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(2014) 05 RAJ CK 0047

In the Rajasthan High Court

Case No : Civil Writ Petition Nos. 3233, 3235, 3236, 3237, 3238, 3242, 3243 and 3250/2014

Ambuja Cements Ltd. APPELLANT

Vs

State RESPONDENT

Date of Decision : 29-05-2014

Acts Referred:

Citation : (2014) 05 RAJ CK 0047

Hon'ble Judges : Dinesh Maheshwari, J;Banwari Lal Sharma, J

Bench : Division Bench

Advocate : Abhishek Manu Singhvi, Mr. S. Ganesh, Senior Advocates, Mr. U.A. Rana, Mr. Dinesh Mehta and Mr. Lalit Pareek, Advocate for the Appellant; Puneet Jain, Mr. V.K. Mathur, Mr. Ankur Mathur and Mr. Falgun Buch, Advocate for the Respondent

Judgement

1. These eight petitions by the same petitioner-assessee involving fundamentally the same issues, have been considered together; and shall be governed by this common order.

2. After having heard at some length the arguments advanced by the learned senior counsel Dr. Abhishek Manu Singhvi and Mr. S. Ganesh for the petitioners and by the learned counsel Mr. Puneet Jain for the respondents, we have formed the opinion that these petitions deserve to be admitted for consideration; and so far the prayer for interim relief is concerned, the same deserves to be declined in relation to the principal amount of tax demanded for the years 2001-02 to 2005-06 but a limited protection in relation to the amount of interest demanded for these years deserves to be granted; and in relation to the years 2006-07 to 2008-09, different nature protection is required to be granted, in view of the admitted fact situation, as noticed infra.

3. As the issues involved would, otherwise, call for final hearing, we are not making final comments on the merits of the case either way. Only a thumbnail sketch of the background aspects with stand of the respective parties on the

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major issues is being indicated hereinbelow.

4. The petitioner No. 1 in these petitions is a Public Limited Company dealing in manufacturing and marketing of cement. By way of these petitions, the petitioners seek to question the different orders made on 07.04.2014 by the Assistant Commissioner, Commercial Taxes Department, Circle Beawar carrying out reassessment qua the petitioner as a consequence of the judgment delivered by the Hon''ble Supreme Court on 19.02.2014 in Civil Appeal No. 336/2003: CTO Vs. M/s. Binani Cements Ltd. & Anr. Put in a nutshell, the background aspects had been that the petitioner made a claim for sales tax exemption as a "very prestigious unit" under the Rajasthan Sales Tax New Incentive Scheme for Industries, 1989 (''the Scheme of 1989'' hereafter). The petitioner was granted 25% exemption in Rajasthan Sales Tax and 75% in Central Sales Tax on the eligible fixed capital investment with effect from 27.03.1997. Leaving aside the other details at this stage, the relevant aspects of the matter are that the petitioner took up the matter for grant of 90% benefit as "new very prestigious unit". An appeal taken before the Rajasthan Tax Board, being Appeal No. 703/99/ST/Pali was decided on 29.03.2000 where the matter was remanded for consideration to the State Level Screening Committee (''the SLSC''). The SLSC in its meeting dated 09.10.2001 ultimately ordered as under:-

As per amendment made on 10.12.96, the cement units have been deleted from Annexure-B (Negative list). Hence the benefit would be available to them as per provisions 1E of Annexure-C. As per entry No. 1E of Annexure-C, the new large scale cement units except in TSPA is entitled to grant the benefit to the extent of 25% of total tax liability for a period of 7 years and the quantum of benefit would be limited to 100% of EFCI.

Very prestigious cement units are not entitled for the benefit available at entry No. 5 of Annexure-C, Since in that entry No. 5, the cement units are excluded, hence as per amendment made on 10.12.96, very prestigious cement units are entitled for benefit only available at entry No. 1E of Annexure-C as par as other new cement unit. It is worthwhile to mention here that notification dated 10.12.96, units which have been started their commercial production before 10.12.96 the benefit which were available before 10.12.96 would be available to them.

As per above mentioned legal position the Committee was of the view that the contention of the unit that after the deletion of the IInd provision on 10.12.96, given under clause 4(a), the unit became entitled for benefit to the extent of 90% of total tax liability under RST Act vide item No. 5 of Annexure-C, is not tenable, since by notification dated 10.12.96, the item No. 5 of Annexure-C was also amended, where cement units are excluded from new very prestigious units.

The Committee considered the facts of the case mentioned in the agenda note and heard the representation of the unit. The committee after detailed discussion decided to defer the case for the next SLSC meeting and directed to provide the

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list of ineligible items and amount as observed in the SLSC meeting dated 8.1.98 alongwith the copy of circular dated 12.10.95.

5. It appears that the case of the aforesaid Binani Cement, engaged in the same business as a cement manufacturer, which has ultimately been decided by the Hon''ble Supreme Court by the referred judgment dated 19.02.2014, was earlier considered by this Court; and this Court held in the order dated 02.07.2001 passed in Sales Tax Revision No. 582/1999 that the said Company as prestigious unit was entitled to 75% tax exemption under the Scheme of 1989. The State had filed the Petition for Special Leave to Appeal before the Hon''ble Supreme Court against the order so passed by this Court but there was no interim relief therein and, therefore, the said Company Binani Cements Ltd. was enjoying the benefit of 75% of sales tax exemption.

6. In the given fact situation, on 07.01.2002, the petitioner made a representation to the respondents, inter alia, pointing out that higher incentive was being allowed not only to Binani Cements Ltd. but to other cement industries too and the petitioner was being discriminated against.

7. In the backdrop of the aforementioned facts and surroundings, the Government of Rajasthan proceeded to issue a notification on 22.02.2002 in exercise of the powers conferred by Section 15 of the Rajasthan Sales Tax Act, 1994. The contents of the said notification have formed and shall be forming a substantial part of debate in these matters; and hence, it appears appropriate to take note of the contents of the said notification as follows:-

In exercise of the powers conferred by section 15 of the Rajasthan Sales Tax Act, 1994 (Rajasthan Act No. 22 of 1995) the State Government being of the opinion, that it is expedient in the public interest so to do, hereby exempts D.L.F. Cement (Ambuja Cement) from sales tax on the sales made within the State in the manner, to the extent, for the period and subject to the terms and conditions specified hereunder:

1. That the exemption from tax shall be limited to 75% of the tax liability in respect of cement manufactured by the company in the State and sold in the State;

2. that from the date of issuance of this notification the company shall not be entitled to avail benefit under this Sales Tax New Incentives Scheme for Industries 1989 or under any tax exemption or deferment of tax under any other scheme or notification issued under the Act;

3. That the company shall have to give an undertaking in writing to the effect that it will deposit the benefit availed by it exceeding 25% of its tax liability, in case the judgment of the Rajasthan High Court in the matter of M/s. Binani Cement is modified as per any order, judgment etc. issued by the Supreme Court of India;

4. That the company shall be entitled to claim benefit under this notification only

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if it is a very prestigious cement unit under the Sales Tax New Incentive Scheme for Industries 1989;

5. That the benefit of exemption under this notification shall be available only upto 26/03/2006;

6. That the overall benefit available to the company shall not exceed the eligible fixed capital investment i.e. Rs. 16619.99 lacs, granted to the unit under the Sales Tax New incentive Scheme for Industries, 1989 and shall be subjected to clause 7 and 8 of this notification;

7. That the benefit already availed or to be availed under the Sales Tax New Incentive Scheme for Industries 1989 issued under the Central Sales Tax Act, shall be reduced for the purposes of determination of the quantum of benefit under this notification; and

8. that the total benefit already availed under the Sales Tax New Incentive Scheme for Industries 1989 issued under the RST Act, 1994 upto the date of issuance of this notification shall be reduced from the quantum of benefit available under this notification.

9. The benefits under this notification shall be available from the date of notification.

8. We may also refer to Section 15 of the Rajasthan Sales Tax Act, 1994 whereunder the said notification came to be Issued which reads as under:-

(15) Exemption of tax.-

Notwithstanding anything contained in this Act, where the State Government is of the opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette, exempt fully or partially, whether prospectively or retrospectively from tax the sale or purchase of any goods or class of goods or any person or class of persons, without any condition or with such condition as may be specified in the notification.

9. Pursuant to the said notification, the petitioner submitted an undertaking, the contents whereof could also be taken note of as under:-

Whereas, the Board for Infrastructure Development & Investment (BIDI) in its meeting held on 10th January, 2002 has decided to allow the benefit of Exemption of sales tax to the extent of 75% of Rajasthan Sales Tax to M/s. Ambuja Cement Rajasthan Ltd. (formerly known as M/s. DLF Cement Ltd.) and the decision has been given effect to vide Notification No. F. 4 (10FD/Tax-Div/02-138 dated 22.02.2002 issued by the Finance Department, Government of Rajasthan u/s. 15 of the Rajasthan Sales Tax Act, 1994, subject to such Orders as may be passed by the Hon''ble Supreme Court in respect of SLP filed by the Rajasthan State Government against the order/judgment of the Hon''ble High Court of Rajasthan, Jodhpur dated 2.7.2001 in the matter of Commercial Taxes Officer V/s. Binani Cement Ltd., & Anr. The Company in the premises undertakes

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as follows:-

In consideration of the above, I Narendra P. Ghuwalewala S/O late Shri Purshottam K. Ghuwalewala, Managing Director of M/s. Ambuja Cement Rajasthan Ltd., duly authorized by Board of Directors of the company in this regard, do hereby undertake that in the event any judgment passed by Hon''ble Supreme Court in the above mentioned SLP overrules the order/judgment passed by the Hon''ble High Court of Rajasthan, Jodhpur, M/s. Ambuja Cement Rajasthan Ltd. will pay without demur or loss to the exchequer, the sum equal to the difference between tax benefit actually availed and tax as determined by the Hon''ble Supreme Court in respect of the period during which the said differential benefit has been availed by Ambuja Cement Rajasthan Ltd. The payment of difference of tax as availed (75% instead of 25%) as herein referred, shall however be without prejudice to the rights & remedies available under the law to Ambuja Cement Rajasthan Ltd.

In the event that exemption under Rajasthan Sales Tax Act to the extent of 75% is revoked by the Hon''ble Supreme Court in the above referred matter of Binani Cement Ltd., pursuant to the SLP filed by the Rajasthan State Government against the order/judgment of the Hon''ble High Court of Rajasthan, Jodhpur dated 2.7.2001 in the above matter, then the exemption as originally availed upto 25% by M/s. Ambuja Cement Rajasthan Ltd. (formerly as DLF Cement Ltd.) vide eligibility Certificate dated 29.03.97 w.e.f. 27.3.97 shall stand restored indisputably.

10. Before adverting to the issues, another factual aspect may be taken note of that Case No. 43/2002 was taken up by the Board for Industrial and Financial Re-construction (''the BIFR'') in relation to the petitioner-Company wherein ICICI Bank was appointed as the Operating Agency (''the OA''), who was to take up the steps for rehabilitation of the sick company with reference to the guidelines delineated in the proceedings dated 20.06.2002. On the proposed rehabilitation scheme submitted by the OA on 21.11.2002, a draft rehabilitation scheme was circulated; and ultimately, the sanctioned scheme came to be made with reference to the response of the Government of Rajasthan. The Scheme, inter alia, made the provision that the Government of Rajasthan will consider providing sale tax incentives @ 75% on RST in the following terms:-

7.1(ii) To consider providing sales tax incentives @ 75% of Rajasthan Sales Tax (RST) (i.e. the company shall be only liable to pay sales tax at the rate of 25% of the normal sales tax payable) on the sales to be made by the Transferred Unit for a period upto 30th June, 2008 effective from the cut-off date.

11. It is borne out on the record that a corrigendum was made in the said Scheme on 27.05.2004 whereby, in place of the above quoted entry in para 7.1 (ii) of the rehabilitation scheme, the following entry came to be made:-

To grant sale tax incentives @ 75% of Rajasthan State sales tax (RST) i.e. the company shall be liable to pay sales tax @ 25% on the normal sales tax payable

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on the sales to be made by the transferred unit till 26/03/08.

To consider extension of sales tax incentive from 27/03/08 to 30/06/2008.

12. Another order was passed on 20.11.2006 by BIFR wherein, inter alia, the following observations were made:-

The unimplemented provision(s) of the SS-04, for the un-expired period of the scheme, would remain in full force and would continue to be implemented by the concerned agencies and the same would be monitored by the company. The COR would also consider granting reliefs in terms of para(s) 7.1(ii) and 7.1(v) of the SS-04.

13. With reference to the above factual aspects, it has strenuously been contended by the learned senior counsel appearing for the petitioner that the attempt on the part of the respondents to create a demand only on the basis of the judgment delivered by the Hon''ble Supreme Court in Binani Cements Ltd. (supra) is not justified for several reasons. It is submitted that the petitioner''s case for eligibility of exemption at 75% under the amendment dated 10.12.1996 in the Scheme of 1989 is independent of the case of Binani Cement for a fundamental difference in the facts that the date of commencement of commercial production by the petitioner had been 10.09.1996 i.e., before the amendment whereas the date of commencement of commercial production of Binani Cement had been 27.05.1997 i.e., after the amendment. According to the learned counsel, entitlement of the petitioner having, otherwise, been pronounced upon in the proceedings by SLSC, any contra order could not have been passed by the respondents at the present stage. It is also submitted that neither the said notification dated 22.02.2002 could operate against the legal rights of the petitioner nor the petitioner could be said to have contracted out its legal rights by virtue of the undertaking dated 19.03.2002; and further, that the petitioner furnished the said undertaking without prejudice to the rights and remedies available under the law.

14. It is also submitted that the Sick Industrial Companies (Special Provisions) Act, 1985 (''SICA'') being of overriding effect; and the Scheme sanctioned by BIFR being binding on all the concerned, the notification or undertaking, in whatever form existing, stood overridden with the order passed by the BIFR and the scheme sanctioned by it whereby and whereunder, the State Government is under obligation to grant 75% tax exemption. Various communications from the petitioner to the respondents that the undertaking was no longer of any effect have also been referred with the submissions that such communications were not even replied.

15. It is submitted that the claim of the petitioner being sui generis and the petitioner standing in a special category, particularly for operation of SICA, the attempt on the part of the respondents to enforce recovery only with reference to the judgment in Binani Cements Ltd. is not countenanced by law. The learned counsel has referred to the decision in Raheja Universal Limited Vs. NRC Limited

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and Others, to emphasise on the overriding effect of SICA. The learned counsel has also referred to the decision of Hon''ble Supreme Court in International Conveyors Ltd. Vs. Commnr. of Central Excise and Customs, to submit that enforcing of a liability with reference to a similar nature undertaking to pay pursuant to the decision in other case has not been approved when the fact situation of the two cases had been different.

16. Apart from above, a notification of the State Government dated 09.03.2007 has been referred with the submissions that after coming into force of the Rajasthan Value Added Tax, 2003, the Government has made the provision for discharge of the deferred tax liability by making payment of the amount shown in the table appended to the notification. It is submitted that the petitioner made the payment of a sum of Rs. 69,55,95,015/- in total in relation to the years 2006-07, 2007-08 and 2008-09 and such payment was required to be considered as the full and final discharge of the deferred tax liability for the said period. It is submitted that the respondents have failed to take such deposit duly into consideration and the impugned orders in relation to the said period deserve to be quashed on this count alone.

17. The learned counsel would submit that the demand itself is wholly without jurisdiction where no proper adjudication in relation to the case of the petitioner has been made; and the State Government rather attempts to proceed in a perfunctory manner, only with reference to the decision in Benami Cement without considering the singular facts and circumstances of the present case. It is submitted that so far the deferment part is concerned, neither the said notification nor the undertaking could be applied by any stretch of arguments. It is also submitted that the respondents have further raised substantial demand towards interest too although there was no occasion for levying interest because principal demand itself, for the first time, came to be made only on 07.04.2014.

18. The learned counsel for the respondent, at the outset, frankly submitted that so far the deposit of the amount of Rs. 69,55,95,015/- is concerned, about an amount of Rs. 23 crores has already been adjusted and about Rs. 46 crores are lying in credit; and in that regard, a representation made by the petitioner is under due consideration. The learned counsel for the respondent has refuted the contentions made on behalf of the petitioner essentially with the submissions that no exemption exceeding 25% under the Rajasthan Sales Tax Act was ever available for the petitioner under the 1989 Scheme.

19. The learned counsel would submit that the incentive of 75% was not granted to the petitioner under 1989 Scheme but only by virtue of the special notification dated 22.02.2002; and the basic reason for the said notification was that Binani Cement was availing of such incentive of 75% after the order of this Court and that the matter was pending before the Hon''ble Supreme Court but without stay. According to learned counsel, it was only to provide for the parity to the petitioner, lest there was an imbalance qua two similarly situated industries on sales tax exemption, that the State Government proposed to grant the similar

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benefit to the petitioner but then, according to the learned counsel, such extra incentive could have only been, and had rightly been, granted subject to the decision of the Hon''ble Supreme Court in Binani Cement. It is submitted that the petitioner voluntarily agreed to abide by the notification dated 22.02.2002 which was issued, in fact, after the representation of the petitioner.

20. According to the learned counsel, the decision in Benani Cement, when rendered in favour of the revenue, the very basis of grant of exemption is removed and the demand has rightly been raised of the excessive exemption taken by the petitioner beyond its entitlement of 25%. The learned counsel also submitted that on the earlier occasion, exemption was extended to the petitioner so as to bring it at parity with Binani Cement and now, if the exemption is not withdrawn, it would be a matter of reverse discrimination, not countenanced by law, where petitioner may get the benefit and Binani Cement would not. The learned counsel has also referred to the orders passed in relation to the petitioner by SLSC and submitted that entitlement of the petitioner had only been recognized for 25% exemption and not beyond.

21. As regards BIFR proceedings and operation of SICA, the learned counsel has contended that in regard to sales tax exemption, the basic issue taken up for consideration in the proceedings of BIFR had been the period for which such incentive was to be granted and not its rate as such. In any case, according to the learned counsel, the State Government was a third party to such proceedings and any liability upon the Government could have come up only upon its consent or not otherwise. It is submitted that in essence, the order of BIFR had only been to the effect that the Government would consider granting the exemption, as is ultimately seen in the concluding part of the proceedings dated 20.11.2006.

22. The learned counsel for the parties have also advanced several other arguments in the matter which need not be dilated upon; and it appears appropriate to leave the entire matter open for arguments at the final hearing. For the present purpose, suffice it would be to observe that on the grounds taken and contentions urged, the matters do involve arguable issues. Hence, petitions are admitted. The respondents being represented, notices need not be issued.

23. As regards the prayer for interim relief, at this juncture, so far the demand pertaining to the years 2006-07, 2007-08 and 2008-09 is concerned, when it appears that as against the demand pertaining to this period, the petitioner had indeed deposited an amount of Rs. 69,55,95,015/- seeking benefit of preponment notification dated 09.03.2007; and the treatment of an amount of Rs. 46 crores out of the said deposit is yet to be finalized by the Government, it appears appropriate to keep in abeyance the demand in relation to the said years (2006-07 to 2008-09) until determination of the pending issues by the State Government.

24. So far the period from the year 2001-02 to 2005-06 is concerned, without comments on the merits either way, we are clearly of the view that no interim

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relief deserve to be granted in relation to the principal amount of the demand. Hence, the prayer for interim relief in relation to the principal amount of demand in relation to these years deserves to be declined. However, so far the demand of interest is concerned, when it is an admitted position that the decision in Binani Cement was rendered by the Hon''ble Supreme Court only on 19.02.2014 and the order raising demand on the petitioner has been made only on 07.04.2014, in our view, it would be justified to stay the recovery of interest before the date of order raising principal demand.

25. Accordingly and in view of the above, on the prayer for interim relief in these matters, it is ordered:

(A) In relation to CWP Nos. 3243/2014, 3233/2014 and 3236/2014 relating to the years 2006-07, 2007-08 and 2008-09, coercive recovery proceedings of the demand in question shall remain stayed until final decision is taken by the authorities on the representation made by the petitioner and the specific direction for treatment of the deposit of Rs. 66,55,95,015/- is ordered by the respondents. After such order in relation to the said amount, the respondents, if at all seek to recover any other amount from the petitioner, they shall give the petitioner clear 7 days'' notice of their intention to do so and upon service of such notice, it shall be permissible for the petitioner to take recourse to the appropriate remedies in accordance with law.

(B) So far CWP Nos. 3250/2014, 3242/2014, 3235/2014, 3237/2014 and 3238/2014, pertaining to the years 2001-02 to 2005-06 respectively are concerned, the prayer for interim relief in relation to the principal amount of tax demand (based on differential on exemption of 50%) is declined. However, so far the demand of interest is concerned, until further orders of this Court, recovery of any amount of interest prior to the date of demand, i.e. 07.04.2014, shall remain stayed.

26. Subject to the above, these matters be listed for final orders on 01.07.2014.

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