

IN THE HIGH COURT OF HIMACHAL PRADESH

AT SHIMLA

**I.T.A. No.1 of 2007
I.T.A. Nos.17, 18 & 19 of 2007
I.T.A Nos.18 & 22 of 2008**

COMMISSIONER OF INCOME TAX

Vs

H P MARKETING BOARD

Deepak Gupta and Sanjay Karol, JJ

Dated: June 24, 2011

Appellant Rep by: Mr Vinay Kuthiala & Mrs. Vandana Kuthiala Adv

Respondent Rep by: Mr. Ajay Vaidya, Adv

Revenue's appeal allowed

JUDGEMENT

Per: Deepak Gupta:

1. These appeals are being disposed of by a single judgment as the question of law involved in all the appeals is same and reads as follows:

"1. Whether on the facts and in the circumstances of the case the Hon'ble Tribunal was right in law in holding that the H.P. Marketing Board is a local authority within the meaning of Section 10(20) of the Income-tax Act, whereas the Marketing Board does not fulfil the ingredients of a Local Authority as defined in Section 3(31) of the General Clauses Act, and also does not satisfy the tests laid down by the Hon'ble Supreme Court in Union of India vs. R.C. Jain (1981) 2 SCR 854 and followed in other cases?"

2. To appreciate this question it will be appropriate to refer to Section 10(20) of the Income Tax Act as it stood at the relevant time which reads as follows:

"10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

(1) to (19) xxxxxxxxxxxxxxxx

(20) the income of a local authority which is chargeable under the head "income from house property", "Capital gains" or "Income from other sources" or from a trade or business carried on by it which accrues or arises from the supply of a commodity or service (not being water or electricity) within its own jurisdictional

area or from the supply of water or electricity within or outside its own jurisdictional area."

3. It is thus obvious that the income of a local authority if it falls within the ambit of Section 10(20) would not form part of the total income in terms of Section 10. The expression 'local authority' had not been defined in the Income Tax Act at that time and therefore reference has to be made to Section 3(31) of the General Clauses Act, 1897 in which the term 'local authority' has been defined as follows:

"(31) "Local authority" shall mean a municipal Committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund;"

4. In *Union of India vs. R.C. Jain and others*, AIR 1981 SC 951, the Apex Court decided what was the meaning of the expression 'local authority' in the context of the payment of Bonus Act wherein also the term "local authority' had not been defined. Dealing with Section 3(31) of the General Clauses Act the Apex Court held as follows:

"2. Let us, therefore, concentrate and confine our attention and enquiry to the definition of 'Local Authority' in Section 3 (31) of the General Clauses Act. A proper and careful scrutiny of the language of Section 3(31) suggests that an authority, in order to be a local Authority, must be of like nature and character as a Municipal Committee, District Board or Body of Port Commissioners, possessing, therefore, many, if not all, of the distinctive attributes and characteristics of a Municipal Committee, District Board, or Body of Port Commissioners, but, possessing one essential feature, namely, that it is legally entitled to or entrusted by the Government with, the control and management of a municipal or local fund. What then are the distinctive attributes and characteristics, all or many of which a Municipal Committee, District Board or Body of Port Commissioners shares with any other local authority? First, the authorities must have separate legal existence as Corporate bodies. They must not be mere Governmental agencies but must be legally independent entities. Next, they must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. Next, they must enjoy a certain degree of autonomy, with freedom to decide for themselves questions of policy affecting the area administered by them. The autonomy may not be complete and the degree of the dependence may vary considerably but, an appreciable measure of autonomy there must be. Next. they must be entrusted by Statute with such Governmental functions and duties as are usually entrusted to municipal bodies, such as those connected with providing amenities to the inhabitants of the locality, like health and education services, water and sewerage, town planning and development, roads, markets, transportation, social welfare services etc. etc. Broadly we may say that they may be entrusted with the performance of civic duties and functions which would otherwise be Governmental duties and functions. Finally, they must have the power to raise funds for the furtherance of their activities and the fulfillment of their projects by levying taxes, rates, charges, or fees. This may be in addition to moneys provided by Government or obtained by borrowing or otherwise. What is essential is that control or management of the fund must vest in the authority."

5. In *Calcutta State Transport Corporation vs. Commissioner of Income-tax*, (1996) 219 I.T.R. 515, the Apex Court looked into the definition of local authority specifically

in reference to Section 10(20) of the Income Tax Act. After considering the judgment in R.C. Jain's case (supra), the Apex Court held that to fall within the ambit of Section 10(20) the authority must have carried out some general duties and powers being carried out by the municipal authorities such as Municipal Committee, District Board or body of Port Commissioners. Merely because a body or authority is constituted to provide public service and can employ persons it cannot be said that its functions are similar to those of municipal council etc. The Apex court held that merely because the assessee was an authority within the meaning of Article 12 of the Constitution would not make it a local authority within the meaning of Section 10(20) of the Act.

6. In *Commissioner of Income-Tax vs. U.P. Forest Corporation*, (1998) 230 ITR 945, the Apex Court again dealt with this issue and held as follows:

"Applying the ratio of the aforesaid decisions to the facts of the present case, we find that it is not possible to hold that the Corporation is a local authority within the meaning of that expression contained in Section 3(31) of the General Clauses Act, 1857. In R. C. Jain's case (AIR 1981 SC 951) (supra), it has been held that the 'local authority' must have the nature and character of a Municipal Committee, District Board, Body of Port Commissioners. We are unable to accept the contention of Shri Gupta that in interpreting the scope and extent of the expression 'other authority' in the definition of 'local authority' in Section 3(31) of the General Clauses Act the principle of ejusdem generis is not applicable because there is no distinct genus or category running through the bodies named earlier. The local authorities which are specifically mentioned in Section 3(31) of the General Clauses Act clearly can be regarded as local bodies which are intended to carry on self-government. It is for this reason that this definition states that such a authority must have control or management of a municipal or local fund. Municipal Committee, District Board, Body of Port Commissioners are entities which carry on government affairs in local areas and they would give colour to the words 'other authorities' occurring in Section 3 (31). To put it differently 'other authority' referred to in Section 3(31) must be similar or akin to Municipal Committee, district board or body of Port Commissioners. In R. C. Jain's case (AIR 1981 SC 951) (supra), at least five attributes or characteristics of an authority falling under Section 3(31) of the General Clauses Act have been mentioned. At least three of the five attributes mentioned in the passage quoted above from R. C. Jain's case (supra) are absent here. Firstly, the members of the respondent Corporation are not wholly or partly, directly or indirectly, elected by the inhabitants of the area. According to Section 4 of the U. P. Forest Corporation Act, the Corporation is consisted of a Chairman and eight members. The Chairman as well as the members are nominated by the State Government. Five members, so appointed, must be officers serving under the State Government and three non-officials members appointed by the State Government must be belonging to the category, who in the Government's opinion, possess experience in matter relating to preservation and development of forests. It is too tenuous to contend as was sought to be done by Shri Gupta, that because the State Government is a democratically elected body, therefore, persons nominated by the Government to be members of the Corporation must be regarded as being indirectly elected by the inhabitants. This contention is clearly unacceptable. The second essential attribute, which is lacking in the present case, is that the respondent do not have the functions and duties which are usually entrusted to the municipal bodies such as providing civic amenities to the inhabitants of the locality like health, education, town planning, markets, transportation etc. Finally and which is most important, the respondent does not have the power to raise funds by levying taxes, rates, charges or fees. The

expression 'local fund' occurring in Section 3(31) of the General Clauses Act would mean the fund of a local self-government...."

7. Sh.Ajay Vaidya, learned counsel placed before us certain decisions of the Punjab and Haryana High Court. In view of the fact that the Supreme Court has delivered judgments specifically covering this issue, it would not be appropriate to consider the judgments of the Punjab and Haryana High Court.

8. To decide the question whether the Marketing Board is an authority, it would be apposite to refer to relevant provisions of H.P. Agricultural produce Markets Act, 1969 (9 of 1970). Under this Act Marketing Boards as well as Marketing Committees have been constituted. The H.P. Marketing Board has been constituted under Section 3 of the Act. Section 3(13) & (16) of the Act reads as follows:

"(13) The Board shall exercise superintendence and control over all market committees established and constituted under this Act.

(16) The Board or the Chairman of the Board or its Secretary or any other officer authorized by the Board shall have the power to call for any information, records or returns relating to agricultural produce from a market committee or a dealer or other functionaries and shall also have the power to inspect the accounts of a market committee or a dealer or other her functionaries and in case any irregularity comes to its or his notice shall have the power to suspend or cancel the licence of any licensee."

9. The Market Committees on the other hand have been established under Section 9 and duties and powers of the Committees are given under Section 11 of the Act. The Marketing Board Fund has been constituted under Section 23. Section 24 deals with the Market Committee Fund and Section 24(2)(a) reads as follows:

"(2)(a) Every market committee shall, out of its fund, pay to the Board, 20 per cent of the moneys received by it on account of the Board office expenses and such other expenses incurred by it in the interest of the marketing committee generally and also pay to the Government the cost of any special or additional staff employed by the Government in consultation with the committee for giving effect to the provisions of this Act in the notified market area."

10. Thus, 20% of the funds generated by the Marketing Committee have to be given to the Board. The Board can utilize these funds for a number of purposes including better marketing of agricultural produce etc.

11. Sh.Vaidya, learned counsel appearing on behalf of the assessee submits that this is a local fund and therefore the Board is a local authority within the meaning of the Act. This argument cannot be accepted. In U.P. Forest Corporation's case (Supra) the Apex Court laid down a number of tests. The first test is whether the assessee is directly or indirectly elected by the inhabitants of the area. One of the essential attributes of local Government is democracy and election by the public. The Market Board consists of persons nominated by the Government and there no elections are held. Therefore, the first test is not satisfied.

12. The second test laid down by the Apex Court is that the Body should have functions and duties which are usually entrusted to the municipal bodies such as providing civic amenities to the inhabitants of the locality like health, education, town planning, markets, transportation etc. The Marketing Board is not vested with any such duties. It is the Marketing Committee which is vested with such duties but the Marketing Board can only oversee the functioning of the Committees but cannot itself do any such activities.

13. Last and most important test was whether the assessee had the power to raise funds by levying taxes, rates, charges or fees. In the present case, the Marketing Board has no right to direct to levy any taxes or impose any fees or charges. Only the Marketing Committee can levy such charges, rates or taxes. No doubt, the Board gets 20% of the amount raised by the Marketing Committee but this does not in any way imply that it is the Marketing Board which has the power to raise such funds.

14. Sh.Vaidya has vehemently argued that the Marketing Board has control over the funds and therefore should be considered a local authority. The Marketing Board has control only over 20% of the funds which are paid to it by the Committee. It has no power to raise the funds, it is not an elected body and the Marketing Board by itself does not carry out any of the functions which are attributable to municipal authorities. There is no obligation upon the Board to spend its funds for providing specific amenities. Hence, the funds cannot be considered to be local funds.

15. We may make it clear that we have interpreted the phrase 'local authority' only in the context of Section 3(31) of the General Clauses Act since the assessment years in question are for a period prior to the amendment of Section 10(20) of the Income Tax Act whereby explanation defining 'local authority' for purposes of Section 10(20) was added by the Finance Act of 2002.

16. It is also contended by Sh.Vaidya that since the Board was treated to be a local authority for the earlier assessment years, the Revenue is estopped from changing its stand.

17. In *Radhasoami Satsang vs. Commissioner of Income-Tax*, (1992) 193 ITR 321, the Apex Court clearly held as follows:

" We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

18. In this case the Apex Court held that the res judicata does not apply to income-tax proceedings but further held that where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other then the parties should not be permitted to change their position in a subsequent years. In case the Apex Court order is read as a whole these observations do not in any way debar income tax authorities from coming to a new legal conclusion. The question whether the Marketing Board is a local authority or not is a question based more on law than on facts. There being no res judicata in income

tax proceedings the Department cannot be tied down with a view which it may have once taken.

19. Lastly, it was argued by Sh.Vaidya that after the decision of the Commissioner of Income Tax, fresh orders have been issued and the Department has not challenged the same. We are not going into this aspect of the matter because there is nothing on record in this regard. Be that as it may, we are only answering the question of law referred to us and in case the parties have not challenged the subsequent orders it do so at their own peril.

20. In view of the above discussion, we answer the question of law in favour of the Revenue and against the Assessee by holding that H.P. Marketing Board is not a local authority within the meaning of Section 10(20) of the Income Tax Act, 1961 or 3(31) of the General Clauses Act, 1897. All the appeals are disposed of in the aforesaid terms. No costs.