ii) When exported out of State or disposed of otherwise than by sale; (iii) When used in themanufacture or packing of exempted goods except when such goods are sold in the course of export of goods out of the territory of India; (iv) When used in themanufacture or packing of taxable goods which are exported out of State or disposed of otherwise than bysale; (v) When left in stock, whetherin the form purchased or in manufactured or processed form, on the date of cancellation of the registration certificate.
		(vi) When sold by Canteen Store Department
6.	Liquor as defined in the Punjab ExciseAct, 1914	When sold in the State by Bar Licensees (Licenses L-4/L-5/L-12C/L-12G/L-10E).

- **Rule 40 of the Haryana Value Added Tax Rules, 2003:**

40. Computation of output tax, purchase tax, input tax and taxdue. (1) Output tax in respect of a VAT dealer for a tax period isthe aggregate of tax calculated on the sale of taxable goods made by him in the State during the tax period. It shall be represented by total of entries in column (h) in the Day Book (Sale side) prescribedin rule 53.

(2) Any goods purchased in the State by a VAT dealer on the sale ofwhich to him no tax is levied or paid under the Act and such goods are used or disposed of by him during a tax period in the circumstances that no tax is payable by him

under the Act or the Central Act on them or the goods manufactured therefrom, then he shall, except when such goods not being the goods specified in Schedule F of the Act, or the goods manufactured from such goods are sold in the course of export of goods out of the territory of India, be liable to pay tax on the purchase of such goods at the rate(s) specified in clause (b) of sub-section (1) of section 7.

(3) Input tax in respect of a VAT dealer for a tax period is the aggregate of tax paid in respect of goods purchased in the State from other VAT dealer(s) on tax invoice(s) during the tax period, which shall be the aggregate of entries made in column (g) in the Day Book (Purchase side) in respect of the said period, as reduced by the amount of tax paid in respect of goods specified in Schedule E of the Act, when used, intended to be used or disposed of during the said period or when left in stock at the end of the said period, in the circumstances mentioned therein against such goods. The amount to be reduced shall be calculated pro rata where the goods specified in Schedule E of the Act, have been partly used or disposed of in the circumstances mentioned therein and partly otherwise.

Illustration - The aggregate of entries made in column (g) in the Day Book (Purchase side) in respect of a tax period in case of a VAT dealer D is Rs.10,000. D exported goods worth Rs.1,00,000/- out of State (sent for sale on consignment) during the said period. These goods were purchased by him in the State from VAT dealers on tax invoices over a span of past three tax periods on payment of tax aggregating to Rs.8,000. D's input tax is Rs.2,000.

(4) The tax due required to be paid by a VAT dealer for a tax period shall be the output tax, calculated under sub-rule (1), plus the purchase tax, calculated under sub-rule (2), minus the input tax, calculated under sub-rule (3).

Arithmetically put:

Tax due = Output tax + purchase tax - input tax.

(6) "Input tax" is the tax paid to the State on the goods sold to VAT dealer. The purchasing dealer is entitled to take credit of tax paid as if it was paid by him. The calculation of credit is to be made as per provision of Section 8 of the Act.

(7) As per definition in Section 2(1)(zg), "sale price" means consideration payable for sale of goods, less cash/trade discount but includes sum charged for anything done to the goods by the dealer at the time or before delivery of goods.

[7.1] There are five explanations to the "sale price". The relevant explanation for the present case is explanation (v), inserted vide notification dated 29th September, 2011. As per explanation (v), sale price charged by retail outlets from customers shall be deemed to be the amount received by oil companies for sales made of petrol or HSD to the retail outlet.

(8) As per Section 8(1), input tax shall be the amount of tax paid to State on the sale of goods purchased by the VAT dealer. For dealers liable to pay tax under Section 3(1) or making an application under Section 11(2) input tax will include the tax paid under this Act or under Haryana General Sales Tax Act, 1973 on the goods held in stock by the dealer, on the date of becoming liable to pay tax but shall not include capital goods. The tax paid on the goods mentioned in Schedule E used or disposed of in circumstances mentioned against them in the Schedule will not be included in input tax.

[8.1] The first proviso to sub-section (1) Section 8 of the Act provides that input tax shall be computed on *pro rata* basis where the goods are partially used or disposed of in circumstances mentioned in Schedule E and partly otherwise.

[8.2] The second proviso provides for reversal of input tax if the goods purchased in the State after availing input tax are used or disposed of as per circumstances mentioned against those goods in Schedule E.

[8.3] As per sub-section (2), the tax invoice showing tax charged from dealer, issued to the VAT dealer shall be sufficient proof of tax paid, subject to the provisions of sub-section (3).

[8.4] As per sub-section (3), in case input tax is questioned in the proceedings under the Act, the authority may ask production of certificate (as prescribed) in addition to the tax invoice. The claim would be allowed only after authority satisfying itself on making inquiry that the particulars contained in the certificate are true and correct.

[8.5] As per sub-section (4), the State Government can frame rules in consistence with the provisions of the Act for computation of

input tax, in case rules are framed, the input tax shall be computed in accordance with such rules.

(9) The first item in Schedule E w.e.f. 01.08.2003 is petroleum products and natural gas and no input tax credit shall be available if these products are used as fuel or exported out of the State.

[9.1] Entry 2 deals with the capital goods and prescribes circumstances in which if used, the input would be nil.

[9.2] Entry 5 provides that all goods except the goods mentioned at Sr. No. 1 and 2, if used in six circumstances mentioned against Entry No.5, no input tax shall be available. Second condition against Entry No. 5 is 'if exported out of State or disposed of otherwise than by sale'.

(10) Rule 40 provides for computation of output tax, purchase tax, input tax and tax due.

[10.1] As per sub rule (1) thereof, tax on sale of taxable goods by the dealer during the tax period would be output tax.

[10.2] Sub-rule (2) deals with the purchase tax. In case no tax is levied under the Act on goods purchased within the State and thereafter such goodsare used or disposed of in a manner that no tax is payable under the Act or Central Act on those goods or goods manufactured therefrom, then tax shall be levied on purchase, as per rates specified under Section 7(1)(b) of the Act. Exception being when the goods or manufactured goods from such goods are sold in course of export out of territory of India. Further that goods mentioned in Schedule F even if exported out of India shall be liable to purchase tax.

[10.3] Sub-rule (3) provides that input tax would be the tax paid in respect of goods purchased on tax invoice in the State from other VAT dealers.The input tax would be reduced for the goods specified in schedule E when used or intended to be used or disposed of or left in stock during the tax period in the circumstances mentioned against those goods in schedule E.

[10.4] As per sub-rule (4), the tax due would be output tax plus purchase tax less input tax.

(11) It is admitted position that considering the nature of petrol and HSD, the Ministry of Petroleum allows evaporation losses to the extent of 0.6% in case of motor spirit and 0.2% in case of HSD.

(12) We may hasten to add that we are dealing with the cases

where handling or evaporation losses are within the prescribed limits.

(13) As per provisions of Act, the tax paid to the State by the oil companies on the goods sold, would be ITC available to the purchasing dealers. There would be no ITC for tax paid on the goods specified in Schedule E when used or disposed of in the circumstances mentioned against those goods. The circumstances mentioned in Schedule E against petroleum products and natural gas are that when used as fuel or exported out of the State. Entry 5 of schedule E is not dealing with the items mentioned at Entries 1 and 2. In other words, circumstances mentioned against Entry 5 are not applicable to petroleum products and natural gas.

(14) The contention raised by learned counsel for the State/appellant has a fallacy, it is based upon circumstances mentioned against Entry 5 i.e. when the goods are disposed of otherwise than by way of sale. If the contention is accepted, it would result in adding circumstance in Entry 1 of Schedule E. Suffice to say no such condition finds mention against Entry 1.

(15) Explanation (v) to Section 2(1)(zg) was inserted vide notification dated 29.09.2011. Explanation gave deeming fiction that sale price of the retail outlets shall be deemed to be amount received by oil companies for sale of petrol and HSD made to retail outlets.

(16) The *vires* of Explanation (v) to Section 2(1) (zg) of the Act was subject matter of challenge before the Division Bench of this Court in ***All Haryana Petroleum Dealers Association's case (supra).*** The *vires* of provisions were upheld by the Division Bench. The issue with regard to reversal of input tax credit on evaporation was not subject matter before the Division Bench. However, a peripheral argument was raised by the petitioner that there would be an ever increasing gap between input tax available and the credit availed by dealers. The Division Bench rejected the argument considering that Ministry of Petroleum allowed evaporation losses to the extent of 0.6% for motor spirit and 0.2% for HSD.Departmental instructions issued for the assessing authority forcalculation to be done in case of petroleum dealer were also referred. However, it was mentioned that as per condition (ii) against Entry 5 of schedule E, the ITC on evaporation shall be nil.

(17) The Division Bench had not considered the language of Section 8 of the Act and Entry 1 of schedule E. Section 8 specifically provides that input tax shall not include tax paid on goods mentioned

in schedule E when used or disposed of in circumstances mentioned against such goods. “Against such goods” is of importance. Even from the reading of Entry 5 of Schedule E, it is clear that entry applies to goods other than those mentioned in Entries 1 and 2 of Schedule E.

(18) Learned counsel appearing for the dealers tried to argue that considering nature of goods, evaporation is not disposal of goods otherwise than by way of sale. We may not dwell upon this argument, in view of clear provision of statute, there is no necessity to go into thisargument.

(19) The question is answered in favour of the dealer i.e. assessee shall be entitled to ITC on evaporation of the petroleum products.

(20) The appeals filed by the State are accordingly dismissed.

(21) Since the appeals are dismissed on merits, the pending applications including applications for condonation of delay, if any, stand disposed of.

(22) Photocopy of this order be placed on the files of connected appeals.

Shubreet Kaur