
(2005) 08 KAR CK 0019
In the Karnataka High Court
Case No : Writ Petition No. 11447 of 2004

Associated Cement Companies Ltd. and Another	APPELLANT
Vs	
State of Karnataka and Others	RESPONDENT

Date of Decision : 01-08-2005

Acts Referred:

Constitution of India, 1950 — Article 265
Contract Act, 1872 — Section 72
Karnataka Sales Tax Act, 1957 — Section 19 C, 5

Citation : (2008) 11 VST 528

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : T.R. Andhyarujina, U.A. Rana and S. Sriranga, for Sundarswamy, Ramdas and Anand, for the Appellant; Niloufer Akbar, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—The first petitioner is a company registered under the provisions of the Companies Act, 1956 with its registered office at Mumbai, but more importantly having its production units mainly cement producing plants in different locations in the State of Karnataka, amongst them two plants at Wadi in Gulbarga district of this State.

The petitioner is also a registered dealer under the provisions of the Karnataka Sales Tax Act, 1957 (for short, "the Act") as also the provisions of the Central Sales Tax Act, 1956. The writ petition is for seeking the relief in the context of certain concession or benefits extended in respect of the sales tax turnover of the petitioner's expanded unit at their plants in Wadi, Gulbarga district, in terms of the Government Notification No. FD 187 CSL 2000(I), (II) and III dated June 5, 2000, a copy of which is produced at annexure K to the writ petition, and on the promise that the real benefit under this notification is to some extent denied to the petitioner by the condition imposed therein, which condition is one linking the concession or benefit to payment or non-payment of the amount which was

the average tax liability of the petitioner's sales turnover in existing units at the place, computed on the average of the last three years tax liability of the existing unit or the actual tax liability, whichever is higher.

2. The petitioner-company has approached this court for the relief on the premise that the authorities purporting to implement the condition as envisaged in the proviso to Clause (iv) of the condition in this notification have been demanding and collecting the tax at an amount higher than the actual liability on the part of the petitioner in respect of its earlier unit and such collection of the tax over and above the actual liability of the petitioner in respect of his existing unit is bad in law ; that assuming for the purpose of arguments, the condition so provides, the condition is an illegal condition, the condition which is at variance with the exemption and concession granted to persons like the petitioners in the new industrial policy of the Government of Karnataka for the years 1996-2001 and the benefit or concession extended to such industries referred to in the policy for the expansion, etc., in terms of annexure I to the Government Order No. CI 30 SPC 96 dated March 15, 1996. Particular reference is drawn to annexure II to this Government order, providing for package of incentives and concessions and here again to item No. 5 of the concessions, under the heading Sales tax concession for new units. The version of the petitioner is that the condition imposed in the exemption notification dated June 5, 2000, purporting to be as a follow-up of the provisions of this policy as also the Government Order No. CI 2 SPI 97 dated September 5, 1998, is not really a condition in consonance with the policy; that the condition as was incorporated for the first time in the Government Order dated September 5, 1998 in itself is not authorised in law and such condition should be held to be bad in law and necessary declaration be granted and relief also be extended to the petitioner.

3. The background to the present notification is that the Government of Karnataka pursuing its policy of industrialisation and industrial development in core and selected sectors and also to encourage the growth of industries in selected or notified areas, had, as a policy matter, in terms of the Industrial Policy Resolution, 1996, extended various benefits to persons setting up new industrial units, persons bringing in additional capital to existing units and persons setting up such industries in notified areas, etc. Extending certain sales tax concessions in respect of such units was one of the incentives under this policy and it is sufficient for the purpose of this petition to notice Clause 5, extending sales tax concession for new units are noticed here, which reads as under:

5. Sales tax concession for new units.--Industrial investments in the tiny/SSI/medium and large scale sectors would be provided with the option of either sales tax exemption or sales tax deferral (KST/ CST). The option is allowed one time only, at the initial stage of availing the concession.

(a) Sales tax exemption/deferral:

Tiny industries Small-scale Medium and large Zone industries industries

No. of Ceiling No. of Ceiling No. of Ceiling years Rs. years Rs. years Rs. I Developed 1 4 150% of 4 100% of 4 100% of areas (6) value of (6) value of (6) value of fixed assets. fixed assets. fixed assets. II Developing 6 150% of 6 100% of 5 100% of areas 6 (8) value of (8) value of (7) value of fixed assets. fixed assets. fixed assets. III Growth 7 150% of 7 100% of 6 100% of centres (8) value of (8) value of (8) value of fixed assets. fixed assets. fixed assets. 1. only the specified categories as in appendix II. Note : Figures in brackets indicate number of years for sales tax deferment in lieu of sales tax exemption if opted.

The above benefits shall also be available for existing units which undertake an expansion project in a new location. However, tax payable on existing production in the existing location would continue without any change;....

(d) Sales tax concession for existing units making new investments under expansion/diversification

Industrial units in specified categories set up in developed areas, and the units set up in developing area including grown centres, under taking new industrial investments, for expansion/diversification shall be eligible for sales tax exemption/sales tax deferment--mutatis mutandis as applicable to new industrial units and as detailed below:

The benefit shall be available only for additional production created out of such investment. Existing production, on which tax liability would continue, would be computed based on average production of three years prior to the commencement of the commercial production of expansion project

Tiny and small-scale industries Medium, and large industries Zone No. of years Ceiling Rs. No. of years Ceiling Rs. I Developed 1 4 60% of value of 4 60% of value of areas (6) fixed assets (6) fixed assets II Developing areas 6 80% of value of 5 80% of value of (8) fixed assets (7) fixed assets III Growth centres 7 80% of value of 6 80% of value of (8) fixed assets (8) fixed assets 1. only the specified categories as in appendix II.

4. It is the case of the petitioner that the petitioner being desirous of availing such benefits, planned to set up new units at its Wadi plant for manufacturing what is known as Pozzuolana Portland Cement (PPC) in addition to manufacture of Ordinary Portland Cement (OPC) that was being manufactured in its existing units. The PPC type was using the fly-ash--a byproduct produced in thermal plants as the raw material in place of conventional raw material, viz., limestone ore used for the manufacture of OPC. The unit was set up with considerable investment, which according to the petitioner, at a cost of Rs. 410 crores, especially to take advantage of the new industrial policy of 1996-2001. It is also the case of the petitioner that they had made necessary application for availing of the incentives of the industrial policy, 1996-2001.

5. There is considerable reference to the correspondence in the course of such

establishment in the averments made in the writ petition, all of which may not very relevant and necessary to be noticed for the purpose of disposal of this writ petition. In fact, the unit was set up and gone into production by May 5, 2001. Thereafter it started sale of PPC manufactured in the new unit, while the sale of OPC, which was being manufactured in the existing units continued. The controversy is in the context of tax liability as the concession available to the new unit is linked to the maintenance of the payment of tax liability in respect of the old or existing units on the calculation of the average tax liability of the existing units, i.e., average for the last three years prior to the production in the new unit and seeking for such benefit, without linking it to the liability to keep paying taxes as at the earlier average tax liability for the production/sale in the existing unit.

6. Petitioner's grievance is not so much that it is denied the benefit of concession available to its new unit, but while extending the benefit, the authorities have been demanding and collecting from the petitioner-company the amount of tax which is over and above the actual tax liability in respect of the existing units on the strength of the condition imposed under the exemption notification. It is this part of the action on the part of the authorities, which is complained of in the present writ petition and the relief sought for is in this context.

7. The exemption notification that has been issued in favour of the petitioner under the provisions of Section 19C of the Act is the one dated June 5, 2000. It is the proviso to the condition (iv) of this notification, which is objected to by the petitioner, and reads thus:

Provided that the existing industrial unit shall be liable to pay the taxes on the existing production of "ordinary portland cement" manufactured and sold by the existing unit based on the average tax liability of three years prior to the commissioning of the new plant (Pozzuolana Portland Cement Plant) or based on the actual production of "ordinary portland cement" after commissioning of the new plant, whichever is higher.

8. Here again, the condition is one which in turn referred to and relied upon the Government order dated September 5, 1998, a copy of which is produced at annexure D to the writ petition, the relevant portion of which reads thus:

Government Order No. CI 22 SPI 97 Bangalore, dated 5th September, 1998

In modification of the incentives and concessions granted vide Government Order No. CI 22 SPI 97 dated February 26, 1997, the Government is pleased to sanction the following incentives and concessions to M/s. Associated Cement Companies Ltd., for their proposed new industrial unit at Wadi in Gulbarga District for manufacture of Pozzuolana Portland Cement, using the fly ash:

(a) 100 per cent exemption from payment of sales tax (KST and CST) on the sale of finished goods for a period of 9 (nine) years or, deferment of sales tax on sale

of finished goods for a period of 11 (eleven) years subject to a limit of 100 per cent of the value of fixed assets.

(b) For the purchase of capital goods/equipment costing Rs. 100 crores or above, in each case made by the company during the construction phase of the project, the KST exemption is given as under:

Purchase tax exemption from the tax payable under the Karnataka Sales Tax Act, 1957 by a recognised dealer in Karnataka on the sale of capital goods/equipment costing more than Rs. 100 crores in each individual purchase invoice in respect of the new industrial unit.

The sanction of above incentives and concessions is subject to the condition that the tax liability on the existing production of ordinary portland cement would continue to be charged based on the average, tax liability of three years period prior to the commissioning of new plant or actual tax liability based on the actual production of ordinary portland cement after commissioning of the new plant, whichever is higher....

9. The controversy revolves around the understanding and justification for examination of this condition, both under the Government Order of the year 1998 and the exemption notification of the year 2000.

10. Notices had been issued to the respondents. The respondents are represented by Ms. Niloufer Akbar, learned Additional Government Advocate. Statement of objections has also been filed on behalf of the respondents--State of Karnataka and the Commissioner of Commercial Taxes.

11. It is urged in the statement of objection that the petitioner is not entitled for the relief sought for; that the petition is hit by laches; that there is nothing wrong with either the Government order dated September 5, 1998 or with the exemption notification dated June 5, 2000 ; that the condition imposed therein is the condition which the petitioner can avail of or not; that the condition is fully justified; that the petitioner even at the stage of setting up of its plant had been apprised of the condition; that it was a condition which was within the knowledge of the petitioner and the petitioner having accepted the condition and having availed of the tax concession in respect of its expanded unit, cannot now turn around and seek for annulment of the condition; that the petitioner having taken the benefit of exemption by accepting the condition and acting on such condition, is not entitled to turn around and now seek the relief that the condition is bad and binding on the petitioner; that the petitioner is estopped from seeking for the relief sought for; that the very premise for seeking relief is also fallacious inasmuch as the petitioner is basing the claim for relief on the premise that it is a new industrial unit, to which the condition in terms of the Clause 5 of annexure II to the Government policy applies, whereas in reality the petitioner's new unit or expanded unit is covered by Clause 7 of the annexure II to the policy, i.e., a concession extended in respect of a mega project; that the investment in the expanded unit of the petitioner being much more than Rs. 100 crores, it is

necessarily covered by Clause 7--mega project--and the Government order of the year 1998 as also the exemption notification of the year 2000 has been specifically issued in respect of the petitioner on such understanding that the petitioner's expanded unit is a mega project, a condition is specifically imposed on the petitioner subject to which the petitioner can avail of the exemption notification and it is not open to the petitioner at this point of time to seek the benefits which are available in general to such other new units covered under Clause (v) of such sales tax concession, etc., available to new units and the action taken in respect of the petitioner being in consonance with the concessions as indicated in respect of the mega projects, the petitioner is not entitled for the relief sought for and therefore the writ petition deserves to be dismissed.

12. I have heard Sri T.R. Andhyarujina, learned Senior Counsel appearing for the petitioner and Ms. Niloufer Akbar, learned Additional Government Advocate, appearing for the respondents.

13. Elaborating the averments made in the petition, learned Senior Counsel for the petitioner submits that the incentives/concessions are offered as part of the Government's industrial policy as revealed in the policy statement in terms of the proceedings of the Government of Karnataka titled as New Industrial Policy, 1996 and Package of Incentives and Concessions (1996-2001); that this new industrial policy was only in continuation of the earlier Government notifications with regard to the industrialisation policy and certain changes are sought to be brought about; that the Government in order to give effect to the policy had issued Government order dated March 15, 1996; that annexure I and II to this Government order contained the incentives and packages in furtherance of the policy; that the petitioner induced by this incentives scheme had embarked upon setting up the new manufacturing unit to manufacture PPC brand cement at its existing unit at Wadi; that the incentives provided in respect of the sales tax concessions, etc., to such units is as envisaged under the heading 5 of annexure II to this Government order, which has a main heading as Package of Incentives and Concessions 1996-2001, and a sub-heading for item No. 5, being sales tax concessions for new units, quoted earlier; that the concession given in respect of the sales tax liability of such new units or even in respect of the existing units as in the case of the petitioner under Clause (d) of the subheading 5, it is not hedged by any conditions other than the stipulation that the existing production on this tax liability would continue as earlier and the concessions would be confined to the production in the new unit or in respect of the production out of the additional investment; that the petitioner had approached the Government seeking for permission to set up a new unit in terms of its application dated May 2, 1996 and such permission was granted in terms of the Government response dated February 26, 1997, a copy of which is produced at annexure C to the writ petition, and also indicated the incentives/concessions in respect of the sales tax liability, etc., in terms of para 3 of this Government order and the petitioner being not satisfied with the same, had addressed a letter dated April 9, 1997, a

copy of which is at annexure B, seeking for better sales tax incentives and purporting to be in response to such letter, the Government had passed the Government order No. CI 2 SPI 97 dated September 5, 1998, a copy is at annexure D to the writ petition and in modifications of the incentives and concessions as indicated in para 3 of the Government order dated February 26, 1997, the incentives and concessions were extended as per this notification in terms of Clauses (a) and (b) of this notification, as quoted earlier, and the condition attached to Clause (b) of this Government order is a condition which was never in the reckoning of the parties or of the Government; that the condition seeks to create an artificial liability on the petitioner in respect of the sales tax liability on the production in the existing unit. In fact the petitioner had further represented with regard to such condition in terms of its letter dated October 28, 1998, a copy of which is produced at annexure E. Para 5 of this letter reads thus:

As discussed earlier, the condition of protection of existing sales tax has been specifically included. In addition, it has been provided that in case OPC production increases, full sales tax on such production has to be paid. It may be recalled that we had agreed to the condition of protecting the State's existing revenue that related only to the average quantum of sales of the previous three years. Hence, you may kindly clarify that the sales tax payable will be limited to tax on actual sales quantity from the existing unit at Wadi or the average quantum referred to above, whichever is higher.

14. That in response, the Government had replied as per its letter dated December 9, 1998, a copy of which is produced at annexure F, and with regard to the clarifications sought for as to the sales tax liability of the existing unit in terms of remarks to point (e), it had been clarified as under:

Points raised Remarks (e) Clarification regarding whether the It is clarified that the sales tax payable sales tax payable would be limited to would be limited to tax on actual quantity tax on actual sales quantity from the of sales from the existing plant at Wadi existing plant at Wadi (manufacturing (manufacturing OPC grade) or the aver- OPC grade) or the average quantum age quantum referred to above, which- referred to above, whichever is higher, ever is higher (in other words, if the OPC production increases in the exiting plant, full ST on such production has to be paid. 15. That it had been indicated that the liability was on the actual basis and not on any fictional basis, but nevertheless, the respondents had followed up the matter by issuing an exemption notification in terms of Section 19C of the Act in respect of the petitioner's unit, as per the Government Notification No. FD 187 CSL 2000 (I), (II) and III dated June 5, 2000, a copy of at annexure K to the writ petition and here again had in terms of proviso to Clause (iv) of the condition, as quoted earlier, imposed for availing the exemption, and such condition is again bad in law and not in consonance with the concessions and incentives in terms of the policy itself; that it is at variance with the conditions, as provided in respect of the new units as under heading 5

of annexure II to the Government Order; that the condition is bad, as one seeking to create a tax liability on a notional basis through an executive order and at variance with the actual tax liability of the petitioner and therefore such a condition both in the Government order dated September 5, 1998 as also proviso to Clause (iv) of the Government Notification dated June 5, 2000, are bad in law and be so declared and the notification read down deleting the condition.

16. Submission of the learned Senior Counsel appearing for the petitioner is that the condition as found in the Government order dated September 5, 1998 as also the proviso to Clause (iv) of the Government notification dated March 15, 1996, is bad in law, as the industrial policy notification dated March 15, 1996 and in terms of the sales tax concession of new units under heading 5 of the annexure II to this notification, no such condition was imposable; that imposing the condition as in these Government order and the notification at variance with the sales tax concession/incentive as indicated in the policy notification amounts to varying the terms of such incentives or concessions after the petitioner had pursuant to the policy notification embarked on the expansion of the unit and had put in considerable investment ; that in the guise of issuing a notification for extending the benefit or concession, the respondents could not have imposed such a condition which virtually whittles down the extent of concession/exemption that had been offered in the policy notification; that the condition compelling the petitioner to maintain its sales tax liability in respect of the production attributable to the existing unit at the average liability for the past three years of its production and only on payment of such tax the petitioner being extended the concession in respect of the production of the expanded unit is an unreasonable condition, not in vogue with the earlier policy nor consistent with nor can be sought to be added for the implementation of the concession/benefits as held out in the policy notification and therefore the condition is bad ; that the Government order as well as notification of the year 2000 should read as without such a condition in which event the petitioner can avail of the benefit of concession without complying with the requirements of artificially paying the sales tax in respect of the production of the existing unit at the average sales tax for the past three years and on the other hand can still seek the benefit of the exemption by paying the actual tax liability in respect of the production attributable to the existing unit.

17. In support of the submission, the learned Senior Counsel appearing for the petitioner has placed reliance on the decision of the Supreme Court in the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, . Submission of the Senior Counsel is that the condition which the petitioner has objected to and challenged in this writ petition is akin to the conditions which had come to the adverse notice at the hands of the Supreme Court in the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, : that the Supreme Court having held that the Government was not competent to impose such condition, which in fact had not been authorised or in consonance with the earlier policy notification and in the present case, such authorisation

being not attributable to the extension of the incentives or benefit indicated under heading 5--Sales Tax Concessions--in annexure II to the Government Notification of the year 1996 and following the ruling of the Supreme Court in the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, , the condition necessarily should be held to be obnoxious and read down as not one available to the Government, for enforcement or to bind the petitioner.

18. The alternative submission of the learned Senior Counsel appearing for the petitioner is that the impugned condition as found in the Government Order as well as Government Notification of the year 2004 is one such as to create an artificial liability in respect of sales tax liability of the petitioner on the production in the existing unit; that though under the charging section and the relevant provision of the Act, the liability of the petitioner in respect of the production in the existing unit is as per the provisions of law and on the actual sales turnover ; that the condition seeks to boost the liability to take it to the level of an average of the past three years" liability; that even here though by subsequent enactment the actual sales tax liability in respect of the sales turnover was sought to be reduced, as earlier such sales tax liability included: (1) the liability u/s 5 of the Act; (2) the liability in respect of the turnover tax; and (3) also the liability towards the cess, and though by subsequent enactment, the liability for payment of tax as turnover tax and towards cess have been deleted, the petitioner is artificially asked to maintain even such impositions by such condition on the sales tax turnover and not necessarily on the actual existing rate of tax on such turnover and that the respondents having in fact collected the tax at such rate from the petitioner taking the amounts corresponding to such liabilities; that such action amounts to levying tax without authority of law and is therefore violative of Article 265 of the Constitution of India and independent of the contention that the imposition of the condition is at variance with the policy notification, the condition by itself is bad for being violative of the Article 265 of the Constitution and on such premise also, the condition should be read down as one not permitted under law. Submission of the learned Senior Counsel appearing for the petitioner is that if the benefit of the notification can still be sustained by separating the condition, the court can definitely do that and following the ratio in State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, , it should be done in the present case also.

19. Learned Senior Counsel appearing for the petitioner submits that though the respondents have already collected the tax from the petitioner, on determination of the liability in respect of its existing units as though it is a liability equivalent to sales tax liability in respect past three years average liability and the petitioner had not questioned either levy or collection of such tax liability by filing an appeal or otherwise, it is always open to the petitioner to seek for a declaration that the collection itself was not authorised in law; that the petitioner had paid the tax due to a mistaken impression of law that the petitioner was liable, but in reality and as per the legal provision, the petitioner is not so liable and if the payment is due to a mistake, whether on fact or law, it is always open to the

petitioner to seek for a suitable declaration and also seek for refund of such collection of tax, which was not authorised in law. In this regard, the learned Senior Counsel appearing for the petitioner has placed reliance on the decision of the Supreme Court in the case of Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, .

20. Learned Senior Counsel appearing for the petitioner submits that though the respondents have raised an objection that the writ petition should be dismissed due to delay and laches in so far as the relief relating to the refund of tax is concerned, it is settled law that a payment made under mistake in law or fact can be sought to be recovered, having regard to the provision of Section 72 of the Contract Act and the courts normally apply the period of limitation in such situations to be the period as applicable in respect of suits filed for recovery of an amount paid under mistake, i.e., the limitation is three years from the date of cause of action, and in the instant case, the relief sought for is still within the period of three years from the date of cause of action, i.e., the date on which the petitioner made the payment under mistake in law, the petitioner is entitled to seek the refund under writ jurisdiction also notwithstanding the objections on the ground of delay and laches. One another contention urged by the learned Senior Counsel appearing for the petitioner, as reply to the stand of the respondents on the premises of delay and laches, is that the sales tax liability which is sought to be imposed in an artificial manner on the petitioner, will work to the detriment of the petitioner so long as the petitioner is entitled to avail of concession or benefit in respect the sales tax liability in its expanded unit; that such benefit is available to the petitioner for a period of nine years; that even assuming for argument's sake that in respect of an earlier period, there is some delay in approaching the court for relief, as the cause of action is a continuous one and the petitioner can definitely seek for a declaration and consequential relief for the recovery and therefore the petitioner cannot be thrown out only on the ground of delay or laches.

21. Learned Senior Counsel appearing for the petitioner has also submitted that the defence put up by the respondents, pointing out that the petitioner's expanded unit is a unit which has to be characterised as a mega project; that such a stand is being aired for the first time in the statement of objections filed in response to the writ petition and therefore not much credence should be given to this stand that the expanded unit is a mega project and therefore not governed by the concessions/benefits as are available to new units in terms of the heading 5 of annexure II to the industrial policy notification of the year 1996. Further submission of the learned Senior Counsel appearing for the petitioner is that having regard to the certificate dated April 9, 2002 (vide annexure N) issued for the purpose of availing sales tax exemption, wherein it has been specifically indicated that M/s. ACC company is a newly established industry at Wadi, Gulbarga district, as found in the very first paragraph of this certificate, it is no more open to the respondents to contend that the petitioner's unit is not a new unit, as under heading 5 of the annexure II to the policy notification, but is

covered under heading 7 of the policy notification. Learned Senior Counsel appearing for the petitioner has also sought to distinguish the decision of the Division Bench of the Madras High Court in the case of TamilNadu Newsprint and Papers Ltd. Vs. The Commercial Tax Officer, The Assistant Commissioner (CT), The State of Tamil Nadu, The State Industries Promotion Corporation of Tamil Nadu Ltd. and The Tamil Nadu Taxation Special Tribunal, , on the premise that a condition for availing sales tax concession while can be imposed as was in the case decided by the Madras High Court, in the case of petitioner, what is sought to be done by imposing the condition is to create an artificial liability in respect of the sales tax turnover of the production attributable to the existing unit and this is not permitted in law ; that creating an artificial liability, as in the present situation is not same as in the case of TamilNadu Newsprint and Papers Ltd. Vs. The Commercial Tax Officer, The Assistant Commissioner (CT), The State of Tamil Nadu, The State Industries Promotion Corporation of Tamil Nadu Ltd. and The Tamil Nadu Taxation Special Tribunal, .

22. Such submissions on the part of the petitioner is countered by Ms. Niloufer Akbar, learned Additional Government Advocate by pointing out that the reliance placed on behalf of the petitioner on the policy by drawing attention to heading 5 in annexure II to the Government notification is not tenable or justified; that the petitioner's unit cannot be treated as one covered under this particular heading available for sales tax concession to new units ; that on the other hand the petitioner's unit is one which is covered under heading 7 of the annexure II to the Government notification, viz., mega project; that the investment in the additional unit of the petitioner in respect of the production of which unit the incentive or benefit is sought far exceed Rs. 100 crores and in fact as noticed earlier, is in the vicinity of Rs. 400 crores and therefore the reference to sales tax concessions available to new units in terms of the heading 5 and testing the condition either in the Government Order or in the Government notification of the year 2000 is most in appropriate.

23. Learned Additional Government Advocate further submits that in so far as mega projects are concerned, while the concession as indicated in heading 5 is not available, it is only such incentive package which is allowed as a special case in respect of which such mega project, as indicated in the Government Order or notification that will have to be looked into for availing the concession. In other words, the submission is that the condition in the Government order of the year 1998 as well as in the Government notification of the year 2000 cannot be tested on the touchstone of the concession or incentive as extended in respect of the new units, as envisaged under heading 5 of annexure II to the Government order, but the condition which is independently imposed for the first time on the petitioner in terms of the Government order and the Government notification. Sub-heading 7 of the policy reads as under:

7. Mega projects:

The projects which have investment in fixed assets in excess of Rs. 100 crores

shall be considered for a special incentives package depending on the merits of each case, and according to range of investment, scope for downstream industrial development, employment potential, etc.

24. Elaborating the submissions, learned Additional Government Advocate, submits that the industrial policy for the years 1996-2001 itself has classified different categories of industries to which the sales tax concessions/ incentives are available ; that the industries for such purpose are categorised into (a) tiny sector/village industry; (b) small-scale industry; (c) medium scale industry; (d) large industries; and (e) mega project; that even in terms of the definition of the mega project as per the very policy, the petitioner's expanded unit is a mega project and this was within the knowledge of the petitioner all along and therefore the petitioner cannot derive any benefit by drawing parallel to the benefit that had been extended under heading 5 in respect of new units and for the same reason, the ratio of the decision of the Supreme Court in the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, is not attracted.

25. Learned Additional Government Advocate also submits that even the petitioner had understood that the expanded unit producing PPC in addition to its existing unit at Wadi was in the nature of the mega project; that the petitioner being aware of this position had bargained hard for getting as much concession/ benefits from the Government as was possible and even after the initial Government order on February 26, 1997, approving the proposal of the petitioner for expansion of the cement manufacturing capacity at its Wadi unit and indicating that the incentives/concessions in terms of para 3 of the Government order, the petitioner had responded seeking for a better concession and it is as a result of this persuasion by the petitioner that the Government had with a subsequent Government order dated September 5, 1998, while extending some additional benefits had imposed conditions as a part of the notification for extending such concessions/benefits and the benefits and conditions are not independent of one another and therefore the extension of the very benefit being subject to the condition as noticed in the Government order dated September 5, 1998 and on the premise that the petitioner's unit is a mega project; that no exception can be taken for imposing such condition and there is no occasion to either sever the condition from the notification or to declare the condition as bad so as to read down the notification as one without this condition.

26. It is also the submission of the learned Government Advocate that while policy provided the availment of the exemption up to a maximum of 80 per cent of the total investment in the case of medium and large industries under sub-heading 5--sales tax concessions for new units, at the request of the petitioner in respect of its expanded unit, it was raised to 100 per cent on the total investment and such enhanced concession or benefit was subject to the condition as was indicated in the Government order/notification itself and the entire notification is in the nature of a package in the sense that the petitioner gets the

benefit subject to the condition and therefore if the condition cannot be dealt with independently and if the condition is not fulfilled, the very benefit also cannot be claimed. In this regard, the learned Government Advocate places reliance on the decision of the Madras High Court in the case of TamilNadu Newsprint and Papers Ltd. Vs. The Commercial Tax Officer, The Assistant Commissioner (CT), The State of Tamil Nadu, The State Industries Promotion Corporation of Tamil Nadu Ltd. and The Tamil Nadu Taxation Special Tribunal, and submits that as it was the policy of the Government to give incentive for new units, additional investment, extension of the industrial unit in backward areas, etc., at the same time the Government was also keen on sustaining its revenue from such units which had already enjoyed the benefit of concession and additional benefits were sought to be given only over and above the existing revenue levels in the sense the benefit was given only after fulfilling the revenue inflow from such units ; that the condition was to ensure that the sales tax liability in respect of the dealer as a whole inclusive of existing unit and expanded unit was maintained to be not less than at the average of the last three years.

27. With regard to the contention that the condition is bad in law and is violative of Article 265 of the Constitution of India, as it is an executive order, through which tax is sought to be imposed in an artificial manner on the petitioner, the learned Government Advocate submits that this is not at all either the intention or result of the condition ; that the condition only seeks to extend the benefit in respect of the production in the expanded unit on and after meeting the fixed tax liability worked out on the average of the last three years turnover in respect of the dealer and a condition of this nature cannot be understood as one creating an artificial liability. Learned Government Advocate in this regard would also draw my attention to the contention urged in para 5 of the statement of objections, which reads as under:

The contention of the petitioner that there is no nexus whatsoever between the setting up of a new manufacturing unit engaged in the manufacture of entirely different product and the earlier existing unit and therefore the requirement that the existing unit should pay tax on the basis of the average tax liability for the past three years is unreasonable is not valid for the following reasons:

(a) The grant of various incentives by the Government to industries undertaking expansion of capacity or to industries which are newly set up in the State is not without purpose. Substantial revenue have to be foregone by way of such incentives. Such parting of potential revenue is only in return for the benefit which the State as a whole would get because of the setting up of the new industry or because of the expansion of the capacity. Such benefit is weighed by the Government in comparison with the quantum of incentives to be offered and only on that basis the quantum of incentives to be offered to any mega project is decided after ensuring that the revenue lost by way of incentives is fully compensated by the gain in terms of the economic advancement of the State

made by the industry concerned. In this background, the imposition of the condition for the maintenance of the original tax base which in other words means the retention of the tax potential that existed from the very beginning has to be considered while allowing any person to start another industry in substantially the same range of produce or in regard to the expansion of the production capacity of the existing unit;

(b) It is the general tendency of different entrepreneurs to avail maximum benefits of incentives in their new industries and after exhausting the full availment of said benefits, the industrialists concerned abandon that unit and set up another unit engaged in the manufacture of the same or a similar product. Such a course of action defeats the very purpose for which the incentives were given to the industrialists when they started the new industry in the first instance. The State sacrificed its revenues for a certain number of years with the expectation that thereafter that unit would have become a fully viable unit and it will pay tax to the State at the full rates and such tax will keep on accruing year after year to the State. If the entrepreneurs are permitted to abandon their original units and go in for new units, immediately after availing the full benefits of incentives in the original unit, then there is a drain of revenue by way of incentives offered which is not in return for any anticipated economic benefit. Such a course will defeat the very purpose of the Government orders granting incentives to the industries set up in the State or the industries which undertake expansion of their production capacity. This aspect of the industrial policy has been considered by the Tamil Nadu High Court in its decision in the case of Tamil Nadu Newsprint & Papers Ltd. v. Commercial Tax Officer reported in [2003] 129 STC 420 Kar. The respondents seek to place reliance on the said decision in support of the aforementioned proposition.

(c) When the original unit of the petitioner at Wadi was set up, it has availed various incentives and support from the Government of Karnataka and over the years the said unit has built up a viable infrastructure around it by way of railway terminals the availment of water from the Kagina river and the leasing out of vast tracts of limestone quarries to the said unit. It is for the further exploitation of such infrastructure that the petitioner-company has set up another unit for the production of cement adjacent to the earlier existing unit. Thus, it cannot be said that the unit set up by the petitioner is an entirely new unit in a new location. When new units are set up by the industrialist in new location, the area around such units gets uplifted economically by virtue of the setting up of such units and it is such economic location which is the aim of the Government in granting incentives to new industries at a much higher scale than the scale of which merely undertakes capacity expansion because it derives the advantage of a location that has been developed through the earlier investment in the original capacity of the earlier existing unit to pay tax to the State is not sacrificed in return for the new unit or the so-called new unit which is set up by the petitioner-company. It is for this reason that the State has insisted upon the payment of tax to the same extent as was being paid earlier on an average by the petitioner-

company in its earlier existing unit such a condition for grant of incentives is very reasonable and has nexus to the industrial policy as a whole.

28. Before I proceed to deal with the rival submissions, it is necessary to notice the relief sought for in this writ petition, which reads thus:

(a) Quash and set aside G.O. No. CI 22 SPI 97 dated September 5, 1998 and that the same provides that the sanctions of incentives and concessions is subject to the condition that the tax liability on the existing production of ordinary Portland cement would continue and would be charge based on the average tax liability of three years period prior to the commissioning new plant or actual tax liability based on the actual production of ordinary portland cement after commissioning of the new plant, whichever is higher (annexure D);

(b) Quash and set aside the notification dated June 5, 2000 to the extent that it provides that the existing industrial unit shall be liable to pay the taxes on the existing production of "ordinary portland cement" manufactured and sold by the existing unit based on the average tax liability of three years prior to the commissioning of the new plant (pozzolana portland cement plant) or based on the actual production of "ordinary portland cement" after commissioning of the new plant, whichever is higher (annexure K1)

(c) direct the respondents to amend the exemption certificate dated April 9, 2002 in accordance therewith;

(d) restrain the respondents from making any demand on the petitioners and/or recovering any amount on the basis of the above referred impugned conditions in prayers above as contained as in the G.O. No. CI 22 SPI 97 dated September 5, 1998 and Notification No. FD 187 CSL 2000(1) dated June 5, 2000;

(e) direct the respondents to refund the additional tax collected as set out in annexure R hereto being the excess recovery together with interest thereon at the rate of 18 per cent from the respective dates of payment till refund to and realisation by the petitioner-company;

(f) grant interim order to restrain the respondents from making any demand on the petitioners and/or recovering any amount on the basis of the impugned conditions contained in annexure D dated September 5, 1998 and notification vide annexure K1 dated June 5, 2000 as mentioned in prayer above.

29. The relief is not with reference with any precise liability that has been quantified on the petitioner in terms of any assessment orders, but more in the nature of a declaratory relief in general and for extending the benefits as a consequence of such declaratory relief granted and on the petitioner being entitled for the same. Even the relief of refund is also on such premise. The consequential relief will flow only if the petitioner gets the main declaratory relief and in which event, it may be necessary to find out as to what consequential relief can be granted or not granted. In the absence of any material or particulars placed before the court, either by the petitioner or even by the respondents, with

regard to any assessment order for the earlier periods nor even the details of the tax paid for such years indicated question of directing any refund or the need for such examination may not be warranted at all for ascertaining the consequential relief. However, the matter having been examined in the light of the challenge to the condition, as discussed above, I will confine the examination to this aspect of the matter.

30. The submission on behalf of the petitioner proceeds mainly on the premise that: (1) the condition is one at variance with the general industrial policy and the benefit extended under the policy; and (2) that even otherwise, the condition is bad in law for being violative of Article 265 of the Constitution of India, as the condition is one imposing an artificial liability for tax through an executive action, etc.

31. In so far as the first ground of attack is concerned, it necessarily involves examination of the policy statement for the years 1996-2001 and the very submission thereon. The policy in fact has maintained a distinction in respect of different categories of industries, as noticed earlier while examining the submissions on behalf of the respondents by the learned Government Advocate. Mega project is one of the categories. Here again it is not in dispute that having regard to the amount invested in the petitioner's expanded unit, it definitely fits into this description of mega project, but what is contended for the petitioner is that the petitioner as well as the respondents had proceeded on the premise that the petitioner's expanded unit is a new unit and even the certificate issued by the respondents themselves confirms this position. An examination of the correspondence particularly the letter dated April 9, 1997 (annexure B) from the petitioner addressed to the Principal Secretary to Government, Department of Industries and Commerce, leaves one with no doubt that the petitioner had also understood that the expanded unit is a mega project, as is indicated in last paragraph of this letter, which reads thus:

You will appreciate that ACC has been a pioneer cement manufacturer which has been associated with the State for the last several decades and has contributed in a large way to its economic development. It is, at this juncture, proposing a further mega capital investment of around Rs. 520 crores which in due course of time with the contemplated phase-II expansion to this new unit is likely to be of the order of Rs. 1,000 crores, in preference to other States....

(emphasis Here italicised is supplied)

32. The contents of this letter also indicate that the petitioner was not content with the incentives and benefits as had been extended to its new unit as contemplated in respect of such units under heading 5, but had bargained hard for various benefits independent of the benefits indicated in respect of the units covered under heading 5 and this was on the premise that the petitioner's unit was a mega project. The very fact that the nature and extent of benefits were got varied from Government order to Government order also indicates that the

petitioner had been differently treated from the units as envisaged under heading 5 from the very beginning and objections raised by the respondents proceeded on the premise that the petitioner cannot blow hot and cold. The petitioner while cannot at the same time refer to the incentives indicated in respect of such incentives/concessions envisaged for mega projects, which are not fixed but could vary from one mega project to another mega project, at the same time seek to avail of the incentives/benefits over and above what is provided to it under the Government orders and notification covering the petitioner's mega project by drawing a parallel to the incentives/benefits provided to new units under sub-heading 5. In fact the petitioner has been extended the benefit of tax concession for a period of nine years, whereas the units covered under heading 5, it is for a maximum period of eight years.

33. There is no dispute that in respect of the mega projects, the benefit or concession is not fixed but was extended depending upon the kind of advantage that the State derives from the setting up of the unit of such type and magnitude. This is indicated in terms of the language in the heading--mega projects--at item No. 7 of the annexure II to the policy statement, extracted earlier. Therefore, the petitioner cannot derive any benefit by drawing a parallel or referring to a benefit or incentive as provided in respect of the units covered by heading 5, which is clearly not applicable to the case of the petitioner. What is to be borne in mind is that both headings 5 and 7 are under the very policy statement of the Government and if the petitioner's case is covered by heading 7, the petitioner has to claim the benefit in terms of the same and not with reference to the benefits and concessions extended for some other units as under heading 5.

34. With regard to the second contention that the condition is one which creates an artificial liability in respect of the sales tax liability on the production in the existing unit and therefore it is bad in law as violative of Article 265 of the Constitution of India, one has to look into the exemption notification in a comprehensive manner. The condition occurs in the notification, which seeks to extend certain benefits and to what extent the benefit or concession can be extended, is a matter within the discretion of the Government and in the instant case also was the subject-matter of a bargain between the petitioner and the Government. The Government has extended the benefits with certain conditions. If the benefit can be worked out in understanding the condition in such a manner and the benefit can be sustained or retained that has to be done so like that only so that the petitioner does get the benefit.

35. What in substance the condition imposed on the petitioner achieves is that the benefit or concession extended in respect of the production in the expanded unit of the petitioner will be available only when the overall production in the units of the petitioner exceeds the average sales tax liability of the petitioner for the past three years in respect of the existing unit. That means, if in respect of the production in the existing unit the sales tax liability is already at this level or

even exceeds it, in respect of the production in the expanded unit, the concession can be availed of from its very initial stage, whereas if the current sales tax liability in respect of the production in the existing unit falls short of the average sales tax liability for the past three years, as in the present case, perhaps it is, particularly as the overall tax liability on the sales tax turnover has come down with the deletion of the turnover tax and cess, the benefit will accrue to the petitioner in respect of the production in the new unit only as and when the overall tax liability put together in respect of the production in the existing unit and the expanded unit reaches this average liability for the past three years, which was attributable to the existing units. That means, the petitioner does not enjoy the benefit of concession till the shortfall which might have resulted in respect of the production of the existing unit is made good by production in the expanded unit and it is only thereafter the petitioner starts to enjoy the benefit of exemption.

36. This is so because the petitioner is assessed as a registered dealer and the assessment is one determining the overall tax liability of the petitioner. The tax liability arising in respect of the sales turnover of the existing unit and the tax liability attributable to the sales turnover of the expanded unit are though sought to be worked out separately, for the purpose of determining the extent of concession and benefit which the petitioner can claim in respect of the tax liability attributable to the sales turnover in the expanded unit, nevertheless, all these exercises are being done as part of a single assessment and for the purpose of determining the overall tax liability in the light of the concession enjoyed by the petitioner in respect of the sales turnover from out of the production in the expanded unit. In fact, the petitioner having not placed before the court the manner in which the sales tax liability is either actually worked out or computed and the manner in which the authorities have understood and implemented the concession in the context of overall liability of the petitioner, it is not possible to examine the question as is sought to be urged by the learned Senior Counsel appearing for the petitioner that a separate levy is created in respect of the sales turnover attributable to the production in the existing unit through the condition imposed on the petitioner for availing the benefit of tax concession on the production in the expanded unit.

37. Condition of this nature cannot be characterised as one either imposing a tax by itself or a condition by which the tax is imposed. Ultimately, even after fulfilling the condition, the petitioner stands to gain in the sense the petitioner gets the benefit in respect of the balance turnover in the expanded unit. Even otherwise, a condition of this nature can only be understood in such a manner, so that it not only saves the notification but also extends the benefit to the petitioner. As submitted on behalf of the respondents by the learned Government Advocate, if the condition is part of a package of incentive extended to the petitioner and the condition cannot be separated independently and if the condition is separated from the notification, the notification itself does not survive the independent by that is not for the benefit of the petitioner nor the

object of extending the concession or benefit achieved. If the notification is understood as indicated above and thereby sustained, while the benefit/incentive is retained, the object of the policy notification is also achieved. In this view of the matter, there is no occasion either to declare the condition as bad or violative of Article 265 of the Constitution of India or even to hold that the condition itself creates an artificial tax liability on the existing production of the petitioner's unit.

38. The condition as it occurs in proviso (iv) of the notification of the year 2000 being only in consonance with the condition that had already been indicated in the Government notification of the year 1998, and being in consonance with the same, there is no occasion to declare the condition in the notification of the year 2000, i.e., the notification dated June 5, 2000 as bad either. The Government order dated September 5, 1998 in modification of the earlier Government order dated February 26, 1997 in itself being the primary notification extending the kind of benefit and the condition subject to which it is extended, particularly as the petitioner bargained for modification of the Government order dated February 26, 1997 and consequently the Government order dated September 5, 1998 having come into existence and it is being independent of any concession or benefit that is attributable to new units covered under heading 5 of the annexure II to the policy notification, there is no occasion to grant any declaratory relief as sought for by the petitioner in this petition.

39. In the result, this writ petition is dismissed, without issuing the rule.